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Date	Our Reference Number
27.05.2019	47/19

Public Consultation on the Vertical Block Exemption Regulation
Our EU Transparency Register Identification Number: 731600116943-09

Dear Commissioner Vestager
Dear Director-General Laitenberger
Dear sir or madam

We are grateful for the opportunity to contribute to the consultation on the Vertical-BER¹ and the Vertical-Guidelines².

In addition to the questionnaire, we would like to share our experience with the Commission Regulation (EU) 330/2010 (**Vertical-BER 2010**) and the Guidelines on Vertical Restraints of 19 May 2010 (**Vertical-Guidelines 2010**). This experience is not only based on our daily business as an online retailer but also on our competition lawsuits. We would also like to submit suggestions which are a result of this experience (we briefly summarise them at p. 21).

A. About us

1. Reuter is an online retailer focussing on bathroom products, lighting, living, kitchen and heating. You find our online shop at reuter.de and reuter.com. We are a family-owned, medium-size company with 500 employees and a turnover of more than EUR 200 million. In addition to our online shop, we run a large brick-and-mortar store in Düsseldorf. A member of our legal department focusses on competition law.
2. The Vertical-BER directly affects us as an online retailer, and we need its protection. Especially Article 4 Vertical-BER 2010 protects us by categorising certain

¹ Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
² Guidelines on Vertical Restraints.

practices as hardcore restrictions. In our opinion, the Vertical-BER 2010 has proven effective. However, we would like to suggest a few improvements.

3. We have extensive experience with illegal restrictions of online retailing, and we have stood up against it. For instance, we have successfully sued a manufacturer of bathroom products for damages. Currently, we sue a furniture manufacturer for damages. Both companies have – in our view – illegally restricted online sales, and both lawsuits are based on competition law.
4. Today, we have fruitful and fair business relations with many manufacturers, which are not harmed by illegal restrictions. However and unfortunately, we can confirm the findings in the Commission's Sector Inquiry E-Commerce from our own experience: Some manufacturers still try to restrict us illegally in our pricing.
5. Therefore, we gratefully take the opportunity to contribute to the consultation.

B. Preliminary remarks on e-commerce

6. E-commerce has a very positive effect on welfare in the European Union. For instance:
 - a. Price transparency in e-commerce has a positive effect on price competition and thus on consumer surplus.
 - b. E-commerce provides for a considerably wider product diversity and improves distribution of goods and services. It is easily accessible – always and everywhere. For example, e-commerce can supply a wide product range to rural areas at low prices, which is simply not possible for stationary trading in the same extent.
 - c. In e-commerce, market-entry costs are far lower than in stationary trading.³ Small-and-medium-sized retailers can enter many markets only through the online channel.
7. Some brick-and-mortar retailers argue against e-commerce that online markets tip easier, and that very few competitors survive. This can be true for platform markets where network effects are important. However, it is not true for all online markets and especially not for regular online retailing.
8. However, such structures of limited competition do exist in stationary trading. Stationary markets are often geographically restricted and narrow, and aside daily needs customers can reach only between one and three retailers (at high price-comparison costs and travelling time). Thus, e-commerce creates a level of competition stationary trading often cannot provide.

C. Preliminary remarks on the Vertical-BER

9. The Vertical-BER grants exemptions without considering the facts of the individual case. This means it sometimes exempts cases which the Commission would

³ Cf. U.K. Digital Competition Expert Panel, Unlocking Digital Competition, March 2019, p. 3 ([link](#)).

not have exempted after examining the individual case. Such a false positive leads to legality of a restriction of competition which is actually illegal. A false negative does not lead to the prohibition of the restriction of competition; it only results in the need for an individual exemption. Accordingly, the Vertical-BER only has a final effect for false positives and not for false negatives, and false positives are more harmful. Thus, block exemptions of problematic cases should remain rare exceptions.

10. The Commission should also take into account that the declaration of non-application⁴ of the Vertical-BER is a tool that has been practically not used.
11. Restraints of retailing which are critical under competition law often concern the online channel. The Sector Inquiry E-Commerce confirms this. Therefore, the Vertical-BER should be very precise in the area of e-commerce.
12. Stakeholders accuse the Commission and the German Federal Cartel Office (**FCO**) of being biased towards e-commerce.⁵ That is wrong. Online sales are particularly restricted and thus require a higher level of protection by competition authorities. We do not know a single case where a manufacturer has restricted brick-and-mortar retailers or excluded them from its distribution network to the benefit of online retailers.

D. The importance of the Vertical-BER for e-commerce

13. The Vertical-BER 2010 and the Vertical-Guidelines 2010 have made an important contribution to making available the advantages of e-commerce to consumers throughout the European Union. They have broken great resistance in the existing structures of commerce.
14. We would like to illustrate that by our case: The Vertical-BER 2010 and the Vertical-Guidelines 2010 have played an important role in paving our way to becoming the first major online retailer in the sanitary sector in Germany. The sanitary sector traditionally is organised in a three-stage-distribution system: Manufacturers exclusively supply to stationary wholesalers, the stationary wholesalers supply exclusively to sanitary craftsmen, who only sell to end consumers (bundled with installation). Alternative distribution channels such as DIY-markets and online retailers have been restricted and mostly excluded.
15. The turning point has been competition-law proceedings against a sanitary manufacturer. This manufacturer used sales conditions which discriminated against online retailers. It granted wholesalers different rebates depending on whether the wholesalers sold the product to craftsmen or online retailers. The manufacturer used this system to restrict e-commerce; it expressly labelled the system an “offense against e-commerce”. It added further restrictions to this discrimination, among others, legal action against use of the manufacturer’s photo material or the manufacturer’s brands in e-commerce.

⁴ Article 6 Vertical-BER 2010 and Article 29(2) Regulation 1/2003.

⁵ Cf. e.g. the submission of the law firm Vogel & Vogel of 5 December 2018 in the pre-consultation process (at p. 8) ([link](#)).

16. The FCO found that the manufacturer's conditions violated Article 101 TFEU and Sec. 1 of the German Act against Restraints of Competition (**ACR**).⁶ The FCO expressly relied on para. 52(d) of the Vertical-Guidelines 2010. Pursuant to this paragraph, it is a hardcore restriction if a retailer has to pay a higher price for products intended to be resold online. After the manufacturer had removed the concerned clauses from its distribution contracts, the FCO closed the case.
17. We sued the manufacturer, and the Higher Regional Court of Düsseldorf awarded us damages.⁷ It was crucial for winning the lawsuit that the manufacturer's distribution agreements have not been block exempted.
18. Pursuant to these proceedings, the sanitary industry opened gradually to online sales, and we could establish our business.⁸ Today, we cooperate with many manufacturers in fair and fruitful business relations. End consumers now can choose from more than 250 brands in our online shop, and we supply hundreds of thousands of articles directly from our warehouse within a few days. Our user-friendly online shop has become the benchmark in the industry.
19. After our lawsuit, other online retailers could successfully enter the market, too. These days, end consumers can purchase sanitary products online and much cheaper than through the three-stage-distribution channel, and they do not have to purchase products and installation in a bundle. Breaking up three-stage distribution and introducing modern distribution counts among the greatest innovations in the sanitary industry in post-war Germany.
20. The Vertical-BER 2010 and the Vertical-Guidelines 2010 have played a critical role in this market evolution. The case of the sanitary industry demonstrates that Vertical-BER and Vertical-Guidelines are important tools to break up entrenched structures and open markets to e-commerce. However, in many sectors strong resistance against e-commerce continues to exist, and many end consumers still cannot fully benefit from the advantages of e-commerce.
21. Thus, the Vertical-BER and the Vertical-Guidelines are and will remain crucial tools to make the benefits of e-commerce fully available to end consumers in the European Union.

E. Effects of the ECJ's Coty judgment

22. The European Court of Justice's (**ECJ**) judgment in the case Coty⁹ directly only deals with restrictions of online retailing of luxury products, but it may have effect far beyond. Courts and authorities could misjudge the specific circumstances of the Coty case and generalise the rulings (see below para. 25). These rulings

⁶ Cf. FCO, Case Report on Premium Bathroom Fittings, case B5-100/10 ([link](#)).

⁷ Higher Regional Court of Düsseldorf, 13.11.2013, case VI-U (Kart) 11/13, ECLI:DE:OLGD:2013:1113.VI.U.KART11.13.00, ([link](#)).

⁸ Although many manufacturers have opened their distribution to e-commerce, other levels of the three-stage distribution system continue to fight e-commerce. Most wholesalers still flatly refuse to supply to online retailers.

⁹ ECJ, 6.12.2017, case C-230/16, ECLI:EU:C:2017:941, Coty ([link](#)).

could even result in a far too lenient interpretation of the term “restriction” in Article 4 Vertical-BER 2010 and possibly in the new Vertical-BER (see below para. 27).

23. First, we would like to note that the rulings in the Coty-judgment cannot be transferred to most other cases. The ECJ based its judgment specifically on the products at dispute and on the clauses of the specific distribution agreement. The ECJ stated that its ruling applied in the context of the facts of the individual case.¹⁰ The ECJ expressly held that its interpretation of Article 4(b) and (c) Vertical-BER 2010 only applies to “circumstances such as those at issue in the main proceedings”.¹¹
24. The ECJ found on the basis of the submitted information “that it does not appear possible to circumscribe, within the group of online purchasers, third-party platform customers”.¹² In the Coty-case, retailers were not allowed to sell through third-party platforms, but they were allowed to advertise through third-party websites and search engines.¹³ In the light of these facts, the ECJ considered the restriction of a certain form of online sales neither to constitute a restriction of customers within the meaning of Article 4(b) Vertical-BER 2010 nor a restriction of passive sales to end users within the meaning of Article 4(c) Vertical-BER 2010.
25. These findings are dangerous for e-commerce. At Article 4(b) Vertical-BER 2010, this danger results from the alleged lack of a restriction when online customers can be reached through other online channels. The judgment could be read to mean: Channels to reach online customers may be restricted if online customers can be reached through other channels. In this interpretation, the prohibition of an online channel – even an important channel – does not hinder the block exemption; the prohibition is automatically legal.
26. The ECJ’s ruling on passive sales within the meaning of Article 4(c) Vertical-BER 2010 also is at risk of being unduly extended. It could be extended to passive sales in Article 4(b)(i) Vertical-BER 2010. Then, restrictions of passive sales would automatically be block exempted and thus be legal if only a part of the passive sales is prohibited – even if it is a substantial part.
27. Beyond that, the Coty-judgment may cause general problems with the interpretation of the term “restriction” in Article 4 Vertical-BER 2010 – and in the new Vertical-BER. The judgment could be (mis-)read to mean that the ECJ interprets the term “restriction” in Article 4 Vertical-BER 2010 differently from “restriction” of competition in Article 101 TFEU. In Article 101 TFEU, the collective term “restriction of competition” comprises pursuant to the wording of the article the “prevention, restriction or distortion of competition”. The Coty-judgment may be (mis-)read to rule that the term “restriction” in Article 4 Vertical-BER 2010 only comprises “prevention” of access to customers because the ECJ considered it no “restriction” when certain sales channels are shut down (for luxury products). Under this interpretation, anything less than a complete prevention of access to (online-

¹⁰ Ibid., para. 31-34.

¹¹ Ibid., para. 69 and ruling No. 3.

¹² Ibid., para. 66.

¹³ Ibid., para. 67.

)customers would not fall within the meaning of “restriction” in Article 4 Vertical-BER.

28. The ECJ only interpreted the Vertical-BER 2010 but not Article 101 TFEU. If the Commission believes that the Vertical-BER does not optimally perform as a block exemption regulation under the interpretation (or potential misreading) of the Coty-judgment, it is the Commission’s right and duty as the legislator to adjust the new Vertical-BER.
29. The exclusion of an online sales channel obviously is a restriction of competition within the meaning of Article 101(1) TFEU. Among the three sub-categories prevention, restriction and distortion of competition, it falls into the sub-category restriction. The retailer cannot compete through this channel. The Commission has to ponder if such a restriction is so harmless in general that the Commission is willing to exempt it without looking at the facts of the specific case – and risking false positives.
30. Furthermore, the ECJ may have relied so heavily on the facts of the specific case that it did not assess in depth the importance of the different sales channels in the entire e-commerce. These sales channels are not of equal value; their value depends on and varies with markets, size and prominence of the dealers.
31. Therefore, we believe that prohibition of certain sales channels is a serious interference with competition and that such a restriction of competition should not be block exempted. The risks for competition are too high. The Commission should adjust the new Vertical-BER to not block exempt the prohibition of sales through certain (online-)channels.
32. Some online marketplaces – the Coty-case dealt with one – may warrant different treatment. One has to recognise that manufacturers and retailers cannot control substantial elements of distribution through some marketplaces. For instance, on some marketplaces retailers cannot control the product environment in which they sell the manufacturers’ products. In addition, presentation and description are often predetermined by the marketplace. Some marketplaces even allow only for one site per product (usually based on GTIN, the Global Trade Identification Number). The first retailer sets up the page, and other retailers are limited in changing it. The first retailer has no influence on whether other retailers use this page (possibly including the manufacturer’s photo material) for their businesses. Such other retailers may not meet the manufacturer’s legitimate quality requirements. Furthermore, retailers are limited in providing customer support on such pages (e.g. per telephone or live chat) because the retailer has to share the site with other retailers, and his support may further his competitors’ sales.
33. Such concerns do not apply to the retailer’s own website. This sales channel should always be open to online retailers. It offers the greatest diversity in service competition, and it is the most important sales channel for most retailers.¹⁴ The

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The Commission’s Sector Inquiry E-Commerce found that almost all online retailers (92%) sell through their own website (European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 93 ([link](#))).

online shop on the retailer's own website is far better suited to adapt to the characteristics of the specific product and to meet the manufacturer's requirements.

- 34. Today, customers mostly reach the retailer's online shop through the retailer's website. However, in the future it will become more important for retailers to provide access to their shop through mobile applications (apps). Customers will increasingly buy mobile, and they prefer apps over websites on their mobile devices.
- 35. Thus, the new Vertical-BER should ensure that the prohibition of sales through the retailer's own online shop – on his own website and app – is a hardcore restriction.

F. Explicit regulation of e-commerce in the new Vertical-BER

- 36. We suggest to expressly regulate e-commerce in the new Vertical-BER. Indirect regulation through passive sales can result in difficulties. Such difficulties have emerged in the Coty-judgment. In the following, we give two examples on restrictions which we consider important. The first example is the reservation of online sales to the manufacturer or a convenient dealer (at para. 37 et seq.). The second example is discriminating online retailers by basing conditions on the retailer's primary sales channel (at para. 40 et seq.).
- 37. One risk of the current structure of Article 4 Vertical-BER is that it may be interpreted to allow for a complete reservation of online sales for the manufacturer itself or a convenient retailer. The ECJ spoke of a "group of online purchasers" in the Coty-judgment.¹⁵ Interested parties may read this to mean a customer group within the meaning of Article 4(b)(i) Vertical-BER.¹⁶ If that reading were correct, online purchasers could be reserved to the manufacturer or a convenient retailer. This way, manufacturers could eliminate online competition.¹⁷
- 38. National competition authorities or courts could view such reservations as not to be limited by passive sales. Online shops aim at online purchasers. And if online purchasers are legitimately reserved, other retailers' online shops could be viewed as active sales to online purchasers. Such an interpretation runs counter to the Vertical-Guidelines 2010,¹⁸ but national competitions authorities and courts are not bound by the Vertical-Guidelines.
- 39. We would like to note that a separate customer group of online purchasers actually does not exist. The most evident facts are:

¹⁵ ECJ, 6.12.2017, case C-230/16, ECLI:EU:C:2017:941, Coty, para. 66 ([link](#)).

¹⁶ For instance, Schultze/Paukte/Wagener, Vertikal-GVO, 4th ed. 2019, p. 347 (fn. 98), note the ECJ's wording in relation to customer groups in Article 4(b)(i) Vertical-BER.

¹⁷ The Commission has identified a trend that manufacturers increasingly use their own online shop to control online retailing, cf. European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 179, 187 ([link](#)).

¹⁸ Schultze/Paukte/Wagener, Vertikal-GVO, 4th ed. 2019, p. 347 (fn. 98), consider that a reservation of would be possible based on this reading of the Coty-judgment, but it would be without effective because online sales are passive sales.

- a. The majority of online retailers also have brick-and-mortar stores.¹⁹
 - b. Online shops exert substantial competitive pressure on brick-and-mortar stores.
 - c. Most customers compare the complete package of price and service in online shops and brick-and-mortar stores in their purchasing decision.
40. Some manufacturers try to interfere with competition between stationary retailers and online retailers. They artificially restrict competition from online retailers by granting stationary retailers better purchasing prices and conditions. Current competition law provides no efficient lever against such practices.
41. In Germany, it is clear from the FCO's practice and from courts' case law that manufacturers shall not grant rebates which depend on whether the retailer sells the product through the online channel or through the stationary channel.²⁰ The German authorities followed the Commission's position in para. 52(d) of the Vertical-Guidelines 2010.
42. Some manufacturer react to this case law by categorising the retailer and not the individual sales. Online retailers get lower rebates than stationary retailers. The economic effect is the same.
43. These manufacturers take that model as a legal loophole to evade the above case law. We believe that such practices can be categorized as hardcore restrictions when focussing on their incentivising effect on stationary retailers not to establish an online business – which would result in lower rebates for the retailer's entire business. The rebate system would thus restrict online sales.
44. However, it is not clear whether national competition authorities and courts would take this view; the result could be a fragmented case law. Furthermore, courts could deny online retailers' locus standi because they are not directly affected by the restriction.²¹
45. For these reasons, restrictions of e-commerce should be directly regulated in the Vertical-BER. If the Commission chooses not to do so, it should at least clarify in the Vertical-Guidelines that it is a hardcore restriction to directly or indirectly attach rebates and conditions to the retailer's primary sales channel and that online purchasers are no separate customer group that may be reserved.

¹⁹ The Commission found in the Sector Inquiry E-Commerce that 59% of the retailers in the inquiry sold online and offline (European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 188 ([link](#))).

²⁰ FCO, Case Report on Premium Bathroom Fittings, case B5-100/10 ([link](#)); Higher Regional Court of Düsseldorf, 13.11.2013, case VI-U (Kart) 11/13, ECLI:DE:OLGD:2013:1113.VI.U.KART11.13.00, para. 49 ([link](#)). The German Federal Court of Justice has rejected the non-admission complaint. The FCO and the Higher Regional Court of Düsseldorf ruled that the double pricing system was illegal because it restricted competition for the following reasons:

1. Online retailers were substantially handicapped in competition.
2. Retailers were incentivised to sell offline and not online.
3. The manufacturer has deep insights into the retailers sales because the retailer has to account the online and offline sales for the rebate payments.

²¹ See below Section K.

G. Online Advertising

46. The Commission has found:²²

Advertising is an important element of the competitive process as it increases the information available for consumers.

47. It is vital for sales through the retailer's own website that customers can find and reach the website. Customers can only find the website if the retailer advertises it. This requires on the one hand improving the customer's general awareness for the website and on the other hand addressing the customer when he is looking for a specific product. That needs forms of advertising which complement each other – one cannot replace the other.²³ General advertising of the website addresses customers in an early stage of the decision-making process. Product-specific advertising aims at customers who have already chosen a certain product.
48. Online advertising is particularly important for online retailers. It can lead the customer by one click to the online shop or to a particular product. Raising general awareness of the online shop requires advertising in general search engines such as Google Search, on third-party websites, and in social media.²⁴ In addition to the short-cut to the online shop, such online advertising also brings the advantage over classic advertising that it can be more targetedly directed to customers interested in the retailer's products.
49. Addressing customers who are interested in buying a specific product requires online advertising.²⁵ Price search engines are indispensable to this end because such customers search the product mostly through these engines.²⁶
50. The German Federal Court of Justice has found:²⁷

Considering the great product range on the internet and the great number of online vendors, price search engines have considerable importance. They enable internet users which have chosen to buy a specific product to search which retailers offers the product at which conditions. A retailer thus can significantly improve his chances that interested internet users will purchase from him by making a cheap offer in combination with a price search engine.

²² Reply of the European Commission of 25.11.2015 to the petition 2383/2014 ([link](#)).

²³ Cf. European Commission, 27.06.2017, case AT.39740, Google Search (Shopping), paras. 174 et seq. and 196 and seq. ([link](#)); FCO, 26.08.2015, case B2-98/11, Asics, paras. 15, 408, 411 ([link](#)).

²⁴ Cf. FCO, 26.08.2015, case B2-98/11, Asics, paras. 29 et seq. ([link](#)), and on the importance of advertising in Google Search see European Commission, 27.06.2017, case AT.39740, Google Search (Shopping), para. 52 ([link](#)).

²⁵ On advantages of large platforms such as Amazons in this area see U.K. Digital Competition Expert Panel, Unlocking Digital Competition, March 2019, p. 23 ([link](#)).

²⁶ Cf. FCO, 26.08.2015, case B2-98/11, Asics, para. 409 ([link](#)).

²⁷ Federal Court of Justice, 12.11.2017, case KVZ 41/17, Asics, para. 25 ([link](#)). In the original language:
Im Hinblick auf das große Produktangebot im Internet und die i der dort tätigen Anbieter kommt Preissuchmaschinen eine erhebliche Bedeutung zu. Sie ermöglichen es den Internetnutzern, die sich bereits für ein konkretes Produkt entschieden haben und dieses erwerben wollen, gezielt danach zu suchen, welcher Händler es zu welchen Konditionen anbietet. Ein Einzelhändler kann danach durch ein preislich günstiges Angebot und die Verknüpfung mit einer Preissuchmaschine die Chance deutlich verbessern, dass Internetnutzer, die sich für das betreffende Produkt interessieren, sein Online-Angebot wahrnehmen.

(our translation)

51. We agree with the Commission that price search engines are no separate online sales channel but are a means of accessing the retailer's own website.²⁸ The Commission rightly noted:²⁹

Restriction to use price comparison tools therefore potentially restrict the effective use of the internet as a sales channel by retailers by taking away an effective means to guide customers (including customers outside their physical trading area) to their own (authorised) website.

52. Furthermore, there is no legitimate reason why manufacturers may prohibit online advertising. Manufacturers may – of course – make non-discriminating and reasonable quality requirements to online advertising to ensure that it meets the product's quality requirements. The Commission stated on price search engines:³⁰

Based on these considerations, absolute price comparison tool bans which are not linked to quality criteria, potentially restrict the effective use of the internet as a sales channel and may amount to a hardcore restriction of passive sales under Article 4 b) and 4c) of the VBER.

53. For these reasons, restrictions of advertising channels and especially online advertising channels should be categorised as hardcore restrictions with the exemption of non-discriminating and reasonable quality requirements. A prohibition to advertise online is a de-facto prohibition of the online shop. Without online advertising, the customer cannot find the online shop at the critical moment of the purchasing process. Without online advertising, most retailers would have to sell through one of the large and prominent marketplaces. That would further tilt the online playing field towards the providers of these marketplaces.

H. Price advertising

54. Advertising is a substantial part of competition, and advertising the price is a key element of it.
55. The Commission has found regarding minimum advertised prices (MAP, the manufacturer fixes a minimum price at which retailers may advertise the product):³¹

While MAPs leave the final decision on what price a retailer charges to the retailer, they aim at influencing retail prices by limiting the possibility of retailers to inform potential customers of available discounts. A key incentive for price competition between retailers is removed. Retailers

²⁸ European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 545 ([link](#)).

²⁹ European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 551 ([link](#)).

³⁰ European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 552 ([link](#)).

³¹ Reply of the European Commission of 25.11.2015 to the petition 2383/2014 ([link](#)).

will not be able to attract additional consumers by advertising lower prices.

56. Therefore, it is well-founded that the Commission and the ECJ consider restrictions of price advertising to violate Article 101 TFEU.³²
57. For two reasons, this holds even more true for e-commerce than for offline commerce: The first reason concerns price transparency in e-commerce, and the second reason concerns online retailers' need for price advertising.
58. E-commerce has the substantial advantage for consumers that they can compare prices far more easily. Against this background, the Commission emphasises that price advertising in e-commerce has substantial advantages for consumers:³³

The increase of sales on online shops and online marketplaces leads to an intensification of competition, which is to the advantage of consumers as it allows them to easily and almost at no costs compare prices across a large number of retailers to find the best value for their money. The Commission does not consider it appropriate to allow companies to take away these benefits by practices aimed at aligning retail prices to the detriment of consumers.

59. In addition, price advertising is a more important competition parameter for online retailers than for stationary retailers. In e-commerce, the advertised price typically is the price consumers pay. Individual price negotiations are rare. Thus, the prohibition of advertising prices which are lower than the recommended retail price (**RRP**) has the same effect as the prohibition to deviate from the RRP.
60. For these reasons, the Consumer and Markets Authority of the United Kingdom has found in its fining decision against the refrigerator manufacturer Foster:³⁴

Foster entered into an agreement and/or concerted practice with each of the Resellers that the Resellers would not advertise Foster products online below the MAP [minimum advertised price].

In the legal and economic context in which they operated, the Agreements genuinely restricted in practice the ability of the Resellers to determine their online sales price for Foster products at a price below the MAP. Where customers buy the products online (ie 'click-to-buy' sales), the advertised price is typically the price paid by the customer, that is, the sales price. This was reinforced by measures to identify resellers who priced below the MAP combined with actual or threatened sanctions for advertising prices below the MAP.

³² European Commission, 16.07.2003, case COMP/37.975, PO/Yamaha, para. 133 et seq. ([link](#)); EuGH, 26.11.1975, case 73/74, Papiers Peints, ECLI:EU:C:1975:160, paras. 10-12 ([link](#)).

³³ Reply of the European Commission of 25.11.2015 to the petition 2383/2014 ([link](#)); also see European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, para. 11 ([link](#)).

³⁴ U.K. Consumer and Markets Authority, 24.5.2016, case CE/9856/14, Online resale price maintenance in the commercial refrigeration sector, p. 108 et seq. ([link](#)).

As such, the CMA finds that the Agreements amounted to RPM in respect of online sales of Foster products.

- 61. Prohibitions to advertise using crossed-out prices also significantly restrict competition in e-commerce. Manufacturer frequently prohibit to cross out their RRP's. However, such cross-out prices are important to provide the customer with information on whether the retailer's price is actually attractive. This is even more important where customers cannot compare prices.
- 62. Thus, the Commission should categorize restrictions in price advertising as hardcore restrictions.

I. Resale price maintenance is a hardcore restriction

- 63. Resale price maintenance (**RPM**) should remain a hardcore restriction. RPM has the same effect on competition as a cartel among the involved retailers.
- 64. RPM is widespread in e-commerce; this is a result of online transparency.³⁵ On the one hand, transparency leads to an intense price competition in e-commerce; on the other hand, transparency makes it easy to monitor prices in e-commerce.³⁶ Both factors encourage manufacturers to maintain resale prices.
- 65. The widespread belief that online retailers only compete by price is wrong. Quality competition is very strong in e-commerce, and this is closely connected to transparency. It is very transparent for customers how satisfied other customers are with the product, services, delivery time and so on. The Commission has found internal manufacturer studies which support this.³⁷
- 66. In our experience, RPM is used in e-commerce for the following reasons:³⁸
 - a. If stationary retailers have enough power vis-à-vis the manufacturers, some push RPM.³⁹ They press manufacturers to maintain high resale prices⁴⁰ in order to prevent more efficient (online) retailers from sharing

³⁵ The Commission found in the Sector Inquiry E-Commerce that 43% of the online retailers in the European Union are subject to price limitations. See European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, para. 28 ([link](#)).

³⁶ Cf. European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, paras. 12 et seq., 33 ([link](#)); the U.S. Council of Economic Advisers of the (Obama) White House noted too that transparency on the one hand increases price competition but on the other hand facilitates restricting agreements (Council of Economic Advisers Issue Brief April 2016, p. 13 ([link](#))).

³⁷ European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para. 171(i), (k) and (l) ([link](#)).

³⁸ Our experience supports the findings of the Commission set out in the Vertical-Guidelines 2010 at para. 224.

³⁹ The FCO has found in several cases that retailers have actively participated in monitoring and enforcing RPM (cf. FCO, Case Report of 17.05.2019, Bicycle Wholesaler ([link](#)); FCO, Press Release of 25.07.2019, Wellensteyn ([link](#)); FCO, Case Report of 11.01.2017, Furniture ([link](#)); FCO, Presse Releases of 22.08.2014, Matresses ([link](#)); FCO, Case Report of 08.10.2012, Electric Tools ([link](#)); FCO, Case Report of 14.12.2016, Haribo ([link](#))).

⁴⁰ The FCO found in a non-published fining decision:

Many retail partners followed the requirements on resale prices from the outset in order to benefit from higher sales prices – without having to answer to cheaper offers from competitors – and to obtain higher margins and maximum conditions.
(our translation)

Original:

their efficiencies with end customers in form of lower prices. This artificially enhances competitiveness of less efficient (stationary-)dealers.

- b. Some established retailers exert pressure on manufacturers to fix resale prices. They aim at restricting competition from smaller and new retailers, which need very competitive prices to be noticed by customers.
- c. Some manufacturers fix resale prices so that they can charge higher prices from retailers. If intra-brand price competition among retailers is strong, they bargain hard with the manufacturer.
- d. Some manufacturers fix resale prices because they are uneasy with e-commerce and try to maintain the stationary status quo. They do not act for economically rational reasons but fearsome and perceive e-commerce as a risk and not as an opportunity.⁴¹
- e. Finally, some manufacturers have not fully comprehended the importance of e-commerce for their businesses. Professor Heinemann, an economist specialised in e-commerce, has noticed:⁴²

Why do so many manufacturers and retailers struggle with today's customer orientation? Why are there still efforts to restrict online distribution and to chain it by resale price maintenance? Why is the quality and experience level of online vendors depicted worse than it really is? The answer can only be – apart from hanging on to overcome structures and the lack of service culture in Germany – a lack of understanding for modern customers, the internet and changing user behaviour.

(our translation)

- 67. RPM is not necessary to improve retailers' services to customers.⁴³ Manufacturers can support such retailer efforts by less competition-restricting means; it is

Viele Fachhandelspartner hielten sich von vornherein an die Vorgaben zu den Endverkaufspreisen, um – ohne auf günstigere Wettbewerberangebote erwidern zu müssen – höhere Endverkaufspreise und somit für sich eine höhere Handelsmarge und maximale Konditionen für sich zu erzielen.

⁴¹ Just like every other human, a manager is no homo oeconomicus. Managers are influenced by emotions and gut feelings like everyone else. Two intuitive factors may be relevant in rejecting new distribution channels: First, humans rate possible losses higher in their decisions than possible gains; second, humans who are satisfied with the status quo tend to avoid risks (cf. Kahneman, Thinking, Fast and Slow, 2011, p. 316 et seq., 334 et seq.; Kahneman/Tversky, Choices, Values, and Frames, American Psychologist 1984, p. 341, 348 ([link](#))).

⁴² Heinemann, Der neue Online-Handel, 8th ed. 2017, p. 10 et seq.:
Wieso tun sich so viele Hersteller und Händler in Deutschland so schwer mit der neuen Kundenorientierung? Wieso gibt es immer noch Versuche, den Online-Vertrieb zu beschränken und mit Preisbindungen zu fesseln? Wieso wird das Qualitäts- und Erlebnisniveau der Online-Anbieter häufig schlechter dargestellt, als es in Wirklichkeit ist? Die Antwort kann nur – neben dem Festklammern an teilweise überlebten Strukturen und der Servicewüste in diesem unserem Land – in einem mangelnden Verständnis für den modernen Kunden, das Internet und das sich ändernde Nutzungsverhalten liegen.

⁴³ Opponents of prohibiting RPM emphasise the risk of free riding. They argue that retailers could free ride on other retailers' investments into service and product presentation if the manufacturer cannot fix the retailers' resale prices (c.f. U.S. Supreme Court, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) ([link](#)); Posner, Antitrust Law, 2nd ed. 2001, p. 172 et seq.; also see European Commission, Vertical-Guidelines 2010, para. 225). See on the submissions in the consultation process on the Vertical-BER 2010: Peepkorn, Revised EU Competition Rules for Supply and Distribution Agreements, in: Kilpailuoikeudellinen Vuosikirja 2010, p. 201, 212 ([link](#)).

not necessary to entirely eliminate intra-brand price competition. For instance, special compensations for certain services at the same time restrict competition less and support service efforts more targetedly.⁴⁴

68. We experience in our markets that RPM significantly increases prices. However, we cannot see that RPM boosts competition in non-price parameters. RPM in particular fails to improve service where it is directed against e-commerce. It rather restrains services coming with e-commerce, such as high availability of products, which is a service that is very important to modern customers.⁴⁵
69. The Commission should also take into account that price competition is far more important for retailers than for manufacturers. Manufacturers rank the price as fifth most important competitive factor and retailers as number one.⁴⁶
70. Apart from that, the Vertical-BER 2010 categorises RPM as a hardcore restriction, but it does not prohibit it per se.⁴⁷ It still allows for an individual exemption if the RPM is necessary to create improvements within the meaning of Article 101(3) TFEU. This corresponds to the current case law of the U.S. Supreme Court.⁴⁸
71. For these reasons, the regulation of RPM in Article 4(a) Vertical-BER 2010 should be retained unchanged; the underlying motivations of the Commission still hold true.⁴⁹

J. Online retailers are no free riders

72. It is frequently claimed in relation to RPM that online retailers free ride on stationary retailers' services and product presentation.⁵⁰ As a general claim, this is wrong. In some product markets, stationary retailers may provide better services, possibly regarding shoes that customers want to try on or perfumes whose fragrance cannot be conveyed online.⁵¹ But the opposite is true for many other areas; stationary retailers benefit from online retailers' services.

⁴⁴ This corresponds to the regulation in para. 52(d) of the Vertical-Guidelines 2010.

⁴⁵ Cf. Heinemann, Der neue Online-Handel, 8th ed. 2017, p. 8.

⁴⁶ European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, paras. 137 et seq. ([link](#)). To manufacturers, the following competitive parameters are more important the prices: product quality, brand, innovation, novelty and pre- and after-sales services. Also see European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, para. 12 ([link](#)).

⁴⁷ The submission of the law firm Vogel & Vogel of 5 December 2018 in the pre-consultation process ([link](#)) misjudges this. It reads on page 6: „A per se prohibition of resale price maintenance (RPM) [...]“ and „Article 4 (a) of the Vertical Restraints Regulation automatically prohibits price-fixing practices [...]“.

⁴⁸ The U.S. Supreme Court applies the rule of reason to RPM, i.e. it reviews on the basis of the facts of the case if RPM violates Sec. 1 Sherman Act (U.S. Supreme Court, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) ([link](#))). This corresponds to the individual exemption under Article 101(3) TFEU in EU competition law (cf. Inderst/Thomas, Kartellrecht, 2nd ed. 2016, § 19 Rn. 140). The submission of the law firm Vogel & Vogel of 5 December 2018 in the pre-consultation process (at p. 6) ([link](#)) misjudges this.

⁴⁹ Cf. Vertical-Guidelines 2010, paras. 223 et seq. on the underlying motivations.

⁵⁰ Cf. European Commission, Staff Working Document Accompanying the Final Report on the E-commerce Sector Inquiry, SWD(2017) 154 final, para.45 ([link](#)).

⁵¹ Cf. on perfumes FCJ 04.11.2003, case KZR 2/02, Dealer Cosmetics on the Internet. However, many end customers enjoy trying shoes and clothing etc at home. This is a service first provided by online retailers, stationary retailers only began providing such services under pressure from e-commerce.

73. The internet has become the most important information medium for the average end consumer. Most end consumer begin their product searches on the internet. They use the internet for information on available products and their features, they read product reviews and enjoy that such information is readily and comfortably available from home.

74. The FCO's findings support this:⁵²

Not only brick-and-mortar stores let end consumers check product quality adequately. Online retailing also meets the end consumers' need to check product quality – if not completely at least to a certain extent – because they can extensively check products which they have bought online and return them – where applicable without cost – if they do not like the product. The internet can contribute to appropriate consumer advice on product choice because it provides a wide range of information such as customer rating systems.

(our translation)

75. In many product markets, end consumers do research online before they visit a brick-and-mortar store. They already have a precise idea which product best suits their demand before entering the store.

76. The FCO noted in 2015:⁵³

It has to be taken into account that customers gather information not only in brick-and-mortar stores and then shop online. To a high extent, customers gather information on a product on the internet before they buy it in a brick-and-mortar store.

⁵² FCO, 26.08.2015, case B2-98/11, Asics, para. 101 ([link](#)):

Nicht allein der stationäre Einzelhandel stellt im erforderlichen Umfang die Möglichkeit des Verbrauchers sicher, die Qualität eines Produkts zu überprüfen. Aufgrund der Möglichkeit, über das Internet bezogene Produkte eingehend zu prüfen und bei Nichtgefallen – ggf. kostenfrei – wieder zurückzusenden, trägt auch der Online-Vertrieb in einem hohen Maße dem Bedürfnis der Verbraucher Rechnung, die Qualität von Produkten – wenn auch nicht immer vollständig, so doch in gewissem Umfang – prüfen zu können. Gleiches gilt für die Gewährleistung eines ausreichenden Beratungsniveaus für den Verbraucher. Aufgrund der vielfältigen Informationsmöglichkeiten, wie z.B. Kundenbewertungssystemen, kann auch das Internet zu einer sachgerechten Beratung des Kunden bei der Produktauswahl beitragen.

⁵³ FCO, 26.08.2015, case B2-98/11, Asics, paras. 98 et seq. ([link](#)):

Dabei ist zu beachten, dass nicht nur im stationären Handel Informationen eingeholt und der Kauf alsdann über das Internet getätigt wird. In ganz erheblichem Umfang informieren sich Kunden auch vorab über ein gewünschtes Produkt im Internet, kaufen dieses aber dann in einem Ladengeschäft.

So kommt eine Studie von Roland Berger Strategy Consultants zu dem Ergebnis, dass von den im Internet getätigten Produktkäufen ca. 54% mit Vorabinformation erfolgen. Hiervon werden 46% im Internet sowie 10% per Smartphone vorbereitet, während nur 21% nach vorheriger Beratung im Ladengeschäft erfolgen. Von den im stationären Handel getätigten Produktkäufen werden hingegen nur bei ca. 26% vorab Informationen eingeholt. Dies geschieht zu 13% im Internet, zu 4% per Smartphone und zu 17% im Ladengeschäft. Eine Studie des ECC Köln kommt sogar zu dem Ergebnis, dass rd. ein Drittel der stationären Käufe durch eine Online-Recherche vorbereitet wird und diese Käufe rd. 50% der Umsätze in stationären Geschäftsstellen entsprechen. Umgekehrt geht demnach nur bei rd. 11% der Käufe in Online-Shops eine stationäre Informationssuche voraus. Auch nach anderen Angaben ist der Anteil der Käufe, bei denen sich Kunden online informieren und offline kaufen, von 2011 auf 2012 von 7,9% auf 8,5% und damit stärker gestiegen als der Anteil der Käufe, bei denen die Information offline und der Kauf online erfolgte. Dieser stieg lediglich von 1,3% auf 1,5%.

Accordingly, a study by Roland Berger Strategy Consultants comes to the result that 54% of product purchases on the internet are made with preceding information. 46% of that information is gathered on the internet and 10% via smartphone, whereas only 21% of online purchases are made after consulting a stationary retailer. Only 26% of purchases in brick-and-mortar stores are made after previous consultation. 13% of this information is gathered on the internet, 4% via smartphone and 17% in brick-and-mortar stores. A study of the ECC Cologne even comes to the conclusion that about one third of stationary purchases are prepared by online research and that these purchases represent about 50% of the sales in stationary retailing. Vice-versa, stationary information gathering precedes only 11% of purchases in online-shops. Pursuant to other sources, the share of cases where customer gather information online and buy offline has increased from 7,9% to 8,5% from 2011 to 2012. This increase exceeds the increase of purchases where customers gathered information offline and purchased only; it increased only from 1,3% to 1,5%.

77. In extensive investigation, the Commission has found too that free riding occurs to roughly the same extent in both directions, and stationary retailers benefit from online retailers to the same extent as vice-versa.⁵⁴
78. In our case: Many end consumers who buy stationary use the large and user-friendly database of our online shop. Stationary retailers can only show a fraction of the available products in their showrooms.⁵⁵ They do not have digital databases for end consumers because establishing and maintaining such a database costs millions of Euros.
79. Furthermore, we – and many other online retailers – have a call center where proficient staff helps our customers seven days a week and which customers can comfortably reach from home.
80. Against this background, it is not only wrong that we or other online retailers free ride on stationary retailers services. The opposite is true: Stationary competitors benefit from (or free ride on) our services at least as much as online customers use stationary retailers' services.
81. Therefore, there should be little concern that online retailers could free ride on stationary retailers' services. In any case, such free riding can be reasonably prevented by requiring online retailers to maintain a stationary store where they provide services typical of stationary retailing.

K. Refusal to supply and regular termination as means to enforce RPM

82. Refusal to supply and regular termination can be abused to pressure retailers into pricing patterns. Some manufacturers refuse to supply to certain online retailers without giving reasons; in fact, however, the reason is that these online retailers

⁵⁴ Cf. European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, para. 11 ([link](#)).

⁵⁵ In the sanitary sector, wholesalers operate the showrooms but do not sell to end consumers. They sell only to craftsmen which usually do not have own showrooms.

are known to be price leaders. If the manufacturer already supplies to an online retailer and does not appreciate its price setting any more, some manufacturers regularly terminate the supply contract without giving reasons or giving generic reasons such as a “re-organisation of the distribution network”. Effectively, this termination is a sanction for the retailer’s price setting.

83. This contradicts the purpose of competition and thus the objectives of competition law. Manufacturers should not select retailers for their price setting but for their sales performance and services. In the same vein, the Vertical-Guidelines 2010 state (on selective distribution systems):⁵⁶

The conditions of Article 101(3) are in general unlikely to be fulfilled if the selective distribution systems at issue prevent access to the market by new distributors capable of adequately selling the products in question, especially price discounters or online-only distributors offering lower prices to consumers, thereby limiting distribution to the advantage of certain existing channels and to the detriment of final consumers.

84. However, courts still rule that a manufacturer may terminate a retailer because the manufacturer does not approve the retailer’s pricing. The Higher Regional Court of Düsseldorf ruled in 2014:⁵⁷

This is not the case here even if the defendant – which he denies – does not supply to the claimant because the claimant does not comply with the defendant’s minimum retail prices. Fixing minimum retail prices would violate Sec. 1 ARC and thus could not be legally agreed in a contract within the meaning of Sec. 21(2) ARC. Furthermore, the claimant would have a supply claim pursuant to Sec. 33(1) ARC (1.) if and (2.) to the extent the defendant uses a refusal to supply in order to make the claimant comply with the minimum retail price and thus interferes with the claimant’s business decisions [...]. However, the claimant does not assert the defendant’s intent – in a business relation both parties generally want – to bend the claimant’s will and call it to observe minimum prices. The defendant rather has refused to supply to the claimant from the outset, that is from claimant’s foundation, after the defendant had finally terminated the business relation with the claimant’s predecessor and had stopped supplies.

⁵⁶ Vertical-Guidelines 2010, para. 179.

⁵⁷ Higher Regional Court of Düsseldorf, 25.06.2014, case VI-U (Kart) 46/13, para. 126 ([link](#)):

So liegt der Fall hier aber selbst dann nicht, wenn die Beklagte - wie diese allerdings bestreitet - die Klägerin deshalb nicht beliefert, weil jene sich nicht an ihr vorgegebene Mindestverkaufspreise halten will. Zwar würde eine Vereinbarung von Mindestverkaufspreisen § 1 GWB zuwiderlaufen und damit tatbestandlich ein einer wirksamen vertraglichen Bindung nicht zugängliches Verhalten im Sinne des § 21 Abs. 2 GWB darstellen. Auch würde als Rechtsfolge aus § 33 Abs. 1 GWB ein Belieferungsanspruch der Klägerin in Betracht kommen, (1.) sofern und (2.) solange die Beklagte eine Liefersperre als Mittel einsetzte, sie - die Klägerin - zur Einhaltung von Mindestverkaufspreisen zu veranlassen und hiermit auf ihre unternehmerische Freiheit einzuwirken [...]. Jedoch trägt das Vorbringen der Klägerin nicht den Schluss auf eine Absicht der Beklagten, im Rahmen einer von beiden Parteien grundsätzlich gewollten Geschäftsbeziehung ihren - der Klägerin - Willen zu beugen und zu Mindestverkaufspreisen anzuhalten. Vielmehr hat die Beklagte eine Belieferung der Klägerin von vornherein, nämlich von deren Gründung im Dezember 2005 an, uneingeschränkt abgelehnt, nachdem sie zuvor im August 2005 bereits die Geschäftsbeziehung mit der Vorgängergesellschaft endgültig beendet und Warenbestellungen der Vorgängergesellschaft seitdem nicht mehr bedient hatte.

(our translation)

85. The Higher Regional Court of Düsseldorf has referred to Sec. 1 ARC, which is the national equivalent to Article 101(1) TFEU in Germany. The court has ruled that a retailer has no claim against a manufacturer if the manufacturer has flatly refused to supply to the retailer or has finally terminated the business relation. The reasoning behind: If the business relation between the manufacturer and the retailer has finally ended, there is no agreement or concerted practice between the manufacturer and the retailer, nor does the manufacturer influence the dealers business conduct. Other courts have followed this line.⁵⁸
86. These courts fail to note that such a public execution of a retailer is a threat to other retailers not to deviate from minimum prices. As such, this action becomes part of the manufacturer's agreement with the other (obedient) retailers within the meaning of and violating Article 101(1) TFEU.
87. This German case law is very unfortunate because it rejects claims of those retailers which are most likely to enforce their claims against the manufacturer and thus to enforce competition law – the terminated dealers.
88. This case law also infringes the principle of effet utile. The retailer which has suffered a damage from an infringement of competition law must have the right to file a lawsuit. The ECJ has ruled that Article 101 TFEU has to be open

*[...] to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*⁵⁹

89. Yet, the above German case law erroneously denies locus standi of the terminated dealers although it is obvious that they suffer losses from the termination.
90. Therefore, this case law significantly impairs effective competition-law enforcement. Furthermore, vertical price fixing has to be tackled primarily in civil courts. As the Commission has found in the E-Commerce Sector Inquiry, vertical price fixing is commonplace on the internet,⁶⁰ and competition authorities can prosecute only few of these offences. Accordingly, the vast majority would be left unpunished without efficient civil proceedings.
91. The above case law dates from after the publication of the Vertical-Guidelines 2010. The Vertical-Guidelines 2010 read:⁶¹

In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples of the latter are [...] contract terminations in relation to observance of a given price level.

92. The Commission should therefore state clearly in the new Vertical-Guidelines:

⁵⁸ Regional Court of Dortmund, 25.02.2019, case 8 O 16/16 [Kart] (not published) on final termination.

⁵⁹ ECJ, 20.06.2001, case C-453/99, ECLI:EU:C:2001:465, Courage, para. 26 ([link](#)); ECJ, 13.03.2019, case C-724/17, ECLI:EU:C:2019:204, Skanska, para. 25 ([link](#)).

⁶⁰ Cf. European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, para. 28 ([link](#)). The Commission found that 43% of online retailers are subject to price limitations.

⁶¹ Vertical-Guidelines 2010, para. 48.

- a. When a supplier has (1.) fixed a resale price, (2.) a purchaser has undercut this resale price, and (3.) the supplier has (finally) terminated this purchaser this is a sufficient basis to refutably assume that the supplier has terminated the purchaser for undercutting the fixed resale price.
- b. The principle of effet utile requires that a (finally) terminated or rejected purchaser has locus standi to sue the terminating or rejecting supplier.

L. Restraining competition by restricting use of photo material and brands

- 93. The Vertical-Guidelines should state clearly that regional restrictions in agreements on the use of photo material and manufacturer brands are not block exempted. They should be equally clear on restrictions of sales channels in which photo material and brands may be used.⁶²
- 94. Retailers need product photos to advertise the products. Especially online retailers need such photos because they cannot present the physical product to the customer. High quality photos are crucial for commercial success. They give the customer an impression of the quality, value and functions of the product.
- 95. In online advertising, photo quality is essential beyond attracting customers. For instance, Google requires high quality photos; the photo quality is an essential factor in Google's auctioning of advertising spaces. It is often too expensive for retailers to create own photos for every product (e.g. Reuter offers hundreds of thousands of products and shows several photos for each). Therefore, retailers need photo material from the manufacturers. Some manufacturers exploit this to restrict online competition. They restrict the use to certain member states or revoke image rights if they do not like the retailer's pricing policy.

M. Abuse of selective distribution systems

- 96. Selective distribution systems can serve legitimate interests of manufacturers and can comply with competition law. However, selective distribution systems are sometimes abused to restrict e-commerce and to exclude online retailers.
- 97. To prevent such abuse, we suggest to include into the new Vertical-Guidelines – in addition to the language quoted above at para. 83 – the following: If a supplier runs a selective distribution system, none of the distributors sells online, and the supplier rejects an online distributor which can adequately sell the products, it is (refutably) assumed that this rejection is based on a total ban of online sales.
- 98. Apart from that, the present regulation on selective distribution systems should be kept.

⁶² The FCO has fined Recticel, a manufacturer of mattresses, inter alia because they restricted using their logo on the internet and their brand name at Google AdWords and eBay (see the FCO's press release of 22.08.2014 ([link](#))). In the Asics-case, the FCO considered the prohibition to use brands in Google AdWords an substantial restriction (FCO, 26.08.2015, case B2-98/11, Asics, paras. 349 et seq. ([link](#)); also see the FCO's report on the Adidas-case, 19.08.2014, case B3-137/12, Adidas ([link](#))). Manufacturers may have a legitimate interest in restricting the use on certain online-platforms because retailers may not have sufficient control over the use by third parties (see above para. 32).

N. Transfer of data

99. In the modern economy, data is essential for every company. Data can have a significant impact on the competitiveness of a company.⁶³ The impact of data on quality and innovation competition will probably surge during the term of the new Vertical-BER.
100. Suppliers and certain service providers increasingly demand that retailers share with them data on the retailers' businesses, in particular from the retailers' interactions with their customers. Suppliers often try to obtain data on end consumers and their purchasing behaviour for their distribution strategies. And some try to obtain data on their customers' businesses (which sometimes even compete with the supplier's online shop).
101. Service providers aim at accessing data on end consumers' interactions with the retailer's online shop. In some cases, such data access is an integral part of the service – for instance if the provider analyses for the retailer end consumers' interactions with the online shop. Sometimes transfer of such data is not necessary for the service, e.g. if the service provider advertises for the retailer on third-party websites.
102. Extensive data transfer from retailers' business relations with their customers can increase prices. It grants suppliers and service providers deep insights into the retailers' businesses, enables them to better assess the value of their services or products for the specific retailer and to increase their prices accordingly (behavioural discrimination). This results in a lower consumer surplus – i.e. extensive transfer of data can lead to higher prices.
103. Contractual provisions on data transfer should not automatically be block exempted by the Vertical-BER. Data transfer should only be block exempted considering the increasing relevance of data for competition. In the Vertical-BER, the block exemption of data transfer should be limited similarly to intellectual property rights. We suggest:
- a. If the parties are actual or potential competitors in a relevant market, the block exemption should not comprise the transfer of competition-sensitive data.
 - b. In other cases, the block exemption should only comprise the transfer of such data on the buyer's business which is necessary for or significantly improves the use, sale or resale of goods or services by the buyer or its customers.
104. To the extent the Vertical-BER block exempts data transfer, the Commission should consider which contractual provisions require a counter-exemption. For example, obligations to transfer certain data only to a single supplier or service

⁶³ Cf. European Commission, Final Report on the Sector Inquiry E-Commerce of 10.05.2017, SWD(2017) 154 final, paras. 54 et seq. ([link](#)).

provider may have the same effect as a non-compete obligation.⁶⁴ It may also entrench existing structures in the market of a service provider or tilt the playing field towards the leading service providers.

O. Exclusive supply obligations

105. Some manufacturers claim with regard to the Vertical-BER that the distribution levels in their markets have become highly concentrated. We note that the same is true for the manufacturer level in many markets. However, we recognise that the manufacturers' call for equal treatment of exclusive purchasing obligations and exclusive supply obligations as non-compete obligations is reasonable.

P. Summary of our suggestions

106. In the following, we briefly summarise our suggestions:
- a. Block exemptions of problematic case groups should remain rare. False positives are far more harmful than false negatives. (see above para. 9)
 - b. The Commission should not rely on the option to declare the Vertical-BER not applicable. The declaration has been practically not used. (see above para. 10)
 - c. The Commission should ensure that the Vertical-BER does not block exempt restrictions to sell through the retailer's own website or app. (see above E. Effects of the ECJ's Coty judgment)
 - d. The Vertical-BER should directly regulate e-commerce. If the Commission chooses not to do so, it should at least ensure that online customers are no separate customer group that may be reserved and that it is a hardcore restriction to directly or indirectly attach rebates and conditions to the retailer's primary sales channel. (see above F. Explicit regulation of e-commerce in the new Vertical-BER)
 - e. Restrictions on advertising channels and especially online advertising channels should be categorised as hardcore restrictions with the exemption of non-discriminating and reasonable quality requirements. (see above G. Online Advertising)
 - f. The Commission should categorise restrictions on price advertising as hardcore restrictions. (see above H. Price advertising)
 - g. Resale price maintenance should remain a hardcore restriction. (see above I. Resale price maintenance is a hardcore restriction)
 - h. The Vertical-Guidelines should state that it is a sufficient basis for refutably assuming that a supplier has terminated a purchaser for undercutting the supplier's fixed resale price if the supplier has (1.) fixed a resale

⁶⁴

Cf. Higher Regional Court of Nuremberg, 22.01.2016, case 1 U 907/14, Position Data of Taxis, paras. 57 et seq. ([link](#)).

price, (2.) the purchaser has undercut this resale price, and (3.) the supplier has (finally) terminated the purchaser. (see above K. Refusal to supply and regular termination as means to enforce RPM)

- i. The Vertical-Guidelines should further state that principle of effet utile requires that a (finally) terminated or rejected purchaser has locus standi to sue the terminating or rejecting supplier. (see above K. Refusal to supply and regular termination as means to enforce RPM)
- j. The Vertical-Guidelines should state clearly that regional restrictions in agreements on the use of photo material and manufacturer brands are not block exempted. They should be equally clear on restrictions of sales channels in which photo material and brands may be used. (see above L. Restraining competition by restricting use of photo material and brands)
- k. If the parties are actual or potential competitors in a relevant market, the block exemption should not comprise the transfer of competition-sensitive data. In other cases, the block exemption should only comprise the transfer of such data on the buyer's business which is necessary for or significantly improves the use, sale or resale of goods or services by the buyer or its customers. (see above N. Transfer of data)
- l. We recognise that the manufacturers' call for equal treatment of exclusive purchasing obligations and exclusive supply obligations as non-compete obligations is reasonable. (see above O. Exclusive supply obligations)

We are happy to discuss our submission.

Yours faithfully



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