European Commission

# Expert report on the review of the Vertical Block Exemption Regulation

Final Report

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# Expert report on the review of the Vertical Block Exemption Regulation

Cases dealing with online sales, and online advertising, restrictions at EU and national level

Final report

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# Table of Contents

# Executive Summary

## Introduction and Background

The purpose of this report is to analyse how certain online sales restrictions and online advertising restrictions incorporated into vertical agreement have been treated under Article 101 in cases, at both the EU and national level, since the publication of the 2010 Verticals Block Exemption Regulation (VBER) and Vertical Guidelines, to identify any divergences that have occurred in that jurisprudence and to consider how such restraints should be analysed under the new regime. This is intended to provide information for the Commission to consider in the context of the ongoing revision of the Verticals Block Exemption Regulation (VBER) and the Vertical Guidelines.

The report is required as the fast growth of e-commerce has led to changes in the ways that suppliers distribute their products and services and the types of restraints incorporated in distribution agreements. As many of these newer types of vertical restraints are not addressed, or fully addressed, in the current VBER or Guidelines, the result has been a reduction in the legal certainty that the current regime aims to provide and an increase in compliance costs.

The restraints analysed in the report are marketplace bans, restrictions on the use of price comparison websites, restrictions on brand bidding in online advertising and dual pricing provisions across sales channels.

## Case-law at the EU and National Level

The report examines the legal framework for analysing vertical agreements incorporating online selling and online advertising restraints, before considering cases at the EU and national level dealing with: (in outline) prohibitions on online selling (including the Court of Justice's judgment in Case C-439/09, *Pierre Fabre*); restrictions on selling via a third-party platform or marketplace (including the Court of Justice's judgment in Case C-230/16, *Coty*); prohibitions on the use of price comparison websites; restrictions on online advertising; and dual pricing provisions affecting online selling. It concludes with a summary of the cases. It notes that, of all the cases identified in the report, only one Commission decision (*Guess*) and one decision of a national competition authority (NCA) (*Asics*) have found a marketplace ban, a restriction on the use of price comparison websites, a restriction on brand bidding in online advertising or a dual pricing provision to infringe Article 101. Although other investigations into such practices have been terminated following changes in behaviour, and the removal of such restraints from the agreement, many of these cases predate *Coty*

## Proposed Framework for Analysis and Guidance in 2022 and Conclusions

The report examines the pros and cons of the current system and some of the problems that have been manifest in the application of Article 101 and the VBER to online selling and online advertising restraints. It makes a series of recommendations designed to increase legal certainty by clarifying, in the light of post 2010 case-law, when the VBER applies, and how Article 101 analysis is to be conducted when the VBER does not apply. It recommends that the Commission articulate the objectives underpinning the rules more clearly, and how those objectives shape the interpretation and application of Article 101(1) and Article 101(3) to vertical agreements and the crafting of the VBER. It proposes a clearly identified, and tightly defined, list of hardcore restraints and suggests some restructuring of the Guidelines to support the proposals.

# 1. Introduction and Background

## A. Objectives of, and background to, this report

The EU regime governing vertical restraints under Article 101 centres around the Vertical Block Exemption Regulation (VBER), Regulation 330/2010,[1] and accompanying Vertical Guidelines (the Guidelines).[2] The latter provide guidance not only on the interpretation and application of the VBER but also as to how Article 101 applies to vertical agreements falling outside of it.[3] The system is designed to provide firms with considerable clarity and legal certainty as to the compatibility of their distribution arrangements with Article 101, and to set out clear rules which can be administered consistently by the Commission, the national competition authorities (NCAs) and national courts across the Member States.

Since 2010, e-commerce, involving the online selling and promotion of goods and services, has developed significantly across the EU. Digital players and digitally enabled businesses have emerged and grown; online platforms or marketplaces have developed, allowing independent sellers and buyers to reach each other and to sell and purchase products online on their platform; and online comparison tools have proliferated, allowing consumers to find and compare online offerings of different sellers.

The fast growth of e-commerce, accelerated by the Covid-19 pandemic, has inevitably led to changes in the ways that suppliers or manufacturers distribute their products, changes in customer behaviour, and an increase in price transparency for consumers. The Commission's Final Report following its e-commerce sector inquiry, its accompanying Staff Working Document[4] and its Staff Working Document summarising the results of the evaluation of the VBER,[5] note that many more manufacturers are integrating vertically into online distribution and so are competing with their independent distributors and pursuing an omni or multi-channel strategy making use of both offline and online sales channels. Further, that manufacturers are using selective distribution systems or models (SDSs) more widely and making increasing use of vertical restraints that allow for greater control over the distribution of products, for example through marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks.

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[1] [2010] OJ L102/1.

[2] Commission Guidelines on Vertical Restraints (Guidelines) [2010] OJ C130/10.

[3] Although the Commission did not adopt a decision in relation to a vertical agreement under Article 101 between 2005-2018 (prior to 2018, the Commission's last infringement decision in relation to a vertical agreement was adopted in COMP/36.623, 36.820, and 37.275, *Peugeot* 5 October 2005), it did conduct a detailed inquiry into e-commerce, see note 4 and text, which led to its opening of a number of investigations into vertical arrangements.

[4] The inquiry was launched in 2015, http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html. The Commission issued a Preliminary Report (Preliminary Report) on 15 September 2016, SWD (2016) 312 final, which was followed by a Final Report on the E-commerce Sector Inquiry (Final Report) SWD(2017) 154 final and a Commission Staff Working Document accompanying the Report from Commission to Council and the European Parliament, Final Report on the E-commerce Sector Inquiry COM(2017) 229 final, 10 May 2017 (E-Commerce SWD). The report forms part of the Digital Single Market Strategy.

[5] The Evaluation SWD, 8 September 2020, SWD(2020) 173 final, 5.1.

As many of these newer types of vertical restraints are not addressed, or fully addressed, in the current Guidelines or VBER, the result has been a reduction in the legal certainty that the current regime aims to provide and an increase in compliance costs. Uncertainty has shrouded the question as to how some newer restrictions that are emerging, or have become more prevalent, are to be treated and analysed both under the VBER and Article 101 more generally. The rules and guidelines governing vertical agreements consequently need adaptation to reflect the way that digitisation has changed distribution practices, market developments and new jurisprudence that has emerged dealing with online restraints – both at the EU and the national level.[6] Ideally, they should also ensure that the new rules and principles adopted can cater for future market developments, by increasing the clarity of the VBER, and ensuring convergence of the decisional practice around a common framework for assessment.

The purpose of this report is to analyse how particular online sales restrictions and online advertising restrictions have been treated since 2010 in cases[7] identified principally from a support study conducted for the evaluation of the VBER.[8] The report focuses, as requested, on restrictions on the use of third-party online platforms and price comparison websites, as well as on brand bidding in online advertising and dual pricing provisions (the report does not discuss price parity obligations, restrictions sometimes referred to as most favoured nation clauses, resale price maintenance (RPM), or the question of when a restriction on online selling constitutes a restriction on active, as opposed to passive, selling).

Section 2 seeks to identify relevant jurisprudence, and to identify any gaps or discrepancies in it. Section 3 then goes on to recommend how legal certainty could be increased, by clarifying, in the light of the post-2010 case-law, when the VBER applies and how Article 101 analysis is to be conducted when the VBER does not apply.

The report seeks to provide information for the Commission to consider, and to set out a framework of legal interpretation to draw upon, in the context of the ongoing revision of the rules of the VBER and Vertical Guidelines.

## B. Restraints analysed in this report

The section above explained that many manufacturers have been seeking to tighten their control over the reputation of their brand, including through the incorporation of some newer types of vertical restraints in their distribution arrangements. The restraints focused on in this report are ones which may restrict intrabrand competition – that is competition between retailers of a supplier's product – through limiting certain types of online selling via, for example, marketplace bans, restrictions on the use of price comparison websites or types of advertising, or dual pricing provisions, but which manufacturers may argue are required to intensify interbrand competition.

A vast body of economic literature explores the harmful and potential benefits of vertical restraints, how strong interbrand competition is likely to limit the potential negative consequences of intrabrand restraints,[9] and how firms compete for

[6] See Evaluation SWD, ibid.

[7] Both at the EU and national level.

[8] Evaluation Support Study, 'Support studies for the evaluation of the VBER: Support study and study on consumer purchasing behaviour in Europe Final report' 2020.

[9] See for example, L Telser, 'Why Should Manufacturers Want Fair Trade?' (1960) 3 *Journal of Law & Economics* 86; FH Easterbrook, 'Vertical Arrangements and the Rule of Reason' (1984) 53 *Antitrust LJ* 135, B Klein and KM Murphy, 'Vertical Restraints as Contract Enforcement Mechanisms' (2008) 31(2) *Journal of Law & Economics* 265, P Ippolito 'Resale price maintenance: empirical evidence from litigation' (1991) 34 *Journal of Law & Economics* 263, JC

downstream customers not only on price but just as, or even more, importantly on quality, service, availability, after-sales support and new product development.[10] It also demonstrates how, by better aligning complementary activities (manufacturing and distribution) vertical restraints may address externalities and generate efficiencies that benefit parties to the agreement and end customers, for example, by encouraging the stocking of products and the provision of valuable and valued pre- and after-sales services, preventing free-riding, reducing transaction costs, or signalling the high quality or status of a product or service.[11]

It is also broadly accepted that the growth of e-commerce has created both opportunities and challenges for firms, especially in ensuring that brand image and quality perception are maintained and in preventing free riding behaviour. In some cases this has been argued to strengthen the justification for vertical restraints (especially for products requiring some form of customer service before or after sale). Although presale services offered offline and online differ and free-riding can occur both ways, suppliers may be more concerned about the risk of online retailers free-riding on the services offered by offline retailers given, for example, the higher costs of investment in brick and mortar shops (than the costs of investment in online sales), their different impact on marginal cost, and the risk of brick and mortar shops disappearing, as a result of customers using retail stores as service providers but completing their purchases online.[12]

The sections below describe some restraints that have been found to have been incorporated in distribution agreements since the end of the last review of the EU verticals regimes, which may limit the ability of retailers to sell online, and the motivation that might underpin them.

### i. Marketplace/platform bans

Many manufacturers and retailers use marketplaces (such as Amazon or eBay) to sell their products because of the access they provide to large numbers of customers, including customers across jurisdictions. Indeed, the Commission's e-commerce study recognises the role that marketplaces can play in facilitating cross-border sales within the EU.[13] They may consequently be important means for increasing online sales and contributing to the integration of national markets.

Nonetheless, some EU manufacturers (especially those using SDSs to distribute their products), seek to prevent retailers from selling via online marketplaces either absolutely (marketplace or platform bans) or where those marketplaces do not fulfil certain quality criteria. Although it is arguable that these types of restraint could be used as mechanisms to reduce (rather than prohibit) cross-border trade or to limit price transparency and price competition, manufacturers frequently justify

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Cooper, LM Froeb, D O'Brien and MG Vita, 'Vertical antitrust policy as a problem of inference' (2005) 23 *International Journal of Industrial Organization* 639, S Dutta et al., 'Vertical Territorial Restrictions and Public Policy: Theories and Industry Evidence' (1999) 63 *Journal of Marketing* 121, 122 ('our results suggest that efficiency arguments should play an important role in the public policy debate on vertical restraints').

[10] E-commerce SWD, note 4, para 274.

[11] See for example, Oxera, 'Why vertical restraints? New evidence from a business survey', April 2016 and Guidelines, note 2, paras 106-109.

[12] E-commerce SWD, note 4, paras 318-321.

[13] And without the need to launch a dedicated website in each Member State, ibid, paras 360-361 (noting for example that retailers selling via marketplaces are more likely to sell cross-border compared to those which only sell via their own website).

marketplace restrictions on the basis that they are necessary to: (i) protect their brand image and reputation (which might be damaged by certain marketplaces especially where the supplier has no direct relationship with it and cannot control the presentation of its products on it);[14] (ii) combat the sale of counterfeit products; (iii) ensure the provision of sufficient pre-sales services by retailers (including brick and mortar shops) and to prevent free-riding on them, (as marketplaces tend to focus on the price of the product rather than the quality of the product and services provided);[15] or (iv) protect direct customer relationships.[16]

### ii. Restrictions on use of price comparison websites

Price comparison tools provide a mechanism for consumers to compare offerings for the same product and for retailers to increase their visibility and make consumers aware of their offerings, both domestically and in other Member States.[17] Indeed, the e-commerce sector inquiry found that many retailers supply data feeds to price comparison websites, although they are used more by larger (than smaller) retailers and are more prominent in some product categories than others.[18] While operating differently to marketplaces (as they generally direct customers to distributors' own sites for purchase), they may similarly provide distributors with access to a large number of customers and facilitate sales across borders. They may also increase price transparency and have the potential to increase both intrabrand and interbrand competition.

A number of manufacturers have, however, sought to prevent retailers using price comparison tools (for example by preventing them providing information to, or otherwise promoting their product offerings on, price comparison tools). This is often justified by the emphasis that such websites place on price, rather than the quality or features, of the product or brand and the scope and quality of service provided by retailers.[19] Manufacturers may thus consider that these websites have a negative impact on brand image (even if the products are not actually bought on the price comparison website) and discourage the provision of services by specialised retailers (both online and offline) which have higher cost structures because of the additional services they provide. 'While price comparison tools may therefore increase sales in the short term, they may reduce incentives of specialised retailers to invest in quality and services and lead to a reduced number of retailers in the long run.'[20] Because manufacturers do not contract with comparison tool websites, they may be concerned

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[14] ibid, paras 478-80 (for example, because they do not provide a high quality selling environment, are presented alongside lower quality products and are too rigid in the presentation of content and information to the customer).

[15] ibid, paras 483-5 (especially as it is difficult to ensure that sufficient pre-and post-sale services are provided by retailers selling on marketplaces and for them to differentiate between the service level and quality offered or to protect freeriding on services provided by brick-and-mortar shops/freeriding).

[16] ibid, paras 486-7.

[17] ibid, paras 367-8. Price comparison tools use retailers' data feeds to direct potential customers to the retailers' website, normally on a pay-per-click basis.

[18] ibid, para 520 ('[a]ccording to the findings of the sector inquiry, the use of price comparison tools is widespread. 36 % of retailers reported that they supplied data feeds regarding their products to price comparison tool providers in 2014. … As shown … below, larger retailers (in terms of turnover) are more likely to use price comparison tools than smaller ones').

[19] ibid, paras 535-41.

[20] ibid, para 537. Price comparison tools may help consumers to find the lowest price for a specific item they have selected based on presale services offered by other retailers.

that they cannot control the way the products are presented (and what products they are presented alongside), or the appearance of unauthorised retailers or counterfeit products on the site.[21] Restrictions on price comparison tools range from absolute bans to restrictions based on certain quality criteria.

### iii. Online advertising restrictions

Search engines also provide an important mechanism for retailers to be found by customers and to attract them to their websites. Nonetheless, a number of manufacturers now restrict the use of their trademarks/brand names by retailers for online advertising or marketing purposes. For example, some retailers are precluded from using, or bidding on, the manufacturers trademarks, or trademark protected brand names, as a means of obtaining a preferential listing on the search engines paid referencing service (such as Google Adwords) or are only allowed to bid on certain positions.[22] These restrictions may therefore prevent retailers' websites from appearing prominently in search results following searches based on specific keywords. Alternatively, a manufacturer may prohibit use of its brand name or logo on the distributor's website or the use of its brand name in distributors' internet addresses.

There may be a concern that these restraints could be used as means to reduce the visibility or findability of retailers or to prevent retailers making effective use of the internet as a sales channel. Nonetheless, manufacturers justify the use of these restraints on a variety of efficiency grounds, including the need to protect their own position in top search listing, to reduce their advertising costs and to keep the prices for advertising down (if the brand owner and distributors all bid for the same brand word they bid up the cost of online search advertising and the cost per click increases, making it more expensive to compete with rivals), to prevent free-riding on the brand owners' investments, or to help avoid confusion between the manufacturer's website and those of authorised retailers.

### iv. Dual pricing provisions across sales channels

In some cases, manufacturers may wish to charge a retailer wholesale prices (or provide distinct discount mechanisms or commercial conditions) which differ depending on the sales channel that the retailer uses (for example the distributor has to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line (or vice versa)). This is referred to by the Commission in its Guidelines as dual pricing.[23] Although this practice can influence retail prices of a manufacturer's product, and could arguably affect selling on the different channels, it may also be designed to incentivise the provision of services in one channel and prevent free riding on it in the other, or to reflect differences in the

[21] See RBB Economics 'The effects of vertical restraints and online sales in the cosmetics industry', A report for Cosmetics Europe, 11 ('for instance, comparison tools list retailers selling counterfeit products and unauthorised retailers (also called "grey market players") selling either counterfeit or authentic products, the products sold by these retailers will appear among authentic products sold by authorised retailers. And the likely lower price of counterfeit products and grey market products are likely to be selected by consumers. In addition to harming brand image, it would help unauthorised retailers (who do not provide any of the services offered by authorised retailers) to freeride on the services offered by authorised retailers either online or offline').

[22] E-commerce SWD, note 4, para 632.

[23] The Guidelines describe dual pricing as charging a higher price for products intended to be resold by a distributor or reseller online than for products intended to be resold by that distributor or reseller offline, Guidelines, note 2, para 52.

costs of investments between sales channels (with offline investment typically being more costly).

Nonetheless, the Commission's E-commerce sector inquiry found that manufacturers rarely adopt dual pricing strategies given the strict approach taken against them in the current Guidelines (see Section 2.F below).[24] Although the Guidelines permit as an alternative to dual pricing, fixed compensation by suppliers to their offline retailers to support their presales services, a concern is that this provision is not sufficiently flexible and it is seldom used in practice because it is extremely complex for suppliers to define in a non-discriminatory manner fixed fees for each of their retailers that reflect the variety of store sizes and the variety of services provided by each of them. Many stakeholders thus consider that it would be preferable to allow incentives to be adapted to the actual circumstances of the retailers and called for more flexibility in this area which would better incentivise hybrid retailers to support investments in more costly (typically offline), value added services.[25]

#### v. Brick and mortar requirement, pure online players and quality criteria for online selling

In some cases, manufacturers wish to ensure that retailers have a brick and mortar store for the provision of pre- and post-sales services and/or to create an appropriate selling environment for their products/brands. Such a requirement will, of course, exclude pure online players from the distribution system, although a brick and mortar retailer may also sell online.

A manufacturer may also wish to ensure that its retailers, whether selling off- or online, adhere to requirements that, for example, encourage the provision of dealer services or the projection of an appropriate image for its product. In some cases, therefore, restrictions may be imposed on selling online via channels which do not adhere to specified criteria.

# 2. Case-law at the EU and National Level

## A. The legal framework for analysing vertical agreements - overview

The 'modernised' regime governing vertical agreements centres around a flexible overarching block exemption regulation for vertical agreements, the VBER, and broader guidance on the interpretation and application of both the VBER and Article 101 to agreements not benefiting from its safe harbour. It seeks to provide a balance between an antitrust system which accurately reflects its underpinning goals and one which attains procedural economy and provides legal certainty to firms. It seeks to achieve this in two main ways.

First, the VBER provides a safe-harbour for a huge swathe of vertical agreements (whatever their nature and whether the main objective is exclusive distribution, exclusive purchasing, franchising, selective distribution,[26] or some other) which, broadly, do not contain specified 'hardcore' restraints and satisfy its thirty per cent

[24] E-commerce SWD, note 4, para 595.

[25] ibid, para 599.

[26] By providing, since 1999, an umbrella block exemption the vertical rules have been designed to apply more broadly than previous regulations, which applied only to certain types of distribution. In contrast to the case-law governing SDS under art 101(1), the VBER applies 'regardless of the nature of the product concerned and regardless of the nature of the selection criteria' (whether qualitative or quantitative in nature), Guidelines, note 2, para 176.

market share thresholds.[27] Article 101(1) is disapplied, for agreements satisfying its conditions unless, and until, the benefit of the VBER is withdrawn, either by the European Commission or a NCA.[28]

Secondly, the regime makes clear that vertical agreements incorporating certain types of restraint are likely to be problematic and prohibited under the rules, save in exceptional circumstances. These are agreements containing 'hardcore' restraints identified in Article 4 of the VBER, including RPM, territorial and customer restraints (restricting the territory into which, or the customers to whom, the buyer can sell) and, in SDSs, restrictions on active or passive selling by retailers to end-users or cross-selling between distributors (see further Section 2.B.i below). As currently drawn, Article 4 restraints are closely aligned with, but not identical to, restrictions of competition by object under Article 101(1) (see further 3.B.v). Nonetheless, the Commission's Guidelines draw a parallel between object and hardcore restraints and applies a presumption that agreements incorporating such restraints infringe Article 101.[29] Although rebuttable, there is little jurisprudence as to how this presumption can be rebutted in practice.

Because of the reliance placed (by both enforcers and firms), on compliance with the VBER (where market shares permit), relatively little modern guidance has emerged as to how antitrust analysis of vertical agreements is to be conducted in relation to agreements which are not covered by the VBER and which do not incorporate clearly established hardcore or object restraints. Different lines of case-law provide guidance on the appraisal to be conducted for distinct types of distribution agreement under Article 101(1) (exclusive distribution (see *Société Technique Minière v Maschinenbau Ulm GmbH (STM*)[30]), franchising (see *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*,[31] selective distribution (see, for example, *Metro-SB-Grossmärkte GmbH v Commission (Metro 1)*),[32] and single branding (see *Delimitis v Henninger Bräu*)),[33] but these are not entirely easy to reconcile with each other, or the general framework for analysis of vertical agreements set out by the Commission in Section VI.1 of its Guidelines. Further, almost no modern jurisprudence provides detailed guidance on the individual application of Article 101(3) (see further Section 3).

Since 2010, a recurring question arising has been whether agreements incorporating prohibitions, or limitations on online, or certain types of online, selling infringe Article 101 or may benefit from the safe harbour of the VBER. As many of these agreements have involved SDSs, this has frequently involved assessment of Article 4(c) (as well as Article 4(b)) of the VBER, and navigation of the *Metro* criteria.[34] The sections below

[27] VBER, arts 4 and 3 (the VBER does not, however, exempt a category of non-exempt, severable restraints identified in art 5, which must be appraised separately for their compatibility with art 101. The incorporation of one of these restraints does not preclude the application of the VBER where either the restraint is compatible with art 101 or, if incompatible, severable from the remainder of the agreement).

[28] Reg 1/2003 [2003] OJ L1/1, arts 29(1)(2) and VBER, recital 15 (see also art 6). The Commission, or NCAs, can withdraw its benefit from the agreement which is valid and compatible until then.

[29] Guidelines, note 2, para 47. See further section 3.

[30] Cases 56 and 58/65, EU:C:1966:38.

[31] Case161/84, EU:C:1986:41.

[32] Case 26/76, EU:C:1977:167 (the *Metro* criteria are described in note 69). See also Case 75/84, *Metro-SB-Grossmärkte GmbH v Commission (Metro II)* EU:C:1986:39.

[33] Case C-234/89, EU:C:1991:91.

[34] The criteria laid down in *Metro 1*, notes 32 and 69.

examine the current position that has emerged. It starts by examining the analysis that has been adopted to agreements incorporating a complete prohibition of online selling (whether directly or through indirect means), both in the 2010 Guidelines and in the subsequent ruling of the Court of Justice in *Pierre Fabre v Président de l'Autorité de la concurrence*.[35] They then analyse provisions limiting online selling in certain ways, for example, via marketplace bans, restrictions on the use of price comparison tools or trademarks for advertising, or through dual pricing provisions.

## B. Territorial restraints or prohibitions on online selling

### i. Export bans and restrictions on parallel trade

An established line of cases makes it clear that vertical agreements conferring absolute territorial protection (ATP) on a distributor or otherwise aimed at partitioning national markets by prohibiting export or parallel trade by distributors are liable, in principle, to restrict competition by object.[36] The hardcore restraints in the VBER also prevent the block exemption from applying where specified territorial or customer restraints are imposed. Article 4(b) of the VBER provides that, subject to limited, specified exceptions, restraints on the territory into which (or customer to whom) a buyer can sell the contract products or services are prohibited (although a supplier can restrict active selling by distributors into allocated territories or customer groups, passive sales should remain possible save in exceptional circumstances[37]). Further, Article 4(c) and (d) clarify that restrictions on active or passive selling by retailers in a SDS to end-users is prohibited (but provides that the prohibition of retailers operating out of an authorised place of establishment is permitted[38]) as are restrictions on cross-selling.

[35] Case C-439/09, EU:C:2011:649.

[36] See for example *Consten and Grundig* note 30 and Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission* EU:C:2009:610, para. 61. Although case-law makes it clear that when determining the object of an agreement, it is necessary to take account not only of the content of the provisions, but also the objectives it seeks to ascertain and the economic and legal context of which it forms part (see especially Case C-67/13P, *Groupement des cartes bancaires v Commission (CB)* EU:C:2014:2204) (a flexible characterisation exercise is required), the cases dealing with such restraints in distribution agreements have, save in the most exceptional circumstances, refused to contemplate the possibility that the context of a case supports a finding that the overarching objective is not to restrict competition but to enhance efficiency of the supply chain to the benefit of the parties and end customers, see for example *Consten and Grundig*. Instead, focusing on the impact on the internal market, and the resulting segregation of or maintenance of separate national markets, it has been found that such restraints are liable to restrict competition by object.

[37] Art 4(b)(i), but see for example restrictions on passive selling permitted by art 4(b)(ii) (allowing restrictions on sales to end users by a buyer operating at the wholesale level of trade), art 4(b)(iii) (allowing the restriction of sales by members of SDS to unauthorised distributors), and 4(b)(iv) (in relation to buyers of components for incorporation in another product).

[38] Art 4(b) also applies 'without prejudice to a restriction on the buyer's place of establishment. Thus, the benefit of the Block Exemption Regulation is not lost if it is agreed that the buyer will restrict its distribution outlet(s) and warehouse(s) to a particular address, place, or territory', Guidelines, note 2, para 50.

### ii. Restraints on online selling – general principles in the Guidelines

Suppliers can require distributors to have a brick and mortar shop (such a requirement does not constitute a hardcore restraint – a restriction on active or passive selling[39]). A supplier can also require a distributor to sell at least a certain amount of the products offline, so long as the proportion of a distributor's sales over the internet is not limited.[40] The Guidelines also state that 'under the block exemption the supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general'.[41]

Nonetheless, the Guidelines make it clear that the rules on territorial (and customer) sales restrictions apply to both offline and online sales. Although suppliers can exclude pure online sellers from their distribution system, require a distributor to sell a certain amount of products offline to ensure efficient operation of brick and mortar selling, and impose quality standards on internet selling, they cannot prohibit online selling outright – such restraints are treated as restraints on selling to different customers or territories.[42]

### iii. Pierre Fabre

In *Pierre Fabre*[43] the Court of Justice clarified that a ban on internet selling (or in that case a *de facto* ban on internet selling (created through a requirement that cosmetic products be sold only in premises with a qualified pharmacist present at a physical sales point)) in a SDS, constituted a hardcore restraint (under Article 4(c)[44]). The contractual clauses prohibited *de facto* internet selling as a method of marketing which at the very least had as its object the restriction of passive sales to end-users wishing to purchase online and located outside the physical trading area of the retailer[45] (because the ban operates as a restriction on passive sales it follows that it would also constitute a restraint on the territory into which, or the customers to whom, the buyer can sell under Article 4(b)). Further, adopting a restrictive interpretation of the

[39] Guidelines, note 2, para 54. See also for example Case KZR 2/02, *Depotkosmetik im Internet* (Federal Supreme Court (Germany)) 4 November 2003 (a supplier of perfume which operated a SDS requiring distributors to have a brick and mortar store (and restricting the proportion of sales to be made online) did not have to admit an online only retailer to its SDS. Ruling in relation to Article 101, the 1999 VBER (Reg 2790/1999, [1999] OJ L336/21) and the 2000 Guidelines, [2000] OJ C291/1, the Court noted that although the VBER prohibited a prohibition on online sales it did not preclude a brick and mortar requirement). A supplier can restrict the buyer's place of establishment, see note 38.

[40] Guidelines, note 2, para 52.

[41] ibid, para 54 (art 4 does not prevent the imposition by a supplier of quality standards for the use of internet sites (whether selling on their own internet site or via a third-party platform) to resell its products (and this is especially relevant for SDSs), but see also discussion of the equivalence principle, note 62 and text).

[42] ibid, 52-54. They also seek to provide guidance on when selling over the internet may go beyond passive selling and involve active targeting of customers in a different territory or group (for example, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory but offering different language options on a website is not).

[43] Case C-439/09, note 35.

[44] This case concerned the predecessor of Reg 330/2010, Reg 2790/1999, note 39.

[45] Case C-439/09, note 35, para 54. See also Guidelines, note 2, para 53.

VBER,[46] it rejected the argument that the ban on internet selling could simply be viewed as equivalent to a prohibition on the retailer operating out of an unauthorised establishment (the outlet where direct sales are made). 'Accordingly, a contractual clause, such as the one at issue in the main proceedings, prohibiting *de facto* the internet as a method of marketing cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating out of an unauthorised place of establishment within the meaning of Article 4(c)'.[47]

The Court also made it clear that the clauses resulting in a ban on the use of internet for those sales amounted to a restriction of competition by object, providing support for the view that 'the promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition'.[48] It thus accords with the view set out in the 2010 Guidelines that every distributor should be allowed to use the internet to sell its products; in general, online selling constitutes a form of passive (not active) selling which can be restricted only in exceptional circumstances.[49]

Agreements incorporating a ban on internet selling thus generally infringe Article 101 unless:

(a) the legal and economic context of the agreement makes it clear that the objective of the agreement is not to restrict competition (for example, where a manufacturer needs to encourage substantial investments by a distributor in order to start developing a market, see Guidelines paragraph 61).[50]
(b) the agreement satisfies the four conditions of Article 101(3).

In the context of such agreements no examples exist of successful arguments being made along the line of (a) or (b), however. Rather, as free rider and efficiency justifications raised tend to be overridden by concerns about the impact of the agreement on parallel trade,[51] it is generally understood that these restraints are to be avoided. Indeed, in a number of cases since 2010, fines have been imposed on firms that have prohibited internet selling, both by the European Commission (see, for example, *Guess*,[52] where the Commission, in a settlement decision, fined Guess for incorporating a number of restraints in its distribution agreements enabling it to partition European markets through restricting authorised retailers selling online without authorisation, selling to consumers outside the retailer's allocated territories,

[46] Because an undertaking has the option of asserting the applicability of the art 101(3) exception on an individual basis, it is not necessary to give a broad interpretation of the VBER, see also Guidelines, note 2, para 57.

[47] Case C-439/09, note 35, para 58. See the subsequent ruling of the Paris Court of Appeal (which submitted the preliminary question), applying the Court's guidance and dismissing Pierre Fabre's appeal against the French competition authority's decision, Judgment of 31 January 2013, 2008/23812.

[48] See 'Interview with Dr. Alexander Italianer, Director-General for Competition, European Commission', *theantitrustsource*, April 2011, 1, 6; Guidelines, note 2, paras 52–54.

[49] Guidelines, note 2, para 52.

[50] But see note 36. If the object of the agreement is not to restrict competition, it is for the claimant to establish actual or likely restrictive effects, see further section 3.

[51] ibid.

[52] Case AT.40428, *Guess* 17 December 2018 (€40 million fine for geo-blocking, including through a prohibition of selling online without specific authorisation), discussed in section 2.E.

and cross-selling to other authorised wholesalers/retailers[53]) and by NCAs (see for example *Ping* (UK),[54] *Stihl*, (France),[55] *Bikeurope* (France)).[56]

### iv. Direct and indirect obligations on distributors

Paragraph 50 of the Vertical Guidelines and the jurisprudence establish that the rules governing market partitioning by territory (under Article 101(1) and the VBER) apply not only to agreements directly obliging dealers not to sell in certain territories but also arrangements which indirectly do so, for example, through a ban or a *de facto* ban on internet selling (as in *Pierre Fabre*), charging higher prices or using other pricing mechanisms to discourage export (dual pricing or refusal or reduction of bonuses),[57] limiting the proportion of sales that can be exported,[58] guarantee systems designed to discourage export,[59] or by allowing exports only with the supplier's consent.[60] Even if an export prohibition is not expressly incorporated into an agreement, it may be read into, and become part of the agreement, via conduct if a concurrence of wills between the parties is established (for example a supplier's policy to prohibit export is accepted by distributors following a refusal, or threat of a refusal, to supply the products, reductions in the volume of the product supplied, following receipt of a circular or an invoice which makes clear that export is prohibited).[61]

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[53] Guess expressly acknowledged the facts and infringements in return for a 50 per cent reduction in its fine. See also, Commission's decision of 20 January 2021 imposing fines of €7.8 million on Valve and five publishers of videogames for 'geo-blocking' of videogames and preventing their activation in certain Member States.

[54] Case 50230, *Ping* 24 August 2017, *aff'd* Case 1279/1/12/17 *Ping Europe Ltd v CMA* [2018] CAT (although the CAT found that the CMA had erred in the law in some respects and reduced the level of the fine it nonetheless held that the agreement did restrict competition by object) and [2020] EWCA Civ 13.

[55] Decision 18-D-23, 28 October 2018.

[56] Decision 19-D-14, 1 July 2019. See also Support Studies for the Evaluation of the VBER, Final Report, 2020: https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf, 155-203, Decision 663, *Elais-Unilever Hellas*, 23 July 2018 (Greek NCA), Decision 51, *Belupo lijekovi*, 28 October 2011 (Romanian NCA), Decision Number 52, *Baxter*, 28 November 2011 (Romanian NCA) and Decision 98, *SC Bayer* 27 December 2011 (Romanian NCA).

[57] See section 2.F below, Guidelines, note 2, para 52 and for example, COMP/28.282, *The Distillers Co Ltd* [1978] OJ L50/16, on appeal Case 30/78, *Distillers Co v Commission* EU:C:1980:186, COMP/30.228, *Distillers Co plc (Red Label)* [1983] OJ C245/3, COMP/32.390, *Newitt/Dunlop Slazenger International* [1992] OJ L131/32, on appeal Case T-38/92, *All Weather Sports Benelux v Commission* EU:T:1994:43, Case T-43/92, *Dunlop Slazenger v Commission* EU:T:1994:79, Case C-501/06 P, *GlaxoSmithKline* note 36, and COMP/35.918, *JCB* [2002] OJ L69/1, this aspect of the decision upheld, Case T-67/01, *JCB Service v Commission* EU:T:2004:3, *aff'd* Case C-167/04 P, *JCB Service v Commission* EU:C:2006:594.

[58] Guidelines, note 2, para 50.

[59] COMP/1576, *Zanussi* 23 October 1978; Case 31/85, *ETA Fabriques d'Ébauches v DK Investments SA* EU:C:1985:494.

[60] Case T-77/92, *Parker Pen v Commission* EU:T:1994:85; Case 19/77, *Miller v Commission* EU:C:1978:19 COMP/37.975, *Yamaha* 16 July 2003, Case AT/40428, *Guess* 17 December 2018 and *Voorne Koi v Oase*, ECLI:NL:RBMNE:2014:6156, Utrecht District Court 3 December 2014.

[61] See, for example, Case C-277/87, *Sandoz Prodotti Farmaceutici SpA v Commission* EU:C:1989:363, *Peugeot* note 3, *aff'd* (but fine reduced) Case T-450/05, *Peugeot v Commission* EU:T:2009:262, COMP/35.733, *Volkswagen* [1998] OJ L124/60.

The 2010 Guidelines state broadly, in paragraph 56 that any restriction on internet selling imposed on a dealer within a SDS will constitute a hardcore restraint (a restriction on active or passive selling) if criteria for selling online are not overall equivalent to the criteria imposed for the sale from the brick and mortar shops (the equivalence principle).[62] With the exception of dual pricing,[63] they do not however provide more specific clarity as to whether and if so when other provisions which do not prohibit online selling, but only limit certain forms of online selling or marketing – for example, marketplace bans, bans on use of comparison websites, and restrictions on online advertising – constitute a restraint on active or passive selling and a hardcore restraint or how they are otherwise to be appraised under Article 101. The sections below outline the jurisprudence that has arisen since 2010 dealing with this question.

## C. Restrictions on selling via a third-party platform or marketplace

### i. Cases prior to the Court of Justice's judgment in *Coty*

In a series of cases prior to the Court of Justice's judgment in *Coty Germany GmbH v Parfümerie Akzente GmbH*,[64] the German and French NCAs treated agreements incorporating prohibitions, or restrictions, on selling on certain marketplaces with suspicion under Article 101.

For example, the German NCA, the Bunderskartellamt or Federal Cartel Office (FCO), in *adidas* (27 June 2014)[65] investigated the compatibility with Article 101 and Section 1 of the German Act against Restraints of Competition (GWB) of adidas' SDS which incorporated a ban on the sale of adidas products via open marketplaces on the internet (which included platforms like eBay and Amazon). In this case the FCO came to the preliminary conclusions that adidas's agreements could not benefit from the VBER (as its market share exceeded the 30 percent threshold) and that (applying the *Metro* criteria) the marketplace ban constituted a restriction of competition;[66] the per se ban on sales via online marketplaces was not a qualitative criterion which was

[62] Guidelines, note 2, para 56. This requirement is however neither easy to apply nor easy to reconcile with the wording of the VBER itself, which applies to SDSs however dealers are selected and so long as restraints imposed on them do not constitute restrictions on active or passive selling. The principle also lacks certainty given the inherent differences between offline and online selling.

[63] See Guidelines, note 2, paras 52(d) and 64 and Section 2.F.

[64] Case C-230/16, EU:C:2017:941.

[65] Case B3-137/12 (the rulings of the German courts on this issue were divergent however, see *Funktionsruksacke* Higher Regional Court of Frankfurt, 22 December 2015 (no infringement of art 101(1)) *Scout* Higher Regional Court Karlsruhe, 25 November 2009, *Schulranzen* Berlin Appellate Court, 19 September 2013 and *Casio* Schleswig-Holstein; Higher Regional Court, 5 June 2014 (infringement of art 101)). See also French NCA investigation in *adidas* 18 November 2015, https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/18-november-2015-onlinesales. Although in Judgment 15/01542, *eNova Santé v Caudalie* 2 February 2016, the Paris Court of Appeal ordered Caudalie to allow its authorised retailers to keep on selling their products via an online marketplace, that judgment was annulled on appeal. When the case was referred back to it by the Cour de Cassation, the Paris Court of Appeal held, following *Coty*, note 64 that the SDS did not infringe art 101, see note 87 and text

[66] It also came to the preliminary conclusion that the criteria of art 101(3) were not satisfied and that even if the VBER had been applicable (because its market share thresholds had not been exceeded) it would not cover restraints which did not satisfy the equivalence principle (there were no qualitative reasons for them, and they do not affect online and offline sale in the same way), see note 62 and text.

necessary to ensure the quality of the products concerned and the quality of their distribution. Rather it was unclear why the ban – which made it more difficult for retailers to access customers – was necessary to safeguard the quality or distribution for the sports articles and less restrictive possibilities were available. The FCO closed its proceedings however after adidas amended its sales conditions to comply with competition law – both by changing its policy on platform use and by changing its e-commerce conditions to clarify that all its authorised retailers were free to use adidas brand related terms as search words for search engine advertising such as Google AdWords. With these changes the FCO's concerns about adidas' ecommerce conditions were dispelled.

Similarly, on 24 October 2013, the FCO closed an investigation into Sennheiser after it lifted an outright ban on sales via Amazon Marketplace for distributors in its SDS,[67] which the FCO considered to be a major hindrance to online distribution. Although the FCO had come to the preliminary conclusion that the conduct was prohibited, especially as Amazon Marketplace was an authorised contractor, it refrained from initiating proceedings following the change of behaviour.

The cases concluded prior to 6 December 2017, must however now be read in light of the ruling of the Court of Justice in *Coty.*

### ii. *Coty*

In *Coty* (judgment of 6 December, 2017),[68] the Court of Justice held, applying the *Metro* criteria,[69] that Article 101(1) does not preclude a contractual clause, 'which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued, these being matters to be determined by the referring court.'[70] In so ruling, the Court distinguished *Pierre Fabre*,[71] where 'an absolute prohibition' was imposed on authorised distributors from selling contract goods online, from the situation in that case – where the clause only prohibited internet sales via third-party platforms which operate in a discernible manner towards consumers. Distributors were therefore permitted to sell online via their own websites (which the Court noted in fact was the main distribution channel in

[67] Case B7-1/13-35.

[68] Case C-230/16, note 64.

[69] ibid, paras 23-24, (although SDSs necessarily affect competition they are not prohibited by art 101(1) 'to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary', relying on Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, EU:C:2011:649, para 41 and the case-law cited there, including *Metro 1*, note 32.

[70] ibid, para 58. The contract in the case at issue allowed the authorised retailer to offer and sell the products on the internet if it was conducted through an electronic shop window of the authorised store and the luxury character of the products was preserved but prohibited online selling through 'the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige', ibid, para 15.

[71] Case C-439/09, note 35.

the context of online distribution[72]) and via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer. This establishes that even if absolute prohibitions on online selling are assumed to restrict competition, restraints which do not amount to a *de facto* prohibition on online selling must be reviewed using the *Metro* criteria when considering if they restrict competition within the meaning of Article 101(1).

The Court also clarified that a platform restriction did not constitute a hardcore restraint prohibited by Article 4(b) or (c). Again, distinguishing *Pierre Fabre*, the Court noted that the clause did not prohibit the use of the internet as a means of marketing the contract goods.[73] Further, it was not possible to circumscribe within the group of online purchasers, third-party platform customers. Because distributors were able to advertise via the internet (including on third party platforms and using online search engines), customers were usually able to find the online offer through these means. Thus, although the agreement restricted a specific form of internet selling, it did not amount to a restriction of the customers to whom authorised distributors could sell the luxury goods, or a restriction of authorised distributors' passive sales to end users.[74]

This seems to make it clear that as long as a limit on online selling does not amount to a *de facto* ban on online selling, it does not constitute a hardcore restraint within the meaning of Article 4(b) or (c). Indeed, in discussing the application of the VBER, the Court attached no importance (in contrast to its analysis under Article 101(1)) to the nature of the product or the question of whether the criteria applied were appropriate and proportionate in the light of the objective pursued, that is to the preserving of the luxury image of the goods.[75]

In conclusion, therefore, it appears that the VBER applies to a SDS regardless of the nature of the products at issue or the nature of the selection criteria,[76] and whether or not limits imposed on authorised distributors selling via the internet are linked to the objective of the SDS or selection criteria, so long as they do not constitute a *de facto* ban on internet selling by making it impossible in practice for customers to find the distributor.[77] Consequently, it seems that a restriction on internet selling, which does not operate as a prohibition or a *de facto* prohibition on online selling, cannot constitute a hardcore restraint even if it imposes limitations on selling which are not overall equivalent to the criteria imposed for the sale from brick and mortar shops –

[72] ibid, para 54 relying on the Preliminary Report on the E-commerce Sector Inquiry carried out by the Commission pursuant to Article 17 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] [2003] OJ L 1/1), 15 September 2016 (confirmed in the final report relating to that inquiry, dated 10 May 2017, see note 4).

[73] ibid, para 65.

[74] ibid, paras 64-68.

[75] See also *Nike European Operations Netherlands (NEWO) v Action Sport,* note 92.

[76] VBER, art 1 and Guidelines, note 2, para 176.

[77] This conclusion thus accords with the Commission view (prior to the publication of the *Coty* judgment) set out in its E-commerce SWD, note 10, that marketplace bans do not amount to a *de facto* prohibition to online selling as online shops remain the most important online sales channel for retailers. Further, that given the potential justifications and efficiencies for marketplace bans (protection of brand image, encouraging the provision of pre- and post-sale services etc), marketplace bans are not aimed at partitioning the internal market and should not be considered as hardcore restrictions within the meaning of arts 4(b) and 4(c) VBER.

so suggesting that the equivalence principle[78] set out in the 2010 Guidelines is too broad.

### iii. Cases at the national level following *Coty*

Although after the Court of Justice's ruling in *Coty*,[79] the German FCO advocated (in line with its previous cases), a restrictive interpretation of the judgment, seeking to limit its impact to cases involving the distribution of luxury goods,[80] this interpretation is not easy to reconcile with the wording of the VBER itself (which applies to SDS whatever the product and whether or not distributors are selected by reference to qualitative criteria[81]), the *Metro* criteria, or, as seen above, the *Coty*[82] judgment itself. This approach has not been supported by the Commission.[83] Further, as outlined below, the French competition authority and courts in France, Germany and the Netherlands have found such provisions to be compatible with Article 101 in cases decided subsequent to *Coty*.

*Manufacturer of aloe vera-based dietary supplements* (Higher Regional Court of Hamburg, 22 March 2018)[84]

In this case the Court upheld the grant to a supplier of food supplements and cosmetics of an injunction to prevent breach of a provision in its SDS prohibiting distributors from selling via eBay and other comparable online sales platforms. In so doing the court confirmed that the SDS did not infringe Article 101 (or the equivalent in German law, Section 1 GWB). It concluded that the use of a SDS to protect the prestigious image of the product was justified (and the benefit of SDSs was not confined to luxury or technical products),[85] and that the restraints were purely qualitative, non-discriminatory, necessary and proportionate to the aim of protecting the quality of the product and pre-sales services. Indeed, in that case the policy had been prompted by the desire to prevent distributors on eBay providing misleading information about the products (for which the supplier had been held accountable).

*Caudalie* (Paris Court of Appeal, 13 July 2018)[86]

In *Caudalie* the Paris Court of Appeal considered an application by Caudalie for an injunction to prevent Enova Santé, the owner of a marketplace for pharmacies 1001pharmacies.com, from commercialising its products in breach of the terms of its SDS. In so doing it had to consider the compatibility of Caudalie's SDS with Article

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[78] Note 62 (rather, the principle seems inconsistent with *Coty*, note 64).

[79] Case C-230/16, note 64.

[80] Bundeskartellamt, 'Competition restraints in online sales after Coty and Asics - what's next? Series of papers on "Competition and Consumer Protection in the Digital Economy' October 2018 (the Court of Justice's statements in this regard are limited to luxury goods. One cannot simply transfer them to other (high-quality) branded products).

[81] See VBER, art 1 and note 26.

[82] Case C-230/16, note 64.

[83] See Competition Policy Brief, April 2018, https://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf

[84] Case 3 U 250/16, 22 March 2018, see http://www.rechtsprechung-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=KORE209972018&st=ent. Judgment on appeal from a decision of the Hamburg Regional Court in favour of the manufacturer (4 November 2016).

[85] ibid, para 44.

[86] Judgment 17/20787, Paris Court of Appeal, 13 July 2018 (France).

101.[87] In this case, the Court held, following *Coty*,[88] that a SDS of luxury products like the one in front of it complied with Article 101(1) where it primarily aimed to protect the luxury image of those products, where the resellers were chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion, and where the criteria laid down did not go beyond what is necessary. Having found it to be compatible with Article 101(1), the Court did not need to conduct a thorough examination of whether the agreement satisfied the conditions of Article 101(3) or the VBER (although the judgment recognised that the marketplace ban did not constitute a hardcore restraint), before granting the injunction.

*Andreas Stihl* (28 October 2018)[89]

In this case the French competition authority (Autorité de la Concurrence (ADC)), examined an SDS incorporating both a *de facto* prohibition of online sales (by requiring hand delivery of its electric gardening tools purchased online) and a marketplace ban. Although the Autorité concluded that the agreement infringed Article 101 because the *de facto* online sales prohibition restricted competition by object, did not satisfy the *Metro* criteria (in particular the hand delivery requirement was not necessary or proportionate to the objective of preserving the quality and safe use of the products), the conditions of the VBER (as it incorporated an Article 4(c) hardcore restraint, following *Pierre Fabre*[90]) or the Article 101(3) criteria, it found that the marketplace ban did not infringe Article 101(1). Rather the ban was necessary and proportionate to the preservation of quality and safe use of its products, ensuring that the products were only sold by selected distributors able to provide adequate information and advice about the products but without cutting off the main channel for e-commerce. Because of the online sales ban, however, the ADC fined Stihl €7 million for infringing the rules and ordered it to modify its SDS contracts. The decision was upheld by the Paris Court of Appeal (although the fine was reduced to €6 million).[91]

*Nike European Operations Netherlands (NEON) v Action Sport* (Amsterdam Court of Appeal, 14 July 2020)[92]

In this case the Amsterdam Court of Appeal, ruling after the Court of Justice's judgment in *Coty*,[93] confirmed a District Court ruling (decided prior to the judgment in *Coty* but following the publication of Advocate General Wahl's opinion[94]) that Nike had legitimately terminated a distribution agreement with an authorised distributor. The distributor had sold Nike products through an unauthorised third-party platform, in breach of Nike's selective retailer distribution policy which incorporated a ban on

[87] At first instance, the Paris Commercial Tribunal granted Caudalie's request for an injunction (31 December 2014). Although in 2016 the Paris Court of Appeal had reversed this judgment (2 February 2016), note 65, the French Supreme Court (Cour de Cassation) annulled the Court of Appeal's decision and referred the case back to it, (13 December 2017). This was therefore the Court of Appeal's second ruling on the case following the annulment of its 2016 judgment by the Cour de Cassation. See also *Showroomprive v Coty France*, No16/02263.

[88] Case C-230/16, note 64.

[89] Decision 18-D-23, 28 October 2018.

[90] Case C-439/09, note 35.

[91] Judgment 18/24456, Paris Court of Appeal, 17 October 2019.

[92] See for example, https://stek.com/en/amsterdam-court-of-appeal-coty-not-confined-to-luxury-products/ .

[93] Case C-230/16, note 64.

[94] Case C-230/16, EU:C:2017:603.

selling on certain marketplaces. In so ruling the court following *Coty*, found that the agreement benefited from the VBER (which applied irrespective of whether the products at issue constituted luxury products) as the marketplace ban did not constitute a hardcore restraint within the meaning of Articles 4(b) or 4(c) VBER.[95] The marketplace ban did not contain a general prohibition of the use of the internet by distributors – but simply restricted its use. Consequently, it rejected Action Sport's argument that the distribution agreement unlawfully prohibited internet selling and infringed Article 101.

*Dammann* (3 December 2020)[96]

In this case the ADC found that a marketplace ban in distribution agreements for the online sale of high end teas – which was not either an exclusive distribution or a SDS – was exempted under the VBER so there was no need to determine whether it restricted competition within the meaning of Article 101(1).[97] Citing *Coty*,[98] the ADC concluded that since the distributors could still use the internet to sell and advertise there was no hardcore restraint under Article 4(b);[99] the ADC thus focused on the nature of the restraint/clause to determine whether it constituted a hardcore restraint rather than the nature of the agreement and whether the clause was necessary to achieve the agreement's objectives. However, the agreement was found to infringe Article 101 because the distribution agreement also incorporated price-fixing provisions (RPM).

**Table 1: Summary of cases incorporating marketplace bans**

| Case | Restriction of competition (Art 101(1)) | Hardcore restraint | VBER applies | Outcome | Penalty |
|---|---|---|---|---|---|
| ***Sennheiser* (2013) NCA (Germany)** | √ (preliminary conclusion | | | No procedure opened following change of behaviour | |
| ***adidas* (2014) NCA (Germany)** | √ (preliminary conclusion | | × Market share threshold exceeded (preliminary conclusion) | Proceedings closed following change of behaviour | |
| ***Asics* (2015) NCA** | Examined but not included in infringement decision (other restraints found to | | | Infringement decision, see Sections 2.D and E below | |

[95] The District Court also considered that the agreement did not restrict competition as the *Metro* criteria, note 69, were satisfied.

[96] Decision 20-D-20, 3 December 2020.

[97] ibid, paras 295-7.

[98] Case C-230/16, note 64.

[99] Decision 20-D-20, note 96, paras 292 and 298.

| | | | | | |
|---|---|---|---|---|---|
| **(upheld on appeal) (Germany)** | infringe Art 101) | | | | |
| ***adidas* (2015) NCA (France)** | | | | Investigation closed after marketplace ban removed | |
| ***Coty*** **(2017) (Court of Justice)** | No infringement if satisfies *Metro* criteria | × | √ (if other conditions satisfied) | N/a (TFEU, Art 267 reference) | |
| ***Aloe Vera products* (2018) (Higher Regional Court of Hamburg)** | × No infringement | | | Injunction granted to prevent breach of SDS | |
| ***Caudalie* (2018) (Paris Court of Appeal)** | × (no infringement of Art 101(1)) | N/a (but no following Coty) | N/a as no Art 101(1) infringement | Injunction to prevent breach of SDS | |
| ***Stihl* (2018) NCA (upheld on appeal) (France)** | × (marketplace ban did not infringe Art 101(1), but other aspects of the agreement did) | *De facto* ban on internet selling constituted a hardcore restraint | × (because of *de facto* ban on online selling) | Infringement decision (because of *de facto* ban on online selling) | Fine for *de facto* ban on online selling (not marketplace ban). Order to modify SDS |
| ***Nike* (2020) (Amsterdam Court of Appeal)** | | × (following Coty) | √ | Upheld termination of distribution arrangement | |
| ***Dammann* (2020) NCA (France)** | | × (following Coty) | × (because of price-fixing provision) | Infringement decision (because of price fixing) | Fine (for online RPM not marketplace ban) |

## D. Prohibitions on the use of price comparison websites

No case at the EU level has examined agreements incorporating prohibitions on the use of comparison websites or price comparison tools. The main reasoned case on this issue at the national level is *Asics*, decided by the FCO (the German NCA) prior to the *Coty*[100] judgment, but upheld on appeal subsequent to it. Although in *BMW/carwow*[101] the UK NCA, the Competition and Markets Authority (CMA), expressed concern about the impact on competition of BMW's decision not to allow dealers to list their cars on a new car comparison website, 'carwow',[102] it decided, in the light of prioritisation principles, not to open a formal investigation after BMW UK changed its policy to allow its dealers to work with carwow and other internet-based new car portals.

*Asics* (26 August 2015)[103]

The FCO investigated Asics' SDS which prohibited authorised retailers from cooperating with price comparison engines by setting up application-specific interfaces. It also prohibited retailers from permitting a third party to use the Asics brand name for online advertising (see further section 2.E below) or advertising or selling contract goods via third-party online marketplaces. In concluding that the agreement infringed Article 101 TFEU and its German equivalent (Section 1 GWB), the FCO found that:

(i) The restriction on cooperation with comparison websites restricted competition by object as it deprived distributors of an important sales channel (that was of particular significance for end customers) and restricted the searchability of their online stores. It also reduced price transparency and competitive pressure from online distributors. Further the *Metro* criteria were not fulfilled, as the restrictions imposed were not aimed at pursuing legitimate objectives in a proportionate way, and the protection of brand image was not a legitimate objective within a SDS.
(ii) The VBER was not applicable as the restriction constituted a hardcore restraint prohibited by Article 4(c). To constitute a hardcore restraint, it was not necessary that a full prohibition on online selling was imposed similar to that at issue in *Pierre Fabre*,[104] so long as the restriction was substantial[105] (as was the case in *Asics*, considering the significance of comparison websites for the visibility of online sellers). Further, the restraint was not justified by quality requirements, such as the need to ensure appropriate presentation of the products, the provision of adequate information and advice to clients, the protection of brand image or to solve a free-riding problem.
(iii) The agreement did not satisfy Article 101(3), as the restraints were not necessary to the maintenance of a specialist trade, to protect brand image or to establish a new brand.

[100] Case C-230/16, note 64.

[101] See https://www.gov.uk/government/news/bmw-changes-policy-on-car-comparison-sites-following-cma-action/, 24 January 2017. See also Cases B9-28/15-1-3 *Ford, Opel* and *Peugeot* 11 November and 1 December 2015 (cases terminated following manufacturers clarifying that their internet standards did not apply to web-based intermediary portals).

[102] Online comparison tools can promote competition in many markets and help consumers make informed choices', Ann Pope, CMA Senior Director of Antitrust.

[103] Case B2-98/11, 26 August 2015, *aff'd* Case KVZ 41/17, *ASICS Deutschland GmbH*, 12 December 2017 (reported in English on Oxford Competition Law).

[104] Case C-439/09, note 35.

[105] Case B2-98/11, note 103, paras 406 et seq (and 330 et seq) of the decision.

The ruling was upheld on appeal by the Higher Regional Court of Dusseldorf, and the Federal Supreme Court.[106] The latter confirmed that, in the circumstances of the case, the comparison tool provision, which was not based on quality requirements,[107] restricted passive sales to end users and so constituted a hardcore restriction under Article 4(c) VBER.[108] Price comparison websites played a decisive role for product search by end customers, and a ban on their use hindered online retailers from improving the searchability of their online stores. Although the court recognised that the case differed from *Pierre Fabre* (as it did not make it *de facto* impossible to sell online but merely limited the possibilities offered by this distribution channel), it also distinguished *Coty*,[109] where retailers were able to advertise via third-party platforms and to use online search engines to reach customers, so allowing customers to find the online offer.[110] In *Asics* in contrast, the case did not concern luxury goods and because of the combination of online sales restrictions (which included restrictions on using Asics' brand name for advertising purposes, see section 2.E below) it was not ensured that the potential customers had access to the online offers of authorised distributors to a substantial extent.

**Table 2: Summary of cases involving prohibition on the use of price comparison tools**

| Case | Restriction of competition (Art 101(1)) | Hardcore restraint | VBER applies | Outcome | Penalty |
|---|---|---|---|---|---|
| ***Asics* (2015) NCA (upheld on appeal) (Germany)** | √ (restriction by object) | √ Art 4(c) | × (hardcore restraint) | Declaratory decision of unlawfulness – upheld on appeal | No fine imposed but decision would facilitate damages actions and have signalling effect |
| ***Ford/Opel/ Peugeot* (2015) NCA (Germany)** | | | | Investigation closed after clarification of internet standards | |

[106] Case KVZ 41/17, note 103.

[107] ibid, referring to the Commission's recognition in its E-commerce SWD, note 4, that limitations on the ability to use price comparison engines that do not match quality criteria may restrict the effective use of the internet as a distribution channel and amount to a restriction on passive selling under VBER, arts 4(b) and (c) and that conversely restrictions based on qualitative criteria could be deemed exempted.

[108] However, it recognised that the EU courts had not yet decided on this issue, ibid, para 23.

[109] Case C-230/16, note 64.

[110] Case KVZ 41/17, note 103, paras 28-30.

| | | | | | |
|---|---|---|---|---|---|
| ***BMW/ carwow*** **(2017)**<br>**NCA (UK)** | | | | No formal investigation after BMW changed policy to allow dealers to work with carwow and other new car portals | |

## E. Restrictions on online advertising

In some cases at the national level, restrictions on online advertising have been found to infringe Article 101 because they have been used together with other mechanisms to achieve RPM (see for example in the UK, *Fender Musical Instruments*,[111] (pricing policy designed to ensure that musical instrument resellers would not advertise or sell Fender guitars online below a specific minimum specified price (enforced through the sending of price lists, monitoring, including through the use of an auto-tracking software, and complaints)), *Casio Electronics*,[112] *Foster Refrigerator UK (Commercial Refrigeration*)[113] (a policy, which prohibited resellers from advertising Foster products below minimum advertised prices (both online and offline) amounted to RPM infringing Article 101 and the UK equivalent), *Roma Medical Aids Ltd*,[114] *Pride Mobility Products Ltd,*[115] and *TGA Mobility Ltd.*)[116]

In both *Asics* and *Guess*, however, the FCO and Commission respectively, examined, and prohibited restraints on bidding for advertising which they found limited online selling. In these cases the concern was that, given the importance of search engines for retailers seeking to attract customers to their websites, the restraints could preclude the effective use of the internet as a sales channel.

*Asics* (26 August 2015)[117]

In addition to the prohibition on supporting price comparison websites discussed in the section above, the German NCA also considered provisions which prohibited Asics' retailers from using the Asics brand on their website, from using the brand name for online advertising campaigns on third-party websites, from using Asics as a keyword for online search advertising (for example, with Google AdWords), and from using search engine optimisation for queries relating to Asics shoes. In concluding that these clauses infringed Article 101 TFEU and Section 1 GWB, the FCO found that:

(i) The restriction on the use of Asics brand name restricted competition by object as it prevented retailers from improving the searchability of their online shops and limited their ability to be found by customers interested in purchasing Asics products. Further the *Metro* criteria were not fulfilled, as the restrictions imposed

[111] Case 50565-3, 20 January 2020.

[112] Case 50565-2, 1 August 2019.

[113] Case CE/9856/14, 24 May 2016**.**

[114] Case CE/9578-12, 5 August 2013.

[115] Case CE/9578-12, 27 March 2014.

[116] Case 50469, 19 October 2017.

[117] Case B2-98/11, 26 August 2015. See also discussion of adidas, note 65.

were not aimed at pursuing legitimate objectives in a proportionate way, and the protection of brand image was not a legitimate objective within a SDS.

(ii) The VBER was not applicable as the restriction constituted a hardcore restraint prohibited by Article 4(c) – to constitute a hardcore restraint it was not necessary that a full prohibition online selling was imposed similar to that at issue in *Pierre Fabre*,[118] so long as the restriction was substantial. Further, the restraint was not justified by the need to ensure quality standards online or to protect Asics' trademarks.

(iii) The restraint did not satisfy the conditions of Article 101(3).

As discussed in the previous section, the decision was upheld on appeal.

*Guess* (European Commission, 2018)[119]

The Commission's proceedings against Guess followed on from its e-commerce sector inquiry and resulted in a prohibition decision which was settled following Guess' cooperation.

Guess sold its products not only through its outlets (off and online), but also through a SDS involving retailers operating mono or multibrand stores. The investigation in this case focused on a range of restraints aimed at restricting both pricing and online selling by authorised distributors, including restrictions from (i) using the Guess brand names and trademarks for the purposes of online search advertising; (ii) selling online without first obtaining a specific authorisation from Guess (to limit the number of online distributors); (iii) selling to end users located outside the authorised distributors' allocated territory; (iv) cross-selling among authorised wholesalers and retailers; (v) determining resale prices independently. The Commission concluded that some were designed to direct as much traffic as possible to Guess' own sales channels (its B2C channel).[120] Indeed, the Commission considered that a key instrument to this policy was the systematic banning by Guess[121] of retailers from using or bidding on the Guess brand names and trademarks, in particular in Google AdWords.[122] Guess

[118] Case C-439/09, note 35.

[119] *Guess*, note 60.

[120] ibid, para 49.

[121] The Commission found that although the online search advertising restriction was not included in the distribution agreements, it was systematically applied whenever an authorised retailer asked for permission to use any of the Guess brand names or trademarks as keywords in Google AdWords in the context of seeking approval from Guess for its advertising (authorisations had been granted only twice in the EEA since introduction of the policy).

[122] Google AdWords is the largest and most widely used online search advertising service. That service allows economic operators, by reserving or bidding on one or more keywords, to obtain the placing of an advertising link to their website whenever an internet user enters one or more of those words as a request in the Google search engine. The advertising links typically appear on Google's general search results pages next to the so-called generic/natural search results. Google selects the advertisers that will be displayed in AdWords by means of a keywords auction which then determines the position of each advertisement and each advertiser's cost per click. Advertisers pay when users click on the advertisement. Google uses two key factors to determine the ranking of an advertisement: (i) maximum bid (the highest amount that an advertiser is willing to pay for a click); and (ii) a quality score determined by Google using an algorithm that determines how relevant and useful the advertisement is to users. Google has set up an automated process for the selection of keywords and the creation of advertisement. Advertisers select and bid on the keywords, draft the commercial message, and input the link to their website. It follows that competition in the form of multiple bids for a specific keyword, such as 'Guess', increases the cost per click, thus the overall advertisement cost of a company, see *Guess*, note 60.

argued however that authorising third parties to use brand names or trademarks would have driven up Guess' Google advertising costs[123] and decreased the visibility and sales for www.guess.eu.[124]

In spite of stated business rationales, the Commission concluded that the ban:

(i) Was not justified under Union trademark law or, in contrast to *Coty*,[125] by the legitimate objective of Guess' SDS, i.e. to protect its brand image. Further, it restricted competition by object as, relying on *Pierre Fabre* and assessed in its context, it reduced the ability of authorised retailers to advertise and ultimately to sell the contract products to customers, in particular outside the contractual territory or area of activity, and limited intrabrand competition;[126]
(ii) Constituted a hardcore restraint under Article 4(c) VBER as its object was to restrict the ability of authorised retailers to advertise. Consequently, it partitioned the market by limiting the ability of the authorised retailers to sell the contract products either actively or passively to customers, in particular outside of the contractual territory or area of activity;[127] and
(iii) Did not satisfy the Article 101(3) criteria. 'In particular, there are no indications that the conduct contributed to improving the production or distribution of Guess' products, or to promoting technical or economic progress, while allowing consumers a fair share of the potential benefits resulting from Guess' restrictive practices. In addition, there are no indications either that the conduct was indispensable, for example to address free-riding, or to protect Guess' brand image.'[128]

In *Guess* therefore, because the Commission was concerned that the restraint restricted the visibility and findability of distributors and their ability to generate traffic to their own websites it limited a necessary means of selling online. It thus equated the restraint more closely with the complete prohibition of online selling in *Pierre Fabre*.

**Table 3: Summary of cases involving limitations on online advertising**

| Case | Restriction of competition (Art 101(1)) | Hardcore restraint | VBER applies | Outcome | Penalty |
|---|---|---|---|---|---|
| ***Asics* (2015)**<br>**NCA (upheld on appeal)** | √ (restriction by object) | √ Art 4(c) | × (hardcore restraint) | Declaratory decision of unlawfulness – upheld on appeal | No fine imposed but decision would facilitate damages |

[123] Guess, note 60, para 49 ('From Guess' perspective, Google AdWords represents a very important advertising tool. Guess invested on average […] of its total Europe "media budget" in Google AdWords in the years 2016 to 2018 and almost [20 – 40%] of the visits to its website (online shop) were generated by Google AdWords during this period').

[124] ibid, para 48.

[125] Case C-230/16, note 64.

[126] *Guess*, note 60, para 125.

[127] ibid, para 157.

[128] ibid para 164.

| | | | | | |
|---|---|---|---|---|---|
| **(Germany)** | | | | | actions and have signalling effect |
| ***Guess* (2018) European Commission** | √ (restriction by object | √ Art 4(c) | × (hardcore restraint) | Infringement decision | Fine (reduced because of settlement) |

## F. Dual pricing provisions affecting online selling

### i. Dual pricing

In some cases, the EU Courts have found that dual pricing provisions designed to discourage export by distributors restrict competition by object. For example, in *GlaxoSmithKline v Commission*,[129] the Court of Justice held, that an agreement requiring a wholesaler (in that case a Spanish wholesaler) to pay a higher price for products to be exported than for sale domestically, and which was designed to restrict parallel trade, constituted a restriction of competition by object. In principle, 'agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition,'[130] even if they could not be presumed to deprive final consumers of the advantages of effective competition in terms of price.[131] An agreement tending to restore national divisions in trade between Member States might be:

> 'such as to frustrate the Treaty's objective of achieving the integration national markets through the establishment of single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that article of the Treaty ...'.[132]

Nonetheless, the Court of Justice upheld the General Court's finding that the Commission's decision in this case should be annulled as the Commission had not adequately discharged its burden of examining the Article 101(3) arguments put forward by the parties and refuting them by means of substantiated evidence. The case reiterates the important point that even agreements containing object restraints are capable of meeting the Article 101(3) criteria.

In *General Motors*,[133] the EU Courts also upheld a Commission decision condemning a general strategy aimed at hindering all export sales of the supplier's vehicles which

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[129] Case C-501/06 P, note 36. See also COMP/28.282, *The Distillers Co Ltd*, note 57; COMP/32.390, *Newitt/Dunlop Slazenger International,* note 57.

[130] Case C-501/06 P, note 36, para 59 (relying on Case 19/77, *Miller International Schallplaten* v *Commission* EU:C:1978:19, paras 7 and 18, and Joined Cases 32/78, 36/78 to 82/78, *BMW Belgium and Others* v *Commission* EU:C:1979:191, paras 20 to 28 and 31).

[131] ibid, paras 62-64.

[132] ibid, para 61.

[133] Case T-368/00, *General Motors Nederland and Opel Nederland v Commission* EU:T:2003:275, and Case C-551/03, EU:C:2006:229. See also Case C-338/00 P, *Volkswagen*

included a restrictive supply policy, a restrictive bonus policy excluding export sales to final consumers and, prior to that, an indiscriminate export ban with respect to sales to final consumers. The Court of Justice reiterated that in determining whether an agreement restricts competition by object, it was legitimate to rely on the intentions of the supplier. Further, although account had to be taken not only of the terms of the agreements but other factors such as its aims in the light of its economic and legal context, the case-law showed that an agreement concerning distribution has a restrictive object if it clearly manifests the will to treat export sales less favourably than national sales so leading to the partitioning of the market in question.[134]

Neither *GlaxoSmithKline* nor *General Motors* dealt with dual pricing affecting different offline and online sales channels (for example requiring a distributor to pay a higher price for products intended to be resold online than for ones sold offline in a bricks and mortar store). Nevertheless, read with *Pierre Fabre*,[135] they provide support for the view that a dual pricing provision specifically designed to restrict online selling (and hence parallel trade), restricts competition by object and, hence, also constitutes a restriction on passive selling for the purposes of the VBER. They also suggest, however, that, where the purpose and effect of a dual pricing provision is not to restrict parallel trade (or to prevent online selling), but simply to curb the risk of freeriding or to otherwise incentivise investment by retailers, neither a finding of restriction of competition by object nor a restriction of passive selling would be warranted. Nonetheless, the 2010 Guidelines (see especially paragraph 52(d) and 64),[136] to prevent circumvention of the prohibition on online selling, state that agreements incorporating such provisions are prohibited unless justified under Article 101(3) (for example, where online sales generate more customer complaints and warranty claims for the manufacturer so increasing its costs).

Although there has been no EU or NCA decision prohibiting dual pricing affecting online selling, some NCAs have investigated such cases. For example, in Germany three distinct investigations were resolved when the investigated companies agreed to abandon dual pricing provisions[137] designed to curb online sales (*Dornbracht* (13 December 2011)[138]), or resulting in different rebates for offline and online sales,

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*AG v Commission* EU:C:2003:473, paras 44-45 (finding a differentiated bonus scheme (allowing for only 15% of sales made outside contract territory to be taken into account) to be incompatible with art 101(1). The arrangement was liable to induce Italian authorised dealers to sell at least 85% of available vehicles within their contract territory and therefore restricted opportunities for end-users and dealers in other Member States to acquire vehicles in Italy, and thus had the purpose of ensuring a degree of territorial protection (it constituted a market-partitioning measure)).

[134] Case T-368/00, ibid, para 67.

[135] Case C-439/09, note 35.

[136] Guidelines, note 2, paras 52 and 64 and see also Staff Working Document, 'Guidance on restrictions of competition "by object" for the purposes of defining which agreements may benefit from the *De Minimis* Notice', SWD(2014) 198 final, 3.1.1.

[137] Although the Croatian NCA investigated an allegation of dual pricing by *BSH*, 8 October 2017, it terminated the proceedings following a finding that no such practice has been implemented and no apparent harm had been inflicted on end consumers.

[138] Case B5-100/10, 13 December 2011. This case concerned a SDS in which the manufacturer granted the wholesaler discounts which made it economically less attractive for them to sell to certain resellers such as DIY stores, internet shops and discounters rather than sanitary craftsmen (making it difficult for these buyers to get the products at all or at competitive prices). The FCO came to the preliminary conclusion, relying on the Guidelines, note 2, that the provision constituted a hardcore restriction which infringed art 101. 'Such an obstruction of

respectively, made by the retailers (see *Gardena* (27 November 2013)[139] and *Bosch Siemens Hausgeräte* (23 December 2013)).[140] In each of these cases the FCO expressed a preliminary conclusion that the dual pricing provisions restricted competition and constituted hardcore restraints.

### ii. Different wholesale pricing for different retailers

In the *Lego* cases, in contrast, both the German and French competition authorities conducted investigations into a differential pricing system operated by Lego through functional rebates which resulted in different wholesale prices being charged for the same product to *different* retailers (and in particular resulting in smaller discounts for pure online players). Although pricing decisions and rebates systems of dominant firms may be subject to close scrutiny under Article 102, in other circumstances they are frequently considered to be a normal part of the competitive process. Nonetheless, Lego agreed to change its rebates system following both of these investigations. As a result of the termination of these investigations following a change of behaviour or commitments, the legal basis for the preliminary view that this discrimination between offline and online players was illegal was not made as clear as it could have been, for example what the contractual restriction was that was considered to be in breach of Article 101.[141] Rather by closing the cases through commitments the enforcers were able to remedy the situation without having to prove anticompetitive agreements between Lego and its offline distributors.

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certain sales channels results in a reduction of intra-brand competition, since the low-priced offers on the internet, in DIY stores and discounters are hampered or even made impossible, to the benefit of specialist tradesmen.' The practice thus 'exceeds the narrow boundaries of permissible restrictions of internet sales'. The proceedings were closed however when Dornbracht agreed to delete the dual pricing provisions from its contracts.

[139] Case B5-144/13, 5 December 2013. This case concerned contractual clauses in Gardena's distribution incorporating staggered functional rebates for its retailers which were designed in such a way that a distributor could only obtain the full rebate in a physical store. The FCO's preliminary conclusion was (citing the Guidelines, note 2, para 52) that the agreements infringed art 101 and constituted a hardcore restraint as the rebates meant that the distributors had lower incentives to reach more and different customers through the internet. The proceedings were closed however following Gardena's commitment to change its conduct.

[140] Case B7-11/13, 23 December 2013. This case involved an investigation into Bosch's system of performance rebates which resulted in hybrid distributors being awarded lower rebates if online sales represented a high proportion of their total sales. The FCO's preliminary conclusion was that the agreement restricted competition and the economic freedom of action of the hybrid retailers and discouraged online selling. The dual pricing provision also constituted a hardcore restraint (relying on the Guidelines, note 2, para 52) and did not satisfy the conditions of art 101(3). The FCO was concerned that the rebates would affect dealers' choice of sale channel and provide incentives for dealers to limit and reduce online sales. The resulting higher prices and output reduction in online sales would dampen the competitive pressure they exert on offline sales. The FCO also rejected the efficiency arguments raised (for example, the rebates served to compensate the higher costs associated with offline sales). In so far as there were efficiencies, Bosch had not established that fixed contributions would not be a less restrictive alternative. The FCO discontinued its proceedings however when Bosch wrote to all dealers letting them know that it would discontinue the rebate system, making it clear that the same level of rebates can be achieved through online or offline selling.

[141] The ADC also referred to the possibility that Lego's practices, aimed at hindering the development of online actors and so allowing prices to remain high to the detriment of consumers, might constitute an abuse of a dominant position, see Decision 21-D-02, 27 January 2021, para 18.

*Lego* (18 July 2016)[142]

The FCO investigated Lego's practice of discriminating against online-shops in favour of brick and mortar shops (through the application of a functional rebate system) and whether it violated Article 101 or 102. As, however, Lego agreed to change its rebate system and to end its discrimination between the different sale channels the FCO closed its proceedings. During the course of the investigation, however, the FCO expressed its concern about the structural disadvantage the system created for online retailers, and that it would weaken competition from online retailers and lead to higher online prices.

*Lego* (27 January 2021)[143]

This case also involved an investigation of Lego's rebate schemes operated between 2014-2016 and from 2017, by the ADC. The ADC scrutinised the systems closely, noting that both discount systems (even after their adaption in 2017) put pure players at a disadvantage. Although the ADC recognised that manufacturers could distinguish between categories of distributors, it set out its view that a system of differentiated pricing could constitute an anticompetitive agreement where, because of the level and discriminatory character of the rebates and the market share[144] represented by the products, it is of a distortive nature for competition by giving certain operators unjustified competitive advantages. Its preliminary conclusion was that:

- The rebate systems implemented by Lego was capable of constituting an anticompetitive agreement;[145]
- Although such a practice did not constitute a restriction of competition by object or a hardcore restraint it could have an anticompetitive and restrictive effect by limiting the competitive pressure that pure players are supposed to be able to exert on traditional retail and because there was no objective justification for the price difference;[146]
- Lego had not shown that the system was indispensable and proportionate to the objectives of building awareness of the brand amongst children, ensuring the availability of products and the quality of the shopping experience.

**Table 4: Summary of dual pricing cases**

| Case | Restriction of competition (Art 101(1)) | Hardcore restraint | VBER applies | Outcome |
|---|---|---|---|---|
| ***Dornbracht* (2011) *Gardena* (2013), *Bosch* (2013) NCA (Germany**) | Preliminary conclusion that hardcore restraints that infringed Article 101 | | | Dual pricing system abandoned |

[142] See press release at, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/18_07_2016_Lego.html.

[143] Decision 21-D-02, note 141.

[144] ibid, paras 32-34 (noting in this case that Lego was the number one toy manufacturer, had a stable market share and that a number of factors reinforced its strong position in the market).

[145] ibid, para 69.

[146] ibid, para 65.

| | | | | |
|---|---|---|---|---|
| ***Lego* (2016) NCA (Germany)** | | | | Proceedings closed following change of behaviour |
| ***Lego* (2021) NCA (France)** | Preliminary conclusion that restrictive effects | × | | Commitments accepted |

## G. Summary

A number of cases at the EU and national level have examined the compatibility of online selling restraints with Article 101 since 2010.

### i. Judgments of the Court of Justice

The two core rulings of the Court of Justice in this sphere are *Pierre Fabre*[147] and *Coty*.[148] Both judgments deal with the compatibility of SDSs containing restraints on online selling with Article 101 and the VBER.

*Prohibitions or de facto bans on online selling*

*Pierre Fabre* holds that a SDS incorporating a ban, or *de facto* ban, on online selling is liable to restrict competition by object. The ban on online selling also constitutes a restraint on active or passive selling to end users by retail members of a SDS contrary to Article 4(c), meaning the VBER cannot apply to such an agreement even it if its other conditions are satisfied.[149]

*Marketplace prohibitions*

In *Coty*, in contrast, the Court held that a limitation (as distinct from an absolute prohibition) on online selling, in that case a prohibition on distributors selling via certain marketplace, could not be assumed to restrict competition under Article 101(1) (rather the compatibility of the agreement with Article 101(1) had to be assessed according to the *Metro* criteria) and did *not* constitute a hardcore restraint prohibited by Article 4(b) or (c) (irrespective it seems of the product at issue or whether the criteria imposed for online selling are equivalent to the criteria imposed for sales of brick and mortar stores).

This ruling accords with the wording of the VBER which applies to all SDSs, regardless of the product at issue and the nature of the criteria used for selecting distributors, so long as, *inter alia*, the parties do not exceed the market share thresholds and the agreement does not contain hardcore restraints. These hardcore restraints only catch limitations imposed on online selling by distributors, in so far as they amount to, for example, RPM, or territorial or customer restraints prohibited by Article 4(b)(c) and (d).

Although dealing with marketplace bans, the case provides a framework for analysis of other limitations on online selling under Article 101 and the VBER. Indeed, the case

[147] Case C-439/09, note 35.

[148] Case C-230/16, note 64.

[149] Where they do amount to a *de facto* ban, the Court in *Pierre Fabre* held that such restraints cannot be treated as equivalent to a prohibition on operating out of an authorised establishment, note 47.

suggests that limitations which merely restrict a specific form of internet selling and leave other means of reaching other customers groups and customers in different territories via the internet, do not amount to a customer or territorial restraint or a restriction on passive selling to end users.

The judgment does not therefore support the prior suggestions in the 2010 Guidelines that both dual pricing provisions, and limitations on online selling which are not equivalent to criteria imposed for the sales from the brick and mortar shop, necessarily constitute hardcore restrictions. Rather, it supports the view that a restriction on internet selling, which does not operate as a prohibition or a *de facto* prohibition on online selling, cannot constitute a hardcore restraint even if it imposes limitations on, and reduces some forms of, online selling.

### ii. Decisional practice of the ECN and other cases at the national level

Only one European Commission decision (*Guess*) and one NCA decision (*Asics*) identified in this report have, post 2010, actually condemned limitations – as opposed to prohibitions (direct or indirect) – on online selling (see Table 5 below for summary). However, a number of authorities have investigated such practices and, in some cases, terminated proceedings following removal of such restraints, although many such cases predate *Coty*.

*Marketplace restrictions*

A number of investigations have been launched into the compatibility of marketplace restrictions with Article 101. Prior to *Coty*, some were closed following changes of behaviour. However, since *Coty* the French competition authority and three national courts (in France, Germany and the Netherlands) have found marketplace bans to be compatible with, and not in breach of, Article 101.

*Dual pricing*

Although *Coty* suggests that dual pricing should not constitute an object or hardcore restraint unless it operates in practice as a prohibition (or *de facto* prohibition) on online selling, it is not surprising to find investigations into the question of whether such conduct has occurred in breach of the rules given the approach taken to dual pricing in the 2010 Guidelines. Although some investigations have been conducted, however, in no case has a decision finding a violation of Article 101 been adopted.

Two cases dealing with Lego, involve rebate schemes alleged to discriminate between offline and online players. Because these cases were resolved following the adoption of commitments, it is unclear whether, and if so how, offline retailers were found to have conspired with Lego to limit competition from online retailers through operation of the rebate system. The French NCA did not, however, treat the practice as a hardcore or object restraint.

*Limitations on the use of price comparison websites and restrictions on online advertising*

The two cases which have found that limitations on online selling infringed Article 101 are *Asics* and *Guess*. Both cases were finally resolved after *Coty*. The conclusions in these cases that individual restraints, which did not operate as absolute prohibitions on online selling constituted hardcore restraints, are difficult to reconcile with the rulings in *Coty*. These cases must be considered in context, however.

First, in both cases, more than one restraint on online selling was incorporated in the agreement. In *Asics* therefore the conclusion that the agreement had a 'substantial' impact on the ability of distributors to engage in online selling, even if it did not constitute an absolute prohibition on online sales, was affected by the combination of the restraints appraised. Similarly, in *Guess* a variety of restraints had been adopted

both to restrict the territories into which distributors could sell, and the prices at which they could sell, making it easier to discern an overarching objective to restrict online selling and cross-border sales. This seems to facilitate the Commission's decision to equate the restraint more closely with the complete prohibition of online selling in *Pierre Fabre* than the limitation in *Coty*.

Secondly, the court in *Asics* recognised that the EU courts had not ruled on the issues raised by this case, so the question of whether the approach taken would be endorsed by the EU courts remains open. The German authorities in this case placed emphasis on the fact that the restraints were not qualitative in nature and substantially impacted online selling. As there was no *de facto* prohibition on online selling, however, it seems arguable that the provisions did not constitute hardcore restraints within the meaning of Article 4(b) or (c) of the VBER or restrictions of competition by object.

Thirdly, *Guess* was a settlement decision in which Guess admitted to the conduct at issue. Consequently, the rather abbreviated analysis set out in the decision on the compatibility of the advertising restraint with Article 101 was not contested or challenged in judicial review proceedings.

**Table 5: Summary of cases**

| | **No infringement of Article 101** | **Infringement of Article 101** | **Termination/ commitments following change of behaviour/ finding another competition authority best placed** | **Court of Justice judgment following Article 267 reference** |
|---|---|---|---|---|
| **Export Ban / Online sales ban** | *Cannett Furniture* (Denmark) (no ban on passive selling, but finding of infringement in relation to RPM and fine imposed) | *Bikeurope* (France)<br>*Stihl* (France)<br>*Ping* (UK)<br>*Belupo lijekovi* (Romania)<br>*Baxter* (Romania)<br>*SC Bayer* (Romania)<br>*Elais-Unilever* (Greece) | *Stihl* (Germany)<br>*Manufacturer of branded sneakers* (Germany) | *Pierre Fabre* |
| **Marketplace ban** | *Aloe Vera Products* (Germany)<br>*Caudalie* (France)<br>*Stihl* (France) | | *Sennheiser* (Germany)<br>*adidas* (France)<br>*adidas* (Germany) | *Coty* |

| | | | | |
|---|---|---|---|---|
| | *Nike* (Netherlands)<br>*Dammann* (France) | | | |
| **Limitation on use of price comparison website** | | *Asics* (Germany) | *Ford, Opel, Peugeot* (Germany)<br>*BMW/carwow* (UK) | |
| **Limitation on online search advertising** | | *Asics* (Germany)<br>*Guess* (Commission) | | |
| **Dual pricing** | *BSH* (Croatia) | | *Dornbracht* (Germany)<br>*Gardena* (Germany)<br>*Bosch Siemens Hausgeräte* (Germany) | |
| **Price discrimination between retailers** | | | *Lego* (Germany)<br>*Lego* (France) | |

# 3. Proposed Framework for Analysis and Guidance in 2022

## A. Pros and cons of the current system and options for reform

The current system governing vertical agreements clearly has advantages.

In particular, for the most part it provides a predictable, transparent and administrable system which is not too costly for businesses and decision-takers to apply. By relying both on a broad umbrella block exemption and safe harbour for a large number of agreements and an intolerant approach to hardcore restraints, it provides significant legal certainty to firms operating in the EU (which is highly valued) and signals that restraints considered to be detrimental to EU competition law objectives should not be incorporated within agreements (at the risk of fines).

Nonetheless some difficulties result from the system, some of which are manifest from the discussion in Section 2 above.

First, it has been seen that it is not easy to draw bright lines in practice and hard to provide guidance as to how such lines apply to all business practices and restraints – this means that the VBER has not always provided the legal certainty intended,

especially to newer restraints that have been emerging or being adopted with increasing regularity.[150]

Secondly, bright line rules or presumptions of illegality and legality (or safe harbours) inevitably create error risks, which may require mitigation (the mitigation need being greater, the greater the error risk[151]). A problem with the EU system, however, is that the safe harbours, rules or presumptions that exist are difficult to set aside or rebut – it is not easy to withdraw the benefit of the VBER in practice and many businesses perceive it to be unclear when hardcore restraints can be justified.

Thirdly, where neither the VBER, nor the presumption of illegality in the Guidelines, applies, the regime does not provide significant clarity. Rather, the heavy reliance on the VBER places emphasis on the 'legal exception' to the Article 101(1) prohibition and the technical requirements set out in the VBER, creates a perception that many vertical agreements require exemption, and deemphasises the economic assessment and analysis of the overall competitive effects of a given vertical agreement. As a result, firms may be fearful of the consequences of falling outside of the scope of the VBER. Indeed, apart from cases falling for assessment under the distinct line of cases dealing with SDS, limited modern guidance has emerged more generally to develop and hone case-law in relation to vertical agreements under Article 101, so enabling it to evolve to better reflect the economics of vertical restraints (explored in the 2010 Guidelines), and to ensure that individual analysis of all vertical agreements is consistent with the guiding principles underpinning EU competition law and the approach adopted under Article 102 and the EU Merger Regulation.

The Commission recognises that some of these issues need addressing. In particular, that the current rules governing vertical agreements do not function as well as they should in certain areas, including in relation to online restraints, and so is exploring the possible revision of the current rules in this area.[152] In revising the block exemption, the Commission is considering how it can clarify and simplify the rules in an area where there has been scope for some divergent interpretations of the current ones (for example, restrictions on the use of marketplaces, price comparison websites and online advertising) and whether, and if so how, to modify, or clarify, its approach towards some practices currently considered to constitute hardcore restraints (including certain limitations on online selling in SDSs, dual pricing and RPM). Broadly, in relation to limitations on online selling the Commission is considering certain options for reform:

- No policy change, but with updating or clarification of certain parts of the Guidelines to reflect developments that have occurred since 2010.
- Recognising that some practices (such as dual pricing and limitations on online selling that are not overall equivalent to the criteria imposed in brick and mortar shops in SDS) should no longer be considered to constitute hardcore restraints, with safeguards to be defined in line with the case-law.

[150] It has been seen in Section 2 that the exact boundaries of art 4 are unclear (what exactly constitutes a ban on active or passive selling or restriction on territory into which buyers can sell), so detracting from the VBER's goal of providing legal certainty.

[151] In the EU, the Court of Justice has held that an undertaking has the option to assert 'on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU … it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption', Case C-439/09, *Pierre Fabre,* note 35, para 57 and note 46 and text.

[152] See note 6 and text.

## B. Reform and guidance

### i. General observations

The discussion above reveals that competition law decision-takers across the EU have had some difficulty in determining how limitations on online selling are to be appraised under Article 101 and the VBER. These difficulties have been exacerbated by a number of features of the current system.

1) Policy in this area remains influenced by the single market objective (and, arguably, in some cases concerns about economic freedom of distributors and traders[153]), which in many cases override efficiency rationales proffered. In some cases, therefore efficiency justifications are, and have been since Article 101's first application (see especially *Consten and Grundig v Commission*[154]), subordinated to the higher goal of integration and are not fully tested in the analysis.[155] It is not entirely clear, however, exactly how limitations on parallel trade, are balanced against other objectives and when one may trump the other.
2) The central role played by the VBER, combined with some of the case-law under Article 101(1) (especially that dealing with SDSs, see point four below), centres Article 101 analysis on justifications for contractual restraints, and the proportionality of measures designed to achieve them. As a result, it is rare for any detailed analysis of the actual or likely restrictive effects of an agreement, or their impact on interbrand competition, to be conducted. Indeed, the methodology set out in paragraph 110 of the current Guidelines, states that an agreements compatibility with the VBER should be assessed first and only if its market shares are exceeded, should Article 101(1), and Article 101(3) analysis be conducted. Although this approach clearly represents practical, pragmatic advice (as it does not matter whether Article 101(1) is infringed if the VBER applies), it continues to place the emphasis of Article 101 analysis on Article 101(3),[156] and turns Article 101 analysis on its head.[157]
3) A core objective of the modernised regime governing vertical agreements was to ensure that their appraisal should be based not on their content and form but taking account of their competitive effects. Nonetheless, the central importance on the VBER, and the coveted safe harbour and legal certainty it provides, means that heavy emphasis is still in fact placed on the content and form of the agreement – and in particular, whether a hardcore restraint has been incorporated within the agreement. As a result, argument in some modern cases dealing with vertical agreements has tended to focus closely on whether a restraint should be

[153] See, for example, note 140.

[154] See note 36 and text.

[155] ibid.

[156] Historically, the Commission's concerns about the divergent effects of vertical restraints on economic freedom, competition and market integration led it to adopt a 'more form-based approach to the interpretation of "restriction of competition"'. Consequently 'a large number of agreements were considered to be caught by the test of Article 101(1) and required exemption under Article 101(3) …' C Esteva Mosso, 'The Contribution of Merger Control to the Definition of Harm to Competition' Brussels, GCLC Conference, February 2016, 2 (a wide interpretation of the application of art 101(1) was adopted coupled with a regulatory approach using block exemptions, J Faull, A Nikpay and D Taylor (eds), *Faull and Nikpay: The EU Law of Competition* (Oxford University Press, 3rd edn, 2014), Chap 9, see also 3.160–3.166).

[157] See A Jones, B Sufrin and N Dunne, *Jones and Sufrin's EU Competition Law: Text, Cases, and Materials* (Oxford University Press, 7th edn, 2019), Chap 11.

categorised as hardcore, with limited emphasis on its actual or likely impact on competition.

4) Fourthly, where the VBER does not apply, relatively little modern jurisprudence exists to guide Article 101 appraisal. Thus, although a core objective of the modernised system was to move away from dealing with vertical agreements by category, the case-law governing analysis of vertical agreements under Article 101(1) has not evolved significantly, and still requires distinct forms of analysis for different types of vertical agreements. Further, some of that case-law, especially the case-law governing SDSs, which reflects an inherent suspicion of restraints on rivalry between a supplier's dealers, is not easy to reconcile either with other lines of cases dealing with analysis of vertical agreements (such as that governing single branding arrangements[158]), other lines of cases dealing with the question of how object and effect analysis under Article 101(1) is to be conducted, or the general framework of analysis advocated by the Commission in its Vertical Guidelines for identifying whether vertical agreements restrict competition (see further Section 3.B.vi).[159]
5) There appears to be some confusion or different views at the national level and amongst practitioners, over the question of how criteria relevant to the appraisal of SDSs under Article 101(1) are to be applied and whether the criteria are relevant in the application of the VBER; in particular, in relation to the VBER to what extent the nature of the product is relevant and whether the criteria applied to limit online selling need to be linked to the overarching purpose of the SDS.

In considering how to address these issues, to increase legal certainty, and to advance policy in this area, it is proposed that in addition to reflecting post-2010 developments in the Guidelines, the Commission should take steps not only to clarify the category of hardcore restraints, but (recognising that safe harbours and presumptions of illegality cannot govern all situations) to strengthen the discussion of how analysis is to be conducted in cases where the VBER does not apply. In particular, the Commission should:

- Articulate more plainly and openly which objectives guide the approach towards vertical agreements under Article 101(1), Article 101(3) and the VBER, and how different objectives should be balanced should they pull against one another (section ii below).
- Stress more forcefully the role of the VBER as a 'safe harbour' for agreements that can be presumed in a majority of cases to be compatible with Article 101 – and that falling outside of it does not necessarily mean that the agreement either

[158] See for example, Case C-234/89, *Delimitis*, note 33, where the Court of Justice accepted that as an obligation imposed on the café proprietor to purchase most of its beer requirements from a brewer entailed advantages for both the supplier and the reseller, the purpose/object of the agreement could not be said to restrict competition. Rather, its effects had to be considered and this inquiry focuses on the question whether the agreement, alone or in conjunction with a network of similar agreements, would be likely to have an appreciable impact on the parameters of competition and allow the parties to exercise market power. The Court stressed the importance of assessing whether the agreement appreciably contributed to a foreclosure of access to the market. This required a definition of the relevant market and an assessment of whether there was a concrete possibility for new competitors to penetrate that market or for existing competitors to expand. The case thus (i) advocates an 'effects-based' approach to assess the competitive effects of vertical restraints under 101(1) and (ii) establishes the importance of interbrand competition to the assessment. See also note 167 and text.

[159] See M de la Mano and A Jones, 'Vertical Agreements under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion' in D Healey, M Jacobs and RL Smith, *Research Handbook on Methods and Models of Competition Law* (Edward Elgar, 2020).

infringes Article 101(1) or fails to satisfy the conditions of Article 101(3). Although the Guidelines already seek to do this,[160] more could perhaps be done to help to address the perception, and anxiety, that many vertical agreements may infringe Article 101 if not block exempted (section iii below).

- To ensure the VBER provides the legal certainty desired, restrict the list of hardcore restraints in Article 4 to a set of narrow, clearly identified restraints which can be assumed to be highly likely to harm competition or the internal market imperative and to be unlikely to have offsetting efficiency benefits in the circumstances of the VBER (where the parties to the agreement lack substantial market power). The question of whether the list of Article 4 hardcore restraints should incorporate all, or any, of the restraints discussed in this report, should be determined on the basis of evidence, experience or theory as to their likely anti- and pro-competitive effects in most cases (section iv below).
- Take further steps to make it even clearer that the presumption against hardcore restraints is a rebuttable one. Although the presumption against hardcore restraints (RPM, export (and online selling) prohibitions) may limit the risk of Type II errors[161] (especially given their risk of harm and the budget limits constraining the activities of ECN members), the risk of the VBER creating Type I errors[162] would be mitigated were it to be more clearly accepted that in exceptional cases even hardcore restraints may not (subject to overriding internal market principles) infringe Article 101 (section v below).
- Use the Guidelines, and bring cases, to develop Article 101 doctrine in line with the approach set out in the Vertical Guidelines and a more consistent framework for analysis in individual cases (section vi below). This would help to promote a better understanding of how Article 101 analysis is conducted where the VBER does not apply, creating greater legal certainty and facilitating greater consistency in approach across the network of courts and agencies enforcing the rules in the EU.
- Consider reordering of the Guidelines to reinforce these proposals and to increase the coherence of the Article 101 analysis overall (section vii below).

### ii. Articulating, balancing and reflecting underpinning objectives

It has long been accepted that the role of EU competition law as an instrument of single market integration differentiates EU law from any other system of competition law, and that the impact of this policy is most striking in respect of the law on vertical restraints.[163] The result has been that some conduct has been prohibited (for example, conferment of absolute territorial protection on a dealer or export bans imposed on dealers), which might be unproblematic in other jurisdictions.[164] The methodological approach changes when market considerations are at stake and '[f]aced with a conflict between the narrow interests of a particular firm and the wider aim of integrating national markets, the tendency has been to subordinate the former to the latter.'[165] Indeed, since *Consten and Grundig,* EU authorities, sidestepping arguments relating to the size of interbrand competition, have consistently sought to protect the higher EU

[160] Guidelines, note 2, para 23.

[161] For example, through tolerating, allowing, or making it too difficult to challenge anticompetitive conduct.

[162] For example, through the application of overinclusive rules or presumptions against conduct which may prohibit or deter procompetitive practices.

[163] Jones, Sufrin and Dunne, note 157, Chapters 1, 5 and 11 and note 36 and text.

[164] Undertakings should not be able to re-erect barriers to the free circulation of goods, which are being dismantled at the Member State level (by provisions such as TFEU, art 30).

[165] R Whish and D Bailey, *Competition Law* (Oxford University Press, 9th edn, 2018), 24.

principle of market integration, the 'Grundnorm' of the system.[166] The policy of promoting, protecting, and encouraging online selling and e-commerce constitutes a clear extension of the market integration objective, as internet selling broadens the market by allowing dealers to reach more and different customers across the EU.

In addition, it is unclear to what extent the Commission's early approach, interpreting the concept of a restriction of competition set out in Article 101(1) broadly to encompass many restraints on firms' economic freedom, is still reflected in modern analysis. For example, in contrast to the approach adopted in *Delimitis*,[167] case-law dealing with intrabrand restraints under Article 101(1), still seems to attach greater weight to the importance of the structure of competition and undistorted competition in all market segments (including the distributor level) than to their impact on interbrand competition. This case-law thus seems to reflect a greater suspicion of restraints on rivalry between a supplier's dealers than on restraints between a supplier and its competitors, and to treat the former as restrictive of competition unless necessary to achieve a legitimate objective, for example, the penetration of a new market, to encourage non-price competition between dealers or to ensure the commercial success of a franchise agreement.

It would be extremely helpful if the Commission Guidelines could clearly articulate which policy objectives underpin the regime, and how they guide the approach to vertical agreements under Article 101(1), Article 101(3) and the VBER respectively. In particular, whether and if so when agreements which create obstacles to market integration, e-commerce or which limit economic freedom of traders/distributors, but which are designed to enhance interbrand competition, may be compatible with Article 101. Further, whether online selling, which is now more developed, requires the same protection as that which was afforded to it in the 2010 Guidelines, or whether it is now bricks and mortar stores that require greater protection.[168]

### iii. Clarifying the role of the VBER as a safe harbour

In most competition systems, different types of antitrust analysis are employed to achieve the laws underpinning objectives and to balance the desire for the competition rules to be accurate and consistent, yet also to be clear, predictable, transparent, administrable and not too costly to apply. A mixture of rules and standards[169] are therefore frequently employed to identify anticompetitive or restrictive conduct, and to distinguish it from procompetitive or competitively neutral conduct. Antitrust systems may therefore use per se rules of legality or safe harbours to preclude challenges to conduct that always, or ordinarily, is believed to have benign or procompetitive effects. Such rules provide valuable legal certainty to business officials by identifying 'safe harbours' in which they can operate without attack and allow them to avoid the expenditure of resources to assess the impact of practices that usually improve competition or, at least, do not endanger it.

Against this backdrop, the Guidelines could do more to emphasise the role of the VBER as a safe harbour for agreements that usually produce efficiencies and are unlikely to

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[166] G Amato, *Antitrust and the Bounds of Power* (Hart Publishing, 1997), 48–49.

[167] Case C-234/89, note 33.

[168] See note 12 and text.

[169] Including, rules or presumptions against certain conduct, rules or presumptions in favour of certain conduct, standards requiring a more complex, multi-faceted analysis and/or intermediate types of analysis, see A Jones and W Kovacic, 'Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework' (2017) 62(2) *Antitrust Bulletin* 254.

harm competition, and to act as an incentive to the conclusion of such agreements. By stressing that the VBER would create error risks were it to be drawn too broadly (and because its withdrawal is not always easy and is rarely a priority for a competition agency), the point would be reinforced that an agreement falling outside of its scope does not necessarily infringe Article 101. Rather, it only means that the application of the safe harbour is not warranted and individual analysis of the agreement in the context in which it is operated is required (usually a matter for self-assessment).

The Guidelines should retain guidance on when the mechanisms for withdrawing the benefit of the VBER might be used and how that might occur in practice.

### iv. Creating a clearly identified, and justified, list of hardcore restraints

A presumption of illegality is applied to hardcore restraints identified in Article 4. Many antitrust systems rely on rules, or presumptions, of illegality to condemn certain behaviour. Like safe harbours such rules serve important ends, particularly the attainment of procedural economy and the clear prohibition, and deterrence, of patently anticompetitive behaviour. When applied in such cases, administrative savings may outweigh the cost of small false positives and exceed the efficiencies that can be derived from requiring a more comprehensive antitrust analysis. To achieve these outcomes, Article 4 should be confined to restraints which are highly likely to restrict competition and highly unlikely to produce efficiencies which offset the harmful effects.[170] To demonstrate this, it would be helpful if the Guidelines could provide an explanation of why 'hard core' classification is justified for each restraint identified[171] – why they are likely to harm competition or market integration and to lack redeeming virtues in most cases (why efficiency arguments are likely to be unjustified). This would help to rationalise the presumption of illegality applied, to illustrate its consistency with Article 101's underpinning objectives, at the same time as shining light on what might be required to rebut the presumption (see v below).

To ensure that the VBER achieves its objective of providing legal certainty, the list of hardcore restraints should also be clearly drawn.

*Current framework*. It has been seen in Section 2 above that a concern has been that VBER Article 4 and the current Guidelines do not provide sufficient clarity on the question of whether certain restraints which are now being used with greater regularity constitute hardcore restraints – in particular whether Article 4 encompasses certain limits on online selling, for example through marketplace bans, prohibitions on the use of price comparison tools and restrictions on online advertising. As a result, some uncertainty exists as to whether and if so when use of such restraints, especially when used in the context of a SDS, deprives an agreement of the VBER's safe harbour. In addition, it has been questioned whether statements in the 2010 Guidelines that dual pricing and restrictions on online selling which do not comply with

[170] In the US, the per se rule is reserved for agreements which theory and experience establishes always, or almost always, tend to restrict, and decrease competition – that have manifestly anticompetitive effects and lack any redeeming virtues, see for example, *Continental TV, Inc v GTE Sylvania* 433 US 36 (1977) (clarifying that rule of reason is the prevailing and presumptive standard) and *Leegin Creative Leather Products Inc v PSKS Inc,* 550 US 554 (2007). But in relation to RPM, see for example, A MacKay, and D Smith, 'The Empirical Effects of Minimum Resale Price Maintenance' (June 16, 2014). Kilts Center for Marketing at Chicago Booth – Nielsen Dataset Paper Series 2-006, available at SSRN: https://ssrn.com/abstract=2513533 (estimating the empirical effects of RPM post-*Leegin* and that consumers are worse off in rule of reason states as welfare decreased and prices increased). In cases where harm is not highly likely and efficiencies highly unlikely, art 5 may be available as an alternative, see note 27.

[171] See Guidelines, note 2, para 224 (in relation to RPM).

the principle of equivalence constitute hardcore restraints, are compatible with Article 4 and the Court of Justice's judgment in *Coty*.[172]

*Updating and clarifying the Guidelines*. *Pierre Fabre* and *Coty* establish that although a prohibition (or *de facto* prohibition) on online selling constitutes a hardcore restraint within the meaning of Articles 4(b) and (c), other limitations on online selling are not prohibited unless they operate in practice as an absolute prohibition on online selling. In line with these cases, the Guidelines should therefore make this position clear and that, consequently, some online restraints, including dual pricing practices, limitations on online selling that are not overall equivalent to the criteria imposed in brick and mortar shops in a SDS, marketplace bans and restrictions on the use of price comparison tools and online advertising, do not in general constitute hardcore restraints. The only exception would be if it could be established that the restriction, as was the case in *Pierre Fabre*, operates in practice as a prohibition on online selling (for example, where combined with other restraints in the agreement or taking account of remaining avenues of online selling available to the distributor, the restraint operates as a *de facto* prohibition on online selling). The Guidelines should also clarify that Article 4 applies only to absolute prohibitions on online selling, not provisions which 'substantially' limit online selling.[173] Extending the prohibition to provisions which substantially restrict online selling would detract from a central goal of the VBER to provide legal certainty.

*Policy change*. As dual pricing provisions, limitations on online selling that are not overall equivalent to the criteria imposed in brick and mortar shops in a SDS, marketplace bans and restrictions on the use of price comparison tools and online advertising do not constitute hardcore restraints, unless amounting to a *de facto* prohibition on online selling, Article 4 would need to be redrafted if it were thought that any such provision should constitute hardcore restraints. Any such extension of the list of hardcore restraints should be justified by experience or theory demonstrating that such provisions create a high risk to competition and a low likelihood that efficiencies would offset such harm.

*Simplification of Article 4*. To simplify Article 4, and increase the legal certainty provided by the VBER the Commission could consider removing Articles 4(c) and (d) from the new block exemption. Indeed, it appears that restraints on active and passive selling by retail members of a SDS to end users, or to other authorised distributors, are in any event prohibited by the prohibition on territorial or customer restraints set out in Article 4(b). This could also help to dispel the view that SDSs warrant fundamentally different treatment to other vertical agreements under the VBER.

### v. Clarifying when hardcore restraints can be justified

To mitigate against the risk that the regime deters agreements which may result in efficiencies in distribution and/or help firms to develop or penetrate new markets, the Guidelines should take further steps to reiterate that even hardcore restraints do not necessarily infringe Article 101.

Currently, the Guidelines draw a strong parallel between hardcore restraints and object restraints. Although the current Guidelines do provide some guidance as to when hardcore restrictions fall outside of Article 101(1) or fulfil the conditions of Article 101(3), new Guidelines could however do more:

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[172] Case C-230/16, note 64.

[173] See discussion of *Asics* in Sections 2.D and E above. The equivalence principle also detracts from the principle of legal certainty, see note 62.

a) To clarify the difference between hardcore and object restraints. Hardcore restraints are those listed in the VBER. Object restraints, in contrast, cannot be listed.[174] Rather they are identified only through an analysis of the purpose of the agreement, taking account of both its clauses and the legal and economic *context* in which it operates.[175] Only if this reveals a sufficiently deleterious impact on competition can a restriction of competition by object be identified (as with 'hard core' classification[176] it must be clear why object restraints are highly likely to be sufficiently deleterious to competition or market integration).[177] Consequently, even though agreements incorporating RPM and territorial and online selling restraints are liable in principle to be found to pursue a restrictive objective, they may still be found not to be restrictive of competition by object if, following an analysis of the relevant context, the restraints are established to be plausibly necessary to achieve a legitimate procompetitive objective.[178] Nonetheless, to date there is no case involving an ordinary vertical agreement (rather than an intellectual property (IP) licensing agreement) in which the Commission (or EU Courts) has been prepared to accept on the facts that either ATP or RPM is not restrictive of competition by object. More guidance on this issue would consequently be helpful. Although paragraphs 60-61 of the current Guidelines provide some guidance as to when, for example, territorial restraints may fall outside 101(1) (where a manufacturer needs to encourage substantial investments by a distributor in order to start developing a market) the guidance is not comprehensive and there is no corresponding or equivalent guidance in relation to RPM. This seems to suggest (without explanation as to why) that the Commission does not envisage circumstances in which the legal and economic context might warrant a finding that RPM does not restrict competition by object. The Guidelines do accept, however, that in exceptional circumstances RPM might generate efficiencies cognisable under Article 101(3). This approach is not easy to follow; in one scenario (territorial restraints) the Guidelines recognise that justifications are cognisable and relevant to the characterisation exercise required to identify by object restraints under Article 101(1), while in another (RPM) that (broadly the same) efficiency justifications are cognisable only under Article 101(3).
b) To clarify how Article 101(3) might be applied, especially when hardcore restraints are likely to create economic benefits and, crucially, are likely to be found to be *indispensable* to the attainment of efficiencies created. Although the current Guidelines do recognise that hardcore restraints may sometimes satisfy the conditions of Article 101(3), the narrow examples provided, combined with the discouraging decisional practice in this area,[179] do not make it clear how far the

[174] See Case C-209/07, *BIDS* EU:C:2008:467, Trstenjack AG.

[175] See note 36 and text and, for example, Case C-591/16 P, *H Lundbeck A/S v Commission* EU:C:2021:243 – agreements restricting competition can be identified only through an analysis of the content of its provisions, the objectives it seeks to ascertain and the economic and legal context of which it forms part. The contextual analysis is not as detailed as that required to identify actual or likely restrictive effects. Rather, it is 'limited to what is strictly necessary in order to establish the existence of a restriction of competition by object', Case C-373/14 P, *Toshiba v Commission* EU:C:2016:26, para 29.

[176] See note 171 and text.

[177] See *CB* note 36.

[178] See also Case C-307/18, *Generics (UK) Ltd v Competition and Markets Authority* EU:C:2020:52, para 107 and Case C-228/18, *Budapest Bank and others v Commission* EU:C:2020:265, para 82.

[179] In its decisions, the Commission has generally taken the view that hardcore restraints are unlikely to benefit consumers or to be indispensable to achieve the efficiencies specific to the

Commission has moved from the view expounded in the Article 101(3) Guidelines, that hardcore restraints are unlikely to create objective economic benefits, to benefit consumers, or to be indispensable to the attainment of any efficiencies created by the agreement.[180] Indeed, by referring to the large measure of substitutability that exists between different vertical restraints,[181] the 2010 Guidelines suggest that indispensability is likely to present a problem to those seeking to rely on Article 101(3) to justify hardcore restraints as they will need to demonstrate that no other vertical restraint would be sufficient to achieve the efficiencies alleged. The problems of defending a hardcore restraint under Article 101(3), is also compounded in the Commission's framework by the fact that it is difficult to establish how the beneficial effects of an agreement offset anticompetitive effects which, in object cases, have been assumed, but not established. This latter point emphasises the importance of step a).

### vi. Guidance and development of doctrine where the VBER does not apply

The safe harbour provided by the VBER and the presumption of illegality created for hardcore restraints provide important short-cuts for antitrust analysis of vertical agreements and the central planks of the EU system. However, they cannot provide legal certainty for every vertical agreement. On the contrary, a number of vertical agreements, or individual restraints within a vertical agreement, will require individual analysis to assess compatibility with Article 101 – for example, where the VBER market share thresholds are not satisfied, where Article 5 restraints are incorporated within the agreement, or as seen in section v above, where an agreement contains hardcore restraints.

Nonetheless, a modern framework for analysing vertical agreements under Article 101 has not been developed. Rather, since modernisation Commission enforcement has been sparse and focused principally on established hardcore restraints. Further, it is seen from the discussion in Section 2 above, that some cases at both EU and national level have been resolved through commitments and settlements (which reduce the chance of judicial review)[182] and that, in general, the focus of the analysis has been on

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agreement (which are likely to be achievable by other practicable and less restrictive means). In COMP/3344, *Grundig*, 23 September 1964, for example, it was the clauses resulting in Consten being granted the exclusive right to sell Grundig's products in France which caused the Commission to find that the agreement both infringed Article 101(1) and did not meet the Article 101(3) criteria (it refused an exemption). (The result was that Grundig acquired Consten.) Subsequently, the Commission has not proved receptive to any argument that these types of clauses may be essential to prevent free-riding on the distributors' services or to ensure that a product is successfully launched in a new market, see for example COMP/28.282, *The Distillers Co Ltd*, note 36, COMP/35.706 and 36.321 *Nintendo*, [2003] OJ L255/33, *aff'd* Case T-12/03, *Itochu v Commission* EU:T:2009:130, and Case T-13/03, *Nintendo and Nintendo of Europe v Commission* EU:T:2009:131 (in which the Commission relied on *Grundig* when it stated that agreements conferring ATP, would not meet the criteria of Article 101(3) as the provisions were not indispensable to realise the potential benefits of the exclusive distribution system) and Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* EU:T:2006:265 (where the General Court held that: the Commission's decision to refuse an exemption to a dual pricing system operated by Glaxo which prevented parallel trade was fundamentally flawed; and the Commission had not adequately discharged its duty under Article 101(3), see further note 129 and text).

[180] Guidelines on the application of Article 81(3) [now 101(3)] (Article 101(3) Guidelines) [2004] OJ C 101/97, para 46.

[181] Guidelines, note 2, para 109.

[182] Which do not provide the same opportunities for the development and clarification of the law, as fully reasoned decisions, see further note 190 and text.

the question of whether the provisions constitute hardcore (or object) restraints, rather than on how they impact on competition.

An important role of the 2022 Guidelines could therefore be to develop the general framework and to provide a more cohesive structure for Article 101 analysis in cases where the safe harbour does not apply. They should also confront head on how existing jurisprudence, can be interpreted, or evolve, to fit within that framework. This will require:

a) An explanation of how object restraints are to be identified (see further section v above), which reiterates the restrictive nature of this category of analysis – it is reserved exclusively for agreements which inherently reveal a sufficient degree of harm to competition. It is only then that a claimant can be exempted from demonstrating actual or likely anti-competitive effects under Article 101(1).
b) An explanation of how it is to be determined whether a vertical agreement has restrictive effects within the meaning of Article 101(1) (assessed against the objectives and perhaps benchmarking it against, and ensuring consistency with, the analysis conducted in relation to vertical mergers[183]). The new Guidelines could elaborate on the framework currently set out in Part VI.1 of the 2010 Guidelines and provide guidance on how a theory of harm, and actual or likely anticompetitive effects, is to be established. They could provide further information on how it should be determined whether the conditions exist for one of the parties to the vertical agreement to exercise sustained market power through foreclosure (input or customer) or coordination or collusion (explicit or tacit, by suppliers or retailers), and how the agreement in some way maintains, enhances, or facilitates the exercise of that market power.
c) An explanation of how Article 101(3) is to be satisfied – in particular, when efficiencies (for example, through internalising double mark-ups, by preventing free riding, encouraging investment in customer services, permitting a cost effective alternative to service contracts, facilitating market entry for new firms and brands or otherwise aligning the incentives of the parties), are likely to enhance the ability of the firms to act procompetitively to the benefit of consumers, thereby counteracting the adverse effects on competition which the agreement might otherwise have. As seen in section v above, an especially important issue is how the indispensability criterion is to be applied.
d) An explanation of how jurisprudence dealing with intrabrand restraints, including exclusive distribution, franchising and especially SDSs fits within this general framework. Currently the analysis in these cases is not easy to map onto the general framework set out. For example, the case law dealing with selective distribution adopts its own rather specific analysis to determine whether restraints are necessary to achieve its objectives and so whether such a system restricts competition within the meaning of Article 101(1). Two problems exist with this case law. First, it is not easily explicable as either object[184] or effects analysis. Rather, the analysis adopted seems to serve as a mechanism for conducting structured, truncated, and specific effects analysis. Secondly, it does not typically inquire whether the parties have market power or whether the agreement affects 'actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability'.[185] Rather, the

[183] The same methodological approaches and concepts could be applied (taking account of the different *ex ante* and *ex post* nature of the review), so eliminating any 'concentration privilege', see de la Mano and Jones, note 159.

[184] See, for example, Case C-67/13P, *CB* note 36.

[185] Guidelines, note 2, para 97 and Article 101(3) Guidelines, note 180, paras 24-26.

approach is to characterise intrabrand restraints as restrictive of competition, unless objectively necessary and proportionate, irrespective of whether the parties have market power. Accordingly, this approach seems to miss a critical step in the appraisal, namely, identifying how the agreement restricts 'competition on the market to the detriment of consumers'[186] and is hard to reconcile with a number of statements in the Guidelines. In particular, that for 'most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, i.e. if there is some degree of market power at the level of the supplier or the buyer or at both levels'[187] and that Article 101(1) analysis should take account of a number of factors, especially, the nature of the agreement, the market position of the parties and competitors and buyers, entry barriers, the maturity of the market, the level of trade, and the nature of the product.[188] It is peculiar that the parties' market power is relevant to the application of the VBER (reflecting the view that vertical restraints are unlikely to pose competition problems where interbrand competition is strong and where agreements involve firms without significant market power), but not in the application of Article 101(1). In so far as the framework in the Guidelines and the case-law seem difficult to reconcile, the new Guidelines could, like the Commission's Guidance Paper on enforcement priorities in applying Article 102,[189] serve to underscore the theories of harm that would serve as the normal standard for the Commission to intervene in relation to a vertical agreement.

This kind of guidance would be reinforced if the Commission were to decide some cases involving vertical agreements which do not incorporate hardcore or established object restraints.[190] This could help to develop the Article 101 structure (rather than the limits of the category of object and hardcore restraints), quell the perception that effects analysis is unmanageable and disorderly and build principles, to be tested before the EU courts, demonstrating how anticompetitive effects in terms of parameters of competition can be identified under Article 101(1) and balanced against procompetitive effects identified under Article 101(3).

### vii. Reordering or restructuring the Guidelines

Some restructuring of the Guidelines might help to bolster the proposals set out above, designed to demonstrate how EU competition law objectives have shaped the approach towards vertical agreements under Article 101(1), Article 101(3) and the VBER and to ensure greater legal certainty both in the application of the VBER and in the individual application of Article 101. For example, after setting out the goals of EU competition law and dealing with vertical agreements which generally fall outside the

[186] Guidelines, note 2, para 7.

[187] ibid, para 6.

[188] ibid, paras 111-121.

[189] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty [now Article 102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2.

[190] Enforcement, especially by the Commission, plays an important 'clarification' function, ensuring that the meaning of the law is developed and elucidated through cases which may be appealed to the EU Courts, see W Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3 and A Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' in M Bergström, M Iacovides, M Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing, 2016). See for example, the CMA's analysis in comparethemarket, https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses, 19 November 2020.

scope of Article 101 (currently in Parts I and Part II), the Guidelines could go straight on to set out how, set against identified goals, vertical agreements may harm and benefit competition (the negative and positive effects of vertical agreements), and how those factors guide Article 101(1) and 101(3) analysis generally (currently in Part VI). If the Guidelines, started with general principles for analysis of Article 101(1), prior to considering when the safe harbour in the VBER and Article 101(3) applies, they would help to reinforce the message that an agreement falling outside of the scope of the VBER does not necessarily infringe Article 101.

# 4. Conclusions

This report analyses how identified online sales restrictions and online advertising restrictions have been treated in cases since 2010 (focusing on restrictions on the use of third-party online platforms and price comparison websites, as well as on brand bidding in online advertising and dual pricing provisions). It notes that although some divergences have occurred in the jurisprudence at the national level, the Court of Justice's judgments in *Pierre Fabre* and *Coty* have increased clarity in this area.

The report makes a series of recommendations designed to increase legal certainty by clarifying, in the light of post 2010 case-law, when the VBER applies, and how Article 101 analysis is to be conducted when the VBER does not apply. It recommends that the Commission articulate more clearly in new Guidelines the objectives underpinning the rules, and how those objectives shape the interpretation and application of Article 101(1) and Article 101(3) to vertical agreements and the crafting of the VBER. It proposes a clearly identified and tightly-defined, narrow list of hardcore restraints and suggests some restructuring of the Guidelines to support the proposals.

# Abstract

In 2010 the Commission reviewed and replaced the generic block exemption applying to vertical agreements, Regulation 2790/1999, and its accompanying Guidelines, with a new Vertical Block Exemption Regulation (VBER), Regulation 330/2010, and Guidelines on Vertical Restraints. The fast growth of e-commerce since 2010 has, however, led to changes in the ways that suppliers distribute their products and services and to the types of restraints incorporated in distribution agreements. As many of these newer restraints are not addressed, or fully addressed, in the current VBER or Guidelines, the result has been a reduction in the legal certainty that the current regime aims to provide and an increase in compliance costs.

The purpose of this report is to analyse how certain online sales restrictions and online advertising restrictions incorporated into vertical agreements have been appraised under Article 101 in cases since 2010 (at both the EU and national level), to identify any divergences that have occurred in that jurisprudence and to consider how such restraints should be analysed under the new regime. It makes a series of recommendations designed to increase legal certainty by clarifying, in the light of post 2010 case-law, when the VBER applies, and how Article 101 analysis is to be conducted when the VBER does not apply. The report focuses on restrictions on the use of third-party online platforms and price comparison websites, as well as on brand bidding in online advertising and dual pricing provisions.


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