On-Topic | Concurrences N° 1-2021

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On-Topic

The VBER and Vertical Guidelines: Revision or Reform? Reflection on critical issues

ABSTRACT

While the European Commission is exploring a possible revision of the VBER and of the Vertical Guidelines and assessing the various policy options proposed, this volume aims to reflect on some of the relevant issues and subjects in the VBER, some more controversial than others, but all having been over the years at the centre of the debates on the legal framework applying to vertical restraints. Hopefully this set of articles will constitute a useful contribution to these debates.

Alors que la Commission européenne étudie une éventuelle révision du VBER et des lignes directrices verticales et évalue les différentes options politiques proposées, ce volume vise à réfléchir à certaines des questions et sujets pertinents du VBER, certains plus controversés que d'autres, mais tous ayant été au fil des ans au centre des débats sur le cadre juridique applicable aux restrictions verticales. Nous espérons que cet ensemble d'articles constituera une contribution utile à ces débats.

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Introduction

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1. Article 101(1) of the Treaty on the Functioning of the European Union (the "Treaty" or "TFEU") prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, unless they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, in accordance with Article 101(3).

This prohibition applies notably to "vertical agreements," i.e., agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice in question, at different levels of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

The European Commission is entitled, under Regulation No. 19/65/EEC of the Council, to apply Article 101(3) of the Treaty by regulation to certain categories of agreements and concerted practices ("block exemption regulations") falling within Article 101(1) of the Treaty. The Commission used these powers by adopting Commission Regulation (EC) No. 2790/1999, the first "Vertical Block Exemption Regulation," meanwhile replaced by Commission Regulation (EU) No. 330/2010, which shall expire on 31 May 2022. Together with the Regulation, the Commission also adopted a set of orientations on the assessment of vertical agreements not only under the Vertical Block Exemption Regulation ("VBER"), but also under Article 101(1) and Article 101(3) TFEU, to the extent that even if an agreement does not fall under the VBER exemption, it may nevertheless benefit from an exemption under Article 101(3).

The Commission has undertaken an evaluation of the VBER and of the Vertical Guidelines with a view to determine whether, in case the VBER is to be renewed, it should be revised.

The truth is that since the adoption of the 2010 VBER a substantial number of market developments have occurred largely due to the growth of e-commerce and online services—moreover substantially increased in the current pandemic confinement times—which calls for changes in the vertical restraints legal regime.

These changes amount to more than simple adjustments and may sometimes require different assessments of the situations covered by the VBER and even the consideration of others that arose in the context of the market developments referred to above. Meanwhile, the case law of the EU courts also brought new light to old issues and legal concepts which should also be reflected in the VBER.

Indeed, a consensus seems to exist as to the need to revise—some would say reform—both the VBER and the accompanying Vertical Guidelines, which also provide, as noted by the Commission, "*a common framework of assessment for national competition authorities and national courts.*"

In fact, to the extent that vertical agreements affect trade between Member States, national competition authorities ("NCAs") and national courts are bound by the directly applicable provisions of the VBER. The current evaluation takes into account not only the Commission practice but also that of the NCAs as well as the case law of national courts. While the Vertical Guidelines do not bind NCAs or national courts, they are usually taken into account in the assessment of vertical agreements under Article 101 of the Treaty.

2. The Commission identified a number of problem areas and the way in which it intends to address them. In its Inception Impact Assessment of 23 October 2020, the Commission indicates that it "*will assess policy options for a potential revision of the VBER in certain areas*" notably by means of the following:

> "*A. (…) clarifying and simplifying the rules, including incorporating recent case law on the substantive conditions of Article 101(3) and filling in gaps in the rules that would otherwise create scope for divergent interpretations notably as regards restrictions that have emerged or that have become more prevalent since the adoption of the current rules (e.g. restrictions on the use of price comparison websites, online advertising restrictions) and the treatment of new market players, such as online platforms in certain areas of the rules (e.g. agency, dual distribution)* (…)

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B. (…) addressing issues raised in the following areas:

a. Improving clarity in relation to the treatment of possible efficiencies resulting from resale price maintenance ('RPM'), which is a hardcore restriction under the VBER (…)

b. Reducing costs and administrative burden by not excluding tacitly renewable non-compete obligations from the benefit of the block exemption, as identified in the evaluation, to the extent that the buyer can periodically terminate or renegotiate the agreement.

C. (…) *exploring a possible revision of the current rules in the following areas* (…)*:*

a. Dual distribution (i.e. situations in which a supplier sells its goods or services directly to end customers, therefore competing with its distributors at retail level) (…)

b. Active sales restrictions. Agreements aimed at restricting the territory into which or the customers to whom the buyer can sell are considered hardcore restrictions not covered by the VBER. (…)

c. Indirect measures restricting online sales. Online sales are generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are considered hardcore restrictions not exempted by the VBER. (…)

d. Parity obligations (so-called most-favoured nation clauses) (…)"

3. While, as noted above, there is a consensus as to the need to revise the VBER and the Vertical Guidelines, the same is not true as regards the policy options that will govern the changes to be made and the scope or breadth thereof. The purpose of this volume is to review with a fresh look, in short, straight to the point articles, some of the issues that are being considered by the Commission in the assessment process.

Some of the issues listed by the Commission will be addressed, certain of them more controversial than others. Topics like the distinction between agents and distributors, the exchange of information in dual distribution systems, the prohibition of resale on marketplaces will be dealt with. The analysis will also take us to a discussion of subjects such as the notion of restriction of competition, which in turn will open the way to a critical review of issues as debated as RPM and most-favoured-nation (MFN) or parity clauses.

4. The notion of restriction of competition has been the object of discussion and controversy over the years. As put by Pablo Ibáñez Colomo in his article—"Vertical restraints after *Generics* and *Budapest Bank*"—"*the essence of the uncertainty concerned the nature and intensity of the assessment that is required to establish whether an agreement falls within the scope of Article 101(1) TFEU by its very nature.*" In fact, the European Court of Justice ("ECJ" or "Court") stated that "*as regards practices characterised as 'restrictions by object', there is no need to investigate their effects nor a fortiori to demonstrate their effects on competition in order to classify them as 'restrictions of competition', within the meaning of Article 101(1) TFEU* (…) *though mere unsubstantiated allegations are not however sufficient.*"[1]

Indeed, the Court in *Generics* stated that:

"*It is clear from the Court's case-law that the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to some concerted practices between undertakings which reveal, in themselves and having regard to the content of their provisions, their objectives, and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects, since some forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition* (…)"[2]

"*When determining that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question* (…)"[3]

Moreover, the Court pointed out that "*where the parties to that agreement rely on its pro-competitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object'* (…)*, in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a 'restriction by object.'*"[4]

Similar propositions and statements may be found in numerous paragraphs of the *Budapest Bank* judgement, where, in sum, the Court stated that "*Indeed,* (…) *in order to justify an agreement being classified as a restriction of competition 'by object', without an analysis of its effects being required, there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition.*"[5]

This much needed clarification brought by *Generics* and *Budapest Bank* is explored by Pablo Ibáñez Colomo in the context of vertical restraints, with a particular focus on brand protection and free-riding issues, as well as on the special features surrounding MFN clauses.

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1 Judgement of 30 January 2020, *Generics (UK) Ltd and others v. Competition and Markets Authority*, Case C-307/18, EU:C:2020:52, paras. 64 and 65.

2 Ibid., para. 67.

3 Ibid., para. 68.

4 Ibid., para. 103.

5 Judgement of 2 April 2020, *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others*, Case C-228/18, EU:C:2020:265, para. 76.

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The author then elaborates on the implications of these developments as regards the review of the VBER. In particular as regards RPM, he reflects on whether the Court, if called to examine such a case, would extend to this usually considered "by object" restriction of competition the apparently difficult to reconcile approach followed in *Generics* and *Budapest Bank.*

This is, no doubt, a stimulating and thought-provoking text which is breaking new ground to be hopefully followed in the future, despite the too broad approach of the notion of "by object" restrictions that is being used in general by the European Commission and EU NCAs, leading notably to a situation of notorious over-enforcement.

5. Speaking of RPM, Luc Gyselen reflects on the intricacies of the subject in "Revisiting the resale price maintenance issue under EU competition law."

As noted above, RPM has been consistently considered a "by-object" restriction of competition. The Commission stated in its 23 October 2020 Inception Impact Assessment its intention of addressing issues notably with regard to RPM, "*improving clarity in relation to the treatment of possible efficiencies resulting from resale price maintenance ('RPM'), which is a hardcore restriction under the VBER. In this context, the Commission will explore the possibility to engage with businesses in discussions on concrete instances regarding the conditions under which efficiencies for RPM can be claimed and the evidence that is required to satisfy the conditions of Article 101(3) TFEU.*"

Luc Gyselen goes as far back as September 2008, at the time the European Commission had started the review of the 1999 VBER, Regulation No. 2790/1999, whose Article 4(a) already considered fixed or minimum RPM clauses as "hardcore" restrictions of competition, the author having "*offered some thoughts on how the EC might want to look at RPM under the next VBER*" at a conference organized by the Austrian competition authority. Recalling that in 2007 the US Supreme Court had, in the *Leegin* case, considered that RPM was no longer per se unlawful and should be assessed thereafter under the rule of reason, thereby overruling a 1991 long-standing judgement in *Dr. Miles*, the author acknowledges that nothing seems to have moved the Commission which, in 2010, issued the current VBER, Regulation No. 330/2010, Article 4(a) having remained unchanged.

Even though the Commission acknowledges in para. 225 of the 2010 Guidelines that, in certain cases, RPM may "*lead to efficiencies*" and are susceptible of being exempted under Article 101(3) of the Treaty, the fact is that both the Commission and NCAs have increasingly continued to decide against RPM practices, as documented by the author.

Luc Gyselen then revisits some RPM related issues and provides his own views on how they should be handled, with interesting considerations to the attention of the Commission regarding "RPM in fulfillment contracts: Inapplicability of Art. 101 TFEU"; "Carve-out: Recommended or maximum resale prices block exempted"; and "The free-rider rationale for RPM schemes under Art. 101(3) TFEU".

The author also addresses the issue of the "by object" nature of RPM, as it is usually characterized ("Principle: RPM a 'by object' infringement of Art. 101(1) TFEU?"), and reviews the case law, notably *Cartes Bancaires*[6] and *Generics.*[7] He notes strikingly that: "*To our knowledge, the EC has never convincingly explained why 'pure' RPM arrangements, i.e., not used by a manufacturer as a tool to limit parallel trade between Member States, always lack a plausible explanation and are therefore—in light of their content and objective and the context in which they arise—so harmful for competition that they should be labeled as 'by object' restrictions under Art. 101(1) TFEU.*"

And on the presumption of RPM as an anti-competitive restriction, he further argues that "*an analysis of the legal and economic context in which a manufacturer operates these schemes is capable of rebutting or neutralizing this presumption.*"

While the Commission admits—let us recall it—in para. 225 of its 2010 Vertical Guidelines that "*RPM may lead to efficiencies*," it concludes so, coherently, within the framework of a possible exemption under Article 101(3) of the Treaty, which it has difficulty to find in any case.

But, it must be noted, as the recent case law discussed above highlights, that the assessment of procompetitive effects has its place in the more restrictive "by object" approach. Advocate General Bobek puts it clearly in his Opinion in the *Budapest Bank* case: "*It is, nevertheless, clear that if the elements that the authority observes when looking at the legal and economic context of an agreement alleged to constitute a restriction 'by object' point in different directions, an analysis of its effects becomes necessary. In that case—as in any case where an agreement is not deemed to be anticompetitive by object—a fully fledged effects analysis must be carried out for the purposes of Article 101(1) TFEU. The objective of that analysis is to determine the impact that the agreement may have on competition in the relevant market. In essence, the authority has to compare the competitive structure in the market caused by the agreement under scrutiny, with the competitive structure which would have prevailed in its absence. The analysis cannot, therefore, stop at the mere* capability *of the agreement to negatively affect competition in the relevant market, but must determine whether the* net effects *of the agreement on the market are positive or negative.*"[8]

And concludes: "*Accordingly, any time an agreement appears to have ambivalent effects on the market, an effects analysis is required. In other words, when a possible*

6 Judgement of 11 September 2014, *Cartes Bancaires (CB) v. European Commission*, Case C-67/13 P, EU:C:2014:2204.

7 *Supra*, note 1.

8 Opinion of Advocate General Bobek delivered on 5 September 2019 in *Budapest Bank*, Case C-228/18, *supra* note 5, para. 50.

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procompetitive economic rationale for an agreement cannot be ruled out without looking at the actual effects on the market, that agreement cannot be classified as restrictive 'by object.'"[9]

Interestingly, the advocate general further states the following: "[T]*he qualification of an agreement as restrictive by object or by effect also has no impact on the possibility of applying an exemption under Article 101(3) TFEU. There is nothing in the wording of that provision to suggest that exemptions can only apply to agreements that restrict competition by effect.*"[10]

This is a debate for sure to be continued.

6. The European Commission, in its Inception Impact Assessment, acknowledges that "*the evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g., other platforms or other online or offline intermediaries)*." Accordingly, the Commission proposes to address issues regarding parity clauses by "*exploring a possible revision of the current rules*."

Avantika Chowdhury brings an economic approach to this subject in "MFN clauses and distribution agreements: In need of an effects-based approach."

The author reviews the hotel booking cases which, in her words, "*led to widely different and sometimes inconsistent approaches and findings.*" The debate is not over as regards the impact of "wide" or "narrow" MFNs on the competition conditions on the online hotel booking sector.

Avantika Chowdhury considers that an *"economic approach would strongly support that MFN clauses benefit from VBER*," i.e., they should not be considered hardcore restrictions. "*From a theoretical perspective, it is well recognised that MFNs can have both anticompetitive and pro-competitive effects, and that the impact of MFNs depends on a number of factors. In this respect, MFN clauses are no different to other vertical restraints such as selective distribution agreements.*" But where that is not possible due to higher market shares, should MFNs be assessed under a "by object" or an effects-based approach?

The author carries out an interesting discussion of various instances that are scrutinized under the most appropriate approach of the two, and comes to the conclusion that "*the lessons from recent cases and the wider economic literature and the various ex-post analyses all suggest the latter, i.e. the assessment of MFN clauses under Article 101 warrants an effects-based approach.*"

The author ends with an interesting note on free-riding, whose prevention, she says, "*is one of the common pro-competitive benefits of MFNs, and indeed of many other vertical agreements.*" And concludes: "*Whatever the method, it is relevant to take into account the inherent challenges in providing concrete evidence of free riding occurring in the specific market. Arguably, what is necessary is to show the scope or risk of free riding rather than actual free riding (assuming the MFN or selective distribution in place, one is less likely to observe actual free riding). It is also necessary to account for such free riding analysis in the competitive assessment of the relevant agreement under Article 101(1) and not only under Article 101(3). It is particularly relevant for vertical agreements also due to the various pro-competitive effects and rationale for such agreements.*"

This is certainly a stimulating complement to the two preceding articles by Pablo Ibáñez Colomo and Luc Gyselen offering an economic perspective notably to the discussion around the "by object"/"by effect" subject matter.

7. As noted above, the evaluation of the VBER identified problems that the European Commission intends to address for example with regard to "*the treatment of new market players, such as online platforms in certain areas of the rules (e.g. agency, dual distribution)*."

Mario Siragusa and Alice Setari, given the somewhat rigid traditional notion of agent and the "*increase in different forms of modern agents*" question and discuss whether "*antitrust agency principles apply to new types of agency-like arrangements*." In "Agents and distributors: Should definitions be revised?" they propose to review "*whether changes are needed to answer more clearly the question of when distribution arrangements with new forms of modern intermediaries (such as online platforms or fulfillment wholesalers) constitute 'genuine' agency agreements.*"

Since the Vertical Guidelines criteria may be seen as "*excessively rigid in relation to these new forms of online and offline distribution*," the authors carry out a thorough analysis thereof, in particular as to "*whether and when online platforms can qualify as 'genuine' agents*," notably as regards the most problematic issues, which concern "*market-specific investments, and the existence of strong bargaining power, multiple principals and the intermediary's autonomous business*" and conclude that "*the VGL already provides an exhaustive framework for analysis*," reason why "*interventions (if any) on the part of the Commission should arguably be minor.*"

A similar conclusion is reached as regards fulfilment wholesalers, the authors stating, at the end of the review undertaken, that "*the introduction of a generalized exception for fulfillment wholesalers is unwarranted, also because the VGL sets out exhaustively the criteria needed to conduct the assessment.*"

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9 Ibid., para. 81.

10 Ibid., para. 34.

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Overall, the authors consider that—with the exception of the possibly useful "*development of the concept of negligible or economically insignificant risk*"—"*the Commission should arguably pursue a 'hands-off' approach in relation to the 'agency' section of the VGL.*"

8. As already referred to above, the European Commission, in the Inception Impact Assessment, lists dual distribution, which is generally covered by the block exemption, among the areas in which a possible revision may take place: "*It constitutes an exception to the general rule that agreements between competitors are not covered by the VBER, but by the horizontal rules. With the growth of online sales, dual distribution increased significantly and there is a risk of exempting vertical agreements, where horizontal concerns are no longer negligible and the conditions of Article 101(3) TFEU are not satisfied. There may also be a gap in the rules, since market participants that are perceived as being in a comparable dual distribution situation to that of manufacturers or service providers, such as wholesalers and importers, do not benefit from the VBER.*"

Iñigo Igartua and Miguel Troncoso Ferrer, in their article, focus on the specific issue of information exchanges between the supplier and the buyer in dual distribution situations, which, as reported in the Commission's Staff Working Document Evaluation,[11] was singled out by stakeholders, who pointed out the "*insufficient clarity as to whether information exchanges in dual distribution scenarios are to be treated as part of the vertical relationship and can thus be considered as covered by the VBER*" as well as "*a lack of clarity as to what extent or under which conditions information exchanges in dual distribution scenarios are admissible or instead problematic.*"

In "Exchange of information in dual distribution systems," the authors note that in dual distribution it is usual for the supplier to request from its distributors not only certain sales information (stocks, products, etc.), but also information regarding the commercial strategy of the distributor when selling the products. "[T]*his is our focus in this paper*," they say, and continue: "*In almost all cases, this information requirement is unilateral and not a true exchange; the distributor provides sales information to the supplier, but the same does not happen the other way round.* (…) *While this vertical information exchange is very common in 'classic' distribution relationships and does not raise any concern under competition law, in the case of dual distribution, the information requested and provided could be considered 'confidential' or 'sensitive' information, to the extent that the supplier also acts as a distributor and is considered a 'competitor' of its own distributors in the distribution market. This way, the vertical intra-brand competition, which is inherent to all distribution systems (i.e., the competition of suppliers versus retailers over the sharing of the profits of the vertical chain), is enhanced.*"

The authors then address the competition law concerns arising out of this framework, the criteria which should govern this information supply and the application of the VBER. Ultimately this analysis leads to the identification of a number of situations in which vertical information exchanges would give rise to competition concerns, "*but none of them would imply that the VBER should not apply or that such exchanges are problematic by themselves.*"

Finally, they undertake to distinguish dual distribution from online platform distribution, which should be kept separate in their respective analyses.

The conclusions, at the end of the article, list some of the situations reviewed under a compatibility criterion with competition law, which, in their view, "*should not change in the ongoing review of the VBER and Guidelines. It should actually be explained in a clearer and more detailed manner, with a new, specific section on vertical information exchanges in the new guidelines on vertical restraints.*"

9. According to the European Commission, in its 8 September 2020 Staff Working Document Evaluation, "*the evidence gathered* (…) *indicated perceived lack of guidance on the assessment of certain restrictions on sales through third-party online marketplaces and need to update the rules in light of recent case law.*"[12]

The judgement of reference, *Coty*,[13] gave rise to different interpretations notably as to whether the permission of marketplace bans is limited to specific types of products beyond luxury goods. Shortly thereafter the Commission issued a Competition Policy Brief on the application of EU competition rules to marketplace bans. The framework of analysis was summarized as follows: "*In its Coty judgment, the Court of Justice confirmed that selective distribution systems designed to preserve the luxury image of products can comply with Article 101(1) TFEU. Analysis of whether or not a marketplace ban in a selective distribution agreement escapes the application of Article 101(1) TFEU must be based on the so-called Metro-criteria. Even if marketplace bans were to restrict competition in individual cases, they do not constitute a hardcore restriction under Articles 4 b) or 4 c) of the Vertical Block Exemption Regulation.*"

Nathalie Pétrignet and Vincent Lorieul provide in their article—"The prohibition of resale on marketplaces at the time of the Vertical Block Exemption Regulation 330/2010's recasting"—an overview of the subject, undertaking a review of the most relevant case law. They start by recalling the current regime as regards marketplaces: "*While the VBER is silent regarding marketplaces, the Vertical Guidelines state that 'a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier*

11 Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation (SWD(2020) 173 final), 8 September 2020, p. 157.

12 Ibid., p. 204.

13 Judgement of 6 December 2017, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, Case C-230/16, EU:C:2017:941.

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and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.'"

Noting that "*the interpretation of these provisions by the courts has led to several decisions which, in line with the* Pierre Fabre *case law, seemed to drastically limit the possible restrictions on sales on marketplaces*," the authors then review the case law until *Coty*, highlighting the aspects which remained unclear in that judgement.

The authors conclude with a straightforward review of the positions of the Commission in this area and on the possible evolutions of the current legal regime given the apparent consensus on the need to revise the VBER and the Vertical Guidelines. ■

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Vertical restraints after *Generics* and *Budapest Bank*

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I. Introduction

1. The meaning of the notion of restriction of competition seemed elusive for a long time.[1] As a result of the most recent case law, however, most remaining doubts regarding the scope of Article 101(1) TFEU have been clarified. In particular, the rulings of the Court of Justice (hereinafter, the "Court" or the "ECJ") in *Generics*[2] and *Budapest Bank*[3] address and make explicit some aspects that were implicit—and thus not entirely uncontroversial—in previous judgments. In particular, it seems now clear beyond doubt that the pro-competitive effects of an agreement are relevant when considering whether it amounts to a restriction by object.[4] The evaluation of the conditions of competition that would have existed in its absence is also a relevant consideration in this regard.[5] More generally, *Generics* and *Budapest Bank* show that the evaluation of the object of an agreement is a context-specific inquiry (and thus not one based on abstract categories).

2. The purpose of this paper is to examine the impact of these rulings on debates around vertical restraints. The link between the two may not seem obvious, as *Generics* and *Budapest Bank* concerned horizontal agreements. It is submitted, however, that the relevance of these rulings—and the extent to which they clarify the scope of Article 101(1) TFEU—is particularly apparent in the context of distribution agreements. This is so for several reasons. To begin with, vertical restraints have long known to be a plausible source of pro-competitive gains.[6] What is more, they are less likely to have anticompetitive effects. As a result, it is typically the case that they are not prohibited by their very nature, as held by the Court in *Maxima Latvija*.[7] In the same vein, the Commission has long acknowledged, in the successive versions of its guidelines, that vertical restraints are unlikely to give rise to competition issues unless there is insufficient inter-brand competition.[8]

3. With the growing importance of digital markets, second, some vertical restraints that had attracted little attention until recently are now at the forefront of disputes between firms and high on competition authorities' agendas. Of these arrangements, the so-called "most-favoured nation" clauses (hereinafter, "MFN clauses") are probably the ones that have proved more controversial and have given rise to more theoretical and practical discussions. In the absence of any case law specifically addressing their nature and whether (and if so in what circumstances) they amount to a restriction of competition, it is necessary to reason by analogy. In this exercise, the principles deriving from *Generics* and *Budapest Bank* are particularly useful to get an idea of a legal treatment that is consistent with the case law and the logic of the Block Exemption Regulation and the Guidelines.

4. This paper focuses on two key rationales behind vertical restraints, which are the fight against free-riding and the creation and preservation of a brand image. From the very early days, the Court noted that the parties to distribution agreements may include contractual devices to address the risk of opportunistic behaviour.[9]

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* In accordance with the ASCOLA declaration of ethics, I am happy to clarify that I have nothing to disclose.

1 For an overview of the issue, *see* P. Ibáñez Colomo and A. Lamadrid de Pablo, On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know, in D. Gerard, M. Merola and B. Meyring (eds.), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe* (Bruylant, 2017).

2 Case C-307/18 – *Generics (UK) Ltd and others v. Competition and Markets Authority*, EU:C:2020:52.

3 Case C-228/18 – *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others*, EU:C:2020:265.

4 *Generics* (n. 2), para. 103.

5 *Budapest Bank* (n. 3), paras. 82–83.

6 V. Verouden, Vertical Agreements: Motivation and Impact, in *Issues in Competition Law and Policy*, Vol. 3 (American Bar Association, 2008).

7 Case C-345/14 – *SIA "Maxima Latvija" v. Konkurences padome*, EU:C:2015:784, para. 21.

8 Guidelines on Vertical Restraints [2010] OJ C 130/1, para. 6.

9 Case 56/65 – *Société Technique Minière v. Maschinenbau Ulm GmbH*, EU:C:1966:38, 250.

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Thus, in some circumstances, clauses aimed at addressing free-riding conduct may be necessary for the agreement to exist in the first place. As a result, the said agreement may fall outside the scope of Article 101(1) TFEU altogether.[10] Similarly, the ECJ understood, from the outset, how brand protection may be an indispensable precondition for a supplier to rely on third parties.[11] This restraint is particularly prominent in selective distribution and franchising systems.

II. Article 101(1) TFEU after *Generics* and *Budapest Bank*

1. How *Generics* and *Budapest Bank* clarify the case law

5. *Generics* and *Budapest Bank* are two landmarks in the case law. They were delivered by the Court following a period of uncertainty and some doctrinal controversy about the interpretation of Article 101(1) TFEU, in particular of the notion of restriction of competition. The essence of the uncertainty concerned the nature and intensity of the assessment that is required to establish whether an agreement falls within the scope of Article 101(1) TFEU by its very nature. By the time the two preliminary references had reached the Court, it was well-established that, in order to establish a "by object" infringement, it is necessary to take into account the economic and legal context of which the agreement is a part.[12] However, there were still disagreements about how penetrating this analysis had to be as a matter of law.

6. The Court clarified in *Generics* and *Budapest Bank* that the analysis of whether an agreement has as its object the restriction of competition is context-specific. In this sense, it confirmed that the mere fact that a restraint is suspicious does not suffice, in and of itself, to conclude that the agreement breaches, by its very nature, Article 101(1) TFEU. Formally speaking, the restraints in the two cases seemed particularly egregious, at least on the surface. In *Generics*, an incumbent in a market made a payment to a potential competitor to stay out of the market. In *Budapest Bank*, a group of rivals coordinated their conduct in relation to prices. Even though these restraints tend to be associated with the most serious violations of competition law, the Court ruled that they are not necessarily restrictive of competition by object. In a given economic and legal context, they may even fall outside the scope of Article 101(1) TFEU altogether.

7. Second, these two rulings confirm that the pro-competitive effects resulting from an agreement are a relevant consideration when evaluating whether it breaches Article 101(1) TFEU by its very nature. In this sense, the Court rejected the suggestion that such pro-competitive gains are only relevant under Article 101(3) TFEU. There was consistent case law leading to this conclusion,[13] but no prior judgment was as explicit as *Generics* and *Budapest Bank* on this point. In the latter ruling, the Court held that, where there are "strong indications" suggesting that an agreement is capable of having pro-competitive or at least ambivalent effects on competition, it does not amount to a "by object" infringement.[14] Similarly, in *Generics*, the Court held that an agreement does not restrict Article 101(1) TFEU by its very nature where there is a "plausible" pro-competitive explanation for it.[15]

8. Third, and more generally, the two judgments emphasise the relevance of the counterfactual in the analysis of restrictions under Article 101(1) TFEU. The Court confirmed in *Budapest Bank* that an evaluation of the conditions of competition that would have prevailed in the absence of the practice is a factor to consider in that regard. For instance, the parties may be able to provide evidence showing that the prices would have been higher if the parties had not concluded an agreement.[16] Similarly, they may show that there are pro-competitive benefits that would not have materialised absent the practice.[17] The analysis of the counterfactual can lead to the conclusion that the agreement is not restrictive by object—insofar as it would provide evidence that there is a plausible pro-competitive rationale for it—or that it falls outside the scope of Article 101(1) TFEU altogether (which would be the case, for instance, where the practice is found to be objectively necessary).[18]

9. A final lesson one may draw from *Generics* and *Budapest Bank* is that the lessons of experience and economic analysis must be considered when evaluating whether an agreement amounts to a "by object" restriction. In the latter ruling, the Court explicitly held that the "by object" label would not be appropriate where there is insufficiently "*reliable and robust*" experience about the nature of the practice and its potential effects.[19] The ECJ appears to suggest that there should be a consensus suggesting that it is appropriate to treat the practice as prima facie unlawful irrespective of its effects. In this regard, mainstream economics can provide valuable

10 Ibid.

11 Case 161/84 – *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41.

12 Case C-67/13 P – *Groupement des cartes bancaires v. Commission*, EU:C:2014:2204, para. 53.

13 *See* inter alia Case 42/84 – *Remia BV and others v. Commission*, EU:C:1985:327; Case C-234/89 – *Stergios Delimitis v. Henninger Bräu AG*, EU:C:1991:91; Case C-238/05 – *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734; and *Cartes Bancaires* (n. 12).

14 *Budapest Bank* (n. 3), para. 82.

15 *Generics* (n. 2), para. 89.

16 *Budapest Bank* (n. 3), paras. 82–83.

17 *Generics* (n. 2), paras. 103–111.

18 *Société Technique Minière* (n. 9) and *Pronuptia* (n. 11).

19 *Budapest Bank* (n. 3), para. 76.

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insights. In *Budapest Bank*—and previously, in *Cartes Bancaires*—research on two-sided markets shed light on the nature and potential effects of the agreements at stake.[20]

2. *Generics*, *Budapest Bank* and vertical restraints

10. In many respects, the Court's case law on vertical restraints provided the most reliable signals that *Generics* and *Budapest Bank* would be decided the way they did. Rulings like, inter alia, *Delimitis* (on exclusive dealing),[21] *Pronuptia* (on franchising)[22] and *Metro I* (on selective distribution) were based on the very same approach.[23] A reading of these judgments shows that, because the agreement was found to have a pro-competitive rationale, it was deemed not to restrict competition by object. Since, for instance, an exclusive dealing arrangement can be plausibly required for reasons that have nothing to do with rival foreclosure, the "by object" label was not deemed appropriate for the practice.[24] In some circumstances, the counterfactual analysis reveals that some clauses are objectively necessary for an agreement to exist and thus fall outside the scope of Article 101(1) TFEU. Accordingly, a clause that is "really necessary" for a supplier to enter a new market is not restrictive of competition, whether by object or effect.[25]

11. The analysis that follows focuses on the role of vertical restraints as a tool to tackle free-riding and brand protection. Experience and economic analysis show that some frequent categories of distribution agreements are in fact a contractual device to address the risk of free-riding.[26] Exclusive distribution, for instance, allows the reseller to prevent third parties from capturing the fruits of the promotional efforts it makes in the territory allocated by its supplier.[27] Vertical restraints also have a major role to play in the preservation of a brand image. As acknowledged by the Court in *Pronuptia*, a supplier may not be willing to rely on third parties to sell its products if the aura surrounding its products would be jeopardised as a result.[28] Franchising and selective distribution, inter alia, are contractual mechanisms that allow suppliers to preserve the value of their brand.

20 Ibid., para. 85.

21 *Delimitis* (n. 13).

22 *Pronuptia* (n. 11).

23 Case 26/76 – *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, EU:C:1977:167 ("*Metro I*").

24 *Delimitis* (n. 13), paras. 10–12.

25 *Société Technique Minière* (n. 9), 250.

26 Guidelines on Vertical Restraints (n. 8), para. 107.

27 Ibid.

28 Ibid. See also Pronuptia (n 11), para. 17.

III. Brand protection under Article 101(1) TFEU

1. Brand protection in the case law: Certainties and uncertainties

12. The seminal rulings on the legal status of selective distribution and franchising were delivered by the Court between the mid-1970s (*Metro I*) and mid-1980s (*Pronuptia*). In these early judgments, it was assumed that brand protection is one of the main drivers behind the recourse to these distribution methods. In fact, the restraints included in selective distribution systems are uniquely suited to ensure that the aura of a product or firm is not harmed in dealings with third parties. The sort of clauses found in these agreements relate, inter alia, to the location, look and feel of the premises as well as the training of employees.[29] If *Metro I* concerned technically sophisticated products, the *Perfume* judgments of 1980 concerned luxury goods. Nothing in the Court's reasoning in the latter suggests that the use of selective distribution in relation to such products would turn the clauses into restrictions of competition, let alone by object.[30] According to the prevailing view after 1980, a selective distribution system concerning luxury goods would fall outside the scope of Article 101(1) TFEU altogether where the rest of the conditions set out in *Metro I* are fulfilled.[31]

13. Doubts about the relationship between selective distribution and the protection of the supplier's brand image emerged in the aftermath of *Pierre Fabre*.[32] The Court held in this judgment that the "*aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.*"[33] This paragraph could be interpreted as suggesting that the preservation of a brand image does not justify the setting up of a selective distribution system. In *Coty*, however, the Court clarified that *Pierre Fabre* must be interpreted as relating to the specific facts of that case alone—a clause that banned all forms of online selling by selective distributors.[34]

29 Ibid., para. 174.

30 Joined Cases 253/78 and 1 to 3/79 – *Procureur de la République and others v. Bruno Giry and Guerlain SA and others*, EU:C:1980:188; Case 37/79 – *Anne Marty SA v. Estée Lauder SA*, EU:C:1980:190; Case 99/79 – *SA Lancôme and Cosparfrance Nederland BV v. Etos BV and Albert Heyn Supermart BV*, EU:C:1980:193.

31 *See* for instance Case T-87/92 – *BVBA Kruidvat v. Commission*, EU:T:1996:191.

32 Case C-439/09 – *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, EU:C:2011:649.

33 Ibid., para. 46.

34 Case C-230/16 – *Coty Germany GmbH v. Parfümerie Akzente GmbH*, EU:C:2017:941.

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14. One can safely conclude from *Coty* that the clauses in a selective distribution agreement that seek to protect the brand image of a product do not restrict competition by object and that, where the conditions set out in *Metro I* are fulfilled, they fall outside the scope of Article 101(1) TFEU altogether. However, this conclusion is not entirely uncontroversial. It has been suggested that the brand protection argument in *Coty* is only relevant concerning luxury goods.[35] According to this view, a selective distribution system applying to non-luxury goods (such as for instance running shoes) would amount to a "by object" infringement. By the same token, arguments relating to the protection of a firm's brand image in such cases would only be relevant, from this perspective, under Article 101(3) TFEU.[36]

2. Addressing the uncertainties in light of *Generics* and *Budapest Bank*

15. *Generics* and *Budapest Bank* provide a useful background to address the above-mentioned uncertainties. The two judgments suggest that the most reasonable interpretation of *Coty* is one where the brand protection argument is relevant irrespective of whether the selective distribution system relates to a luxury or a non-luxury good. Both rulings clarify that the pro-competitive aspects of an agreement can be considered when evaluating its object. What is more, the experience of decades of enforcement, as reflected in the Commission's Guidelines on Vertical Restraints, shows that the protection of the brand image of a product or firm is a plausible explanation for the recourse to selective distribution. This is also consistent with the lessons of economic analysis.[37]

16. Third, experience also shows that concerns with the brand image of a product or firm are not limited to the luxury industry. Product differentiation is a relevant aspect of competition in many sectors in which firms offer heterogeneous goods. This becomes apparent when one takes into account the intellectual property dimension of brand protection. Firms in a wide range of sectors seek trade mark protection for their goods. Crucially, the intellectual property regime does not distinguish between luxury and non-luxury goods in this regard. The "*essential function*" of a trade mark is the same in all cases, and it is to ensure the "*identity of origin*" of the products.[38] Crucially, the Court accepted, in *Copad*, that a selective distribution system may be an integral aspect of brand protection.[39]

IV. MFN clauses under Article 101(1) TFEU

1. The rise of MFN clauses in digital markets

17. MFN clauses have attracted the attention of competition authorities in recent years. The rise in prominence of these clauses is explained, by and large, by their role in digital markets. The essence of MFN clauses in the online context is easy to summarise. Typically, it is a requirement on suppliers selling goods or services via an online platform not to offer lower prices on other distribution channels. It is, in other words, a "best price" guarantee given to the platform operator. MFN clauses have two apparent effects. First, they constrain the freedom of the suppliers to offer lower prices elsewhere, including their own website. Second (and as a result of the first), they reduce price competition and thus deny some of the expected benefits of online distribution. As a result of these features, they are often seen with suspicion, and have been likened to resale price maintenance (hereinafter, "RPM"), which—as the law stands—is restrictive of competition by object. By limiting price competition, MFN clauses may have not only collusive but also exclusionary effects.

18. A careful analysis of the nature and purpose behind MFN clauses suggests, however, that there are plausible pro-competitive explanations for their inclusion in online distribution agreements. In particular, the free-riding explanation comes across as especially compelling.[40] Online platforms provide visibility to suppliers, which may as a result reach a larger number of potential users than they would if they had relied on their own distribution network alone. Platform operators, however, need to develop mechanisms to ensure they receive adequate remuneration for their investments. In this sense, MFN clauses allow them to tackle the supplier's opportunistic behaviour, which may benefit from the exposure given by the platform while offering lower prices elsewhere.

19. Crucially, the pro-competitive rationale behind MFN clauses appears to be equally plausible irrespective of whether they are of the "narrow" or the "broad" variety instead.[41] A "narrow" MFN clause is one whereby the supplier commits not to offering a lower price on its own website. A "wide" MFN clause, on the other hand, is one whereby the supplier commits not to offering lower prices neither via its own website nor via any other platform. While it is generally accepted that the latter variety is

35 Bundeskartellamt, Competition restraints in online sales after Coty and Asics – what's next? (Bonn, October 2018).

36 Bundeskartellamt, ASICS dealers allowed to use price comparison engines –Federal Court of Justice confirms Bundeskartellamt's decision (Bonn, 25 January 2018).

37 Oxera and Accent, Vertical restraints: new evidence from a business survey (London, 24 March 2016).

38 Case C-59/08 – *Copad SA v. Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie*, EU:C:2009:260, para. 22.

39 Ibid., para. 30.

40 J. B. Baker, F. Scott Morton, Antitrust Enforcement Against Platform MFNs'(2018) 127 *Yale Law Journal*.

41 Ibid., 2183. *See also* Commission, Support studies for the evaluation of the VBER (Brussels, May 2020).

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typically more problematic, in the sense that it is more likely to lead to anticompetitive outcomes, the "free-riding" rationale is not less plausible.[42]

2. MFN clauses through the lenses of *Generics* and *Budapest Bank*

20. A joint reading of *Generics* and *Budapest Bank* leads to the conclusion that MFN clauses are unlikely to be deemed restrictive by object by the Court. In particular, the two rulings show that the fact that the clauses limit suppliers' freedom to determine their prices—and the fact that they could have the effect of limiting or eliminating price competition across the board—is not a decisive factor. What matters, according to *Budapest Bank*, is whether there are "*strong indications*" suggesting that the MFN clauses are capable of having both pro- and anticompetitive effects. One should bear in mind, in this regard, that the Court expressly accepted, in *Cartes Bancaires*, that the fight against free-riding is a legitimate objective and a factor that should be taken into account when evaluating its object.[43]

21. Another crucial factor that pleads against categorising MFN clauses as "by object" infringements has to do with the limited experience acquired so far, in addition to the lessons of economic analysis. MFNs raise a relatively new challenge for competition authorities, and its impact is still discussed in the economic literature, both from a theoretical and an empirical standpoint. What is more, the mainstream position, as research stands, pleads in favour of a case-by-case assessment of the impact of these clauses and thus against a blanket ban that would fail to consider, inter alia, the market power of the platform requiring the MFN clause and the features of the relevant market.[44]

22. More generally, one should bear in mind that the impact of MFN clauses on price levels should not be deemed a decisive reason to treat them as restrictions by object. A number of vertical restraints have the same effects without their being treated as infringements, by their very nature, of Article 101(1) TFEU. In *Metro I* and *II*, for instance, the Court acknowledged that selective distribution systems tend to reduce, if not eliminate completely, price competition between resellers.[45] In spite of this fact, it concluded that they are not necessarily anticompetitive and can fall outside the scope of Article 101(1) TFEU altogether where certain conditions are fulfilled.

42 Support studies for the evaluation of the VBER (n. 41), 109–110.

43 *Cartes Bancaires* (n. 12), paras. 74–75.

44 *See* in this sense the Support studies for the evaluation of the VBER (n. 41).

45 *Metro I* (n. 23) and Case 75/84 – *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, EU:C:1986:399.

V. Implications

1. The review of the Block Exemption Regulation

23. Brand protection (in the context of selective distribution) and MFN clauses feature prominently in discussions about the ongoing review of the Block Exemption Regulation on Vertical Restraints.[46] There is evidence suggesting that selective distribution is frequent in the resale of goods and services online.[47] The same is true of MFN clauses.[48] This is the background against which one should consider the legal treatment that should be given in the future regulation to these two restraints. Two fundamental points arise. The first is whether the Commission should depart from the hands-off approach it has traditionally taken vis-à-vis (online) selective distribution. The second is whether MFN clauses should be treated as "hardcore restrictions" (which would leave the agreements outside the scope of the block exemption).

24. Concerning the first point, the evolution of the case law suggests that there would be no reason to alter the treatment, as a matter of policy, of selective distribution. If anything, the very nature of online retail makes it arguably more necessary. It is not necessary to explain at length why the Internet makes the protection of a firm's or a product's brand image more challenging.[49] The Commission appears to share the same view. In a Policy Briefing issued after the Court's judgment in *Coty*, it expressed the view that the distinction between luxury and non-luxury goods is not a crucial one when it comes to the application of the current version of the Block Exemption Regulation.[50]

25. It has been argued that some of the practices aimed at protecting the brand image of a product deserve a stricter approach. In particular, it has been argued that agreements restricting the use of online marketplaces limit retailers' ability to compete and, by the same token, restrict consumer choice.[51] Other contentious clauses include those limiting retailers' ability to rely on price comparison tools, which are essentially similar in their nature and potential anticompetitive effects.[52] Nothing in these clauses, however, is different from those traditionally found in selective distribution systems. The point of all such restraints is to keep tight control over who retails the supplier's product, and how. In this sense, a manufacturer's refusal to supply its products

46 Support studies for the evaluation of the VBER (n. 41).

47 Commission, Preliminary Report on the E-commerce Sector Inquiry, SWD(2016) 312 final.

48 Ibid.

49 Support studies for the evaluation of the VBER (n. 41), 65–66.

50 EU competition rules and marketplace bans: Where do we stand after the Coty judgment?, *Competition policy brief* (April 2018).

51 Bundeskartellamt (n 35).

52 Support studies for the evaluation of the VBER (n. 41), 72.

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to a cash-and-carry chain (at stake in *Metro I*) is not fundamentally different from a restraint preventing a firm's products being associated with service operators (such as marketplaces and price comparison websites) with which it has not chosen to deal.

26. As far as MFN clauses are concerned, the experience accumulated over the past decade and the current state of the academic literature advise against imposing a blanket ban on them by means of a Block Exemption Regulation. The most obvious conclusion, accordingly, would be not to provide any specific rules for MFN clauses. Given their high profile and the concerns to which they give rise in practice, however, the Commission may be tempted to introduce bright lines specifically conceived for them. If so, consistency with the logic of the case law suggests that such bright lines should be a proxy for a standard analysis of effects. Thus, "wide" MFN clauses could be deemed an excluded (Article 5) restriction above the market share threshold. In such circumstances, their lawfulness would require a case-by-case assessment.

2. The future of RPM in the case law

27. When considering the case law as a whole, it is difficult to escape the conclusion that the current treatment of RPM in the case law is not immediately obvious to reconcile with the logic underpinning *Generics* and *Budapest Bank*. Economic analysis shows that vertical price-fixing is a plausible source to achieve pro-competitive gains relating, in particular, to brand protection and the prevention of free-riding.[53] Suffice it to take a look at a case like *Leegin* to realise that, in practice, the nature and purpose of the practice is not fundamentally different from that of selective distribution systems.[54] Accordingly, it would be natural to conclude that RPM should not be treated as a "by object" infringement.

53 Ibid., 85–87.

54 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

28. However, RPM has traditionally been considered to be restrictive of competition by its very nature, and this, irrespective of the circumstances of the case. In *Metro I*, the ECJ held that price competition is "*so important that it can never be eliminated*."[55] In *Binon*, it took the view that any pro-competitive effects of the practice (which were invoked by the parties and not disputed in the judgment) would have to be considered under Article 101(3) TFEU, not under Article 101(1) TFEU.[56] This aspect of the ruling is difficult to reconcile with *Generics* and *Budapest Bank*. This is also true of the Court's analytical approach, which suggested that the context of which the practice is a part is irrelevant. The "by object" status of RPM was reiterated in *Pronuptia*.[57]

29. The fundamental question, against this background, is whether the legal treatment of RPM would change if the case were brought again before the Court. Even though the ECJ is cautious when revisiting its case law, such an outcome cannot be completely ruled out. This is so for two main reasons. First, experience and economic analysis suggest that RPM can have pro-competitive effects. In the support studies prepared for the Commission in the context of the review of the Block Exemption Regulation, the ambivalent effects of the practice are acknowledged. In fact, the empirical evidence from the book publishing sector shows that it can sometimes enhance consumer welfare.[58] Second, it has become increasingly apparent that it may not be obvious to distinguish between RPM and other practices that are not treated as "by object" infringements. The example of selective distribution has already been mentioned. In addition, authorities and commentators have noted that it is not obvious to tell MFN clauses apart from RPM.[59] ■

55 *Metro I* (n. 23), para. 21.

56 Case 243/83 – *SA Binon & Cie v. SA Agence et messageries de la presse*, EU:C:1985:284, para. 46.

57 *Pronuptia* (n. 11), para. 25.

58 Support studies for the evaluation of the VBER (n. 41), 89–90.

59 *See* for instance A. Fletcher and M. Hviid, Broad Retail Price MFN Clauses: Are They RPM "At Its Worst"? (2016) 81 *Antitrust Law Journal* 65.

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Revisiting the resale price maintenance issue under EU competition law

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1. "*L'histoire se répète …*" In September 2008, the Austrian competition authority organized a conference on resale price maintenance (RPM) in Vienna. The European Commission (EC) had just started its review of the Vertical Block Exemption Regulation (VBER) No. 2790/1999. Art. 4(a) of the VBER blacklisted fixed or minimum RPM clauses as "hardcore" restrictions of competition, i.e., restrictions that remove the benefit of the block exemption for the entire distribution agreement between a manufacturer and its dealers. A year earlier, in June 2007, the US Supreme Court had rendered a judgment in *Leegin* whereby it had overruled its judgment in *Dr. Miles* from 1911 and concluded that RPM was no longer per se unlawful and should be assessed under the rule of reason.

2. At the Vienna conference, we offered some thoughts on how the EC might want to look at RPM under the next VBER. These thoughts can be briefly summarized as follows:

– First, fixed or minimum RPM schemes should be automatically exempted if they involve a manufacturer or dealers with a *de minimis* market share (below 15%), unless parallel networks of similar RPM schemes cover more than 50% of the relevant market or the RPM scheme in question has been instigated by a dealer cartel.

– Second, the automatic exemption set forth in the VBER should even extend to fixed or minimum RPM schemes involving a manufacturer with a market share above 15% but below 30% if their purpose is to prohibit dealers from reselling the goods below cost (i.e., below their net invoice price plus a reasonable profit margin) or from using these goods as loss leaders to attract customers to their outlets. The underlying idea was that manufacturers should be allowed to impose this specific form of RPM to avoid erosion of their products' brand image.

– Third, the EC should acknowledge in its guidelines on vertical restrictions[1] (Guidelines) that some RPM schemes can—in specific circumstances—meet the conditions set forth in Art. 101(3) TFEU. For instance, manufacturers who enter a new (product or geographic) market may need RPM to either reward dealers for their willingness to distribute and promote their products or differentiate the price of these products from that of their incumbent rivals' products. We also offered a variation on this price differentiation theme: manufacturers of branded fast moving consumer goods sold in large retail outlets where they compete with the retailers' own-label products should be able to use RPM to position their branded goods vis-à-vis these cheaper private-label goods—the idea being that it was up to the final consumers to make up their mind and pay a premium for the branded product, or indeed refuse to do so.

3. Most, if not all, of the above proposals fell on a cold plate at the Vienna conference and when the EC issued the current VBER No. 330/2010 and its accompanying Guidelines two years later, Art. 4(a) remained unchanged: only maximum resale prices or recommended resale prices could benefit from the automatic exemption, provided these resale prices were not the "*result of pressure from, or incentives offered by, any of the parties*" (in particular, pressure exerted by the dealers upon the manufacturer or incentives offered by the manufacturer to the dealers).

4. In para. 225 of its 2010 Guidelines, the EC did acknowledge that individual RPM schemes might be exemptible under Art. 101(3) TFEU (i) as an incentive for dealers selling a new entrant's products; (ii) as a floor during a promotion campaign in a franchise or similar distribution system; and (iii) as a tool to avoid free riding on presale services for complex products, but only if the parties could demonstrate that RPM would act not only as a means but also as an "*incentive to*

* This contribution was completed on 20 September 2020. Views expressed are strictly personal.

1 https://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

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overcome possible free riding" and that the presale services would "*overall benefit consumers*." The reference to free riding seemed like an encouraging opening, but over the years the high burden of proof regarding these two caveats has not offered business much comfort, to put it mildly. If anything, we have been witnessing a revival of enforcement activity directed against RPM practices.

5. Some examples:

– On 24 July 2018, the EC adopted a quartet of formal prohibition decisions concerning RPM schemes that Asus, Denon & Marantz, Philips and Pioneer had imposed on their online retailers, and on 17 December 2018, it did the same regarding an RPM scheme run by Guess.[2] The passages concerning the non-applicability of Art. 101(3) TFEU in the EC's decisions are extremely succinct but in each case, the EC observes that there were "*no indications that* [RPM] *was indispensable to induce retailer investment in certain promotional measures or pre-sale services or to alleviate the repercussions of free-riding between online and offline sales channels*" (see para. 117 in *Asus*, para. 103 in *Denon & Marantz*, para. 73 in *Philips*, para. 165 in *Pioneer* and para. 164 in *Guess*).

– Several national competition authorities (NCAs) have been prosecuting manufacturers—and sometimes even dealers—for applying RPM schemes (e.g., Germany, Austria, UK). In some instances, their decisions were actually based on the suppliers' self-disclosure (cf. the Danish case involving design company Gubi). Other NCAs have announced that RPM has moved "*up the priority ladder*" (cf. declarations by the head of the Dutch competition authority[3] and dawn raids conducted by it in the home furnishing sector in September 2020).

– In its Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector of July 2017,[4] the Bundeskartellamt (BKA) acknowledges that RPM might generate efficiencies (also outside the food sector). More specifically, it accepts that RPM might avoid dealer free-riding on presale services, encourage dealers to launch a new product and protect a product's brand image. However, for each of these justifications, it opines that there are less restrictive alternatives (cf. pp. 11–12). In comments concerning the current VBER,[5] jointly submitted with Germany's Federal Ministry for Economic Affairs and Energy, the BKA reiterates that viewpoint, adding even that in most cases handled by it "*efficiencies have not been cited as a reason, nor have they been otherwise apparent*" (pp. 3–4).

I. Ongoing review of VBER No. 330/2010: State of play

6. The current VBER will expire on 31 May 2022. The review process is in full swing. The EC ran a public consultation between February and May 2019 and organized stakeholder workshops in November 2019. The EC also consulted its ECN counterparts. Summary reports can be found on DG COMP's website.

7. In addition, the EC published a support study for the evaluation of the VBER[6] and the Guidelines ("Support Study") in April 2020 — a thick brick of more than 500 pages meant to provide qualitative and quantitative evidence on the effectiveness, efficiency and relevance of the VBER and the Guidelines. One could call it an Impact Assessment (IA), akin to the IA reports that the EC issues whenever it considers adopting or amending regulatory acts.

8. The EC's Support Study contains a section on "*resale price restrictions and their effects*" (pp. 83–92) — an interesting title, giving the fact that fixed or minimum RPM schemes are blacklisted in Art. 4(a) VBER as "hardcore" (and thus "by object") restrictions of competition within the meaning of Art. 101(1) TFEU. We will return to this legal "by object" qualification below.

9. The Support Study also contains a set of Annexes, including an econometric analysis on RPM (pp. 318–362) and RPM literature review (pp. 451–476). The former focuses on the book sector and is therefore of limited relevance for the assessment of RPM across sectors. As for the literature, the picture seems to be mixed. In the Support Study's executive summary, it is noted that "*the relatively recent literature is critical of the 'service provision' motivation* [i.e., the free-rider rationale] *for RPM, arguing that it relies on a restrictive set of assumptions*" but it is also noted that some studies "*find empirical support to the 'service provision' motivation for RPM*" (cf. p. 16).

10. In September 2020, the EC published another thick brick: a 200 + page staff working document[7] ("SWD") containing a detailed evaluation of the VBER, including feedback from the public consultation. We will refer to this SWD a couple of times in the next section of this contribution.

2 The EC published all of its July 2018 decisions on 26 September 2018 and its decision in *Guess* on 25 January 2019. These decisions can be consulted on DG COMP's website.

3 M. Snoep at 15th GCLC Annual conference, Brussels, Jan. 30-31, 2020.

4 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/Guidance_note_prohibition_vertical_price_fixing_LEH.pdf?__blob=publicationFile&v=2.

5 https://ec.europa.eu/competition/consultations/2018_vber/bundesministerium_bundeskartellamt_en.pdf.

6 https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf.

7 https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf.

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II. Revisiting some RPM-related issues

11. We will use the remainder of this contribution to briefly revisit the following issues:

12. The first issue is one that we have not mentioned yet because it sits "upstream" of the issues relating to the applicability of Art. 101(3) TFEU to RPM cases. It concerns the applicability of Art. 101(1) TFEU to RPM clauses featuring in so-called fulfillment contracts. Several commentators have raised this question — rightly so in our own experience as a practitioner — and in its SWD, the EC has flagged it as a relevant issue (*infra* 1.).

13. Turning to the applicability of Art. 101(3) TFEU to RPM schemes, we will review three additional issues.

14. To begin with, as long as RPM is blacklisted in Art. 4(a) of the VBER, even if the supplier and its dealers hold market shares below 30%, RPM is commonly viewed as a "by object" restriction within the meaning of Art. 101(1) TFEU. This merits a few comments in light of the existing case law (*infra* 2.).

15. Furthermore, as already mentioned, Art. 4(a) of the current VBER contains carve-outs for, i.e., extends the automatic exemption to recommended or maximum resale prices, if they "*do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties*." The sting of this carve-out provision sits in the "if" language (*infra* 3.).

16. Last, it would be worth receiving additional policy guidance regarding RPM schemes that seek to combat free-rider practices (*infra* 4.).

1. RPM in fulfillment contracts: Inapplicability of Art. 101 TFEU

17. Some suppliers of goods negotiate the terms and conditions (including the price) governing the sale of their goods directly with end customers (e.g., original equipment manufacturers) and, once they have completed these negotiations, they call upon intermediaries — often at the request of their end customers — to provide logistic support services relating to the delivery of the sold goods. The service contracts between these suppliers and intermediaries typically provide that the latter should charge the end customers the sales price that the suppliers have negotiated with these end customers.

18. In a variation on the above scenario, suppliers may be working with wholesale list prices which these logistic service providers must contractually charge to retailers when they deliver the goods to these retailers (for resale to the end customers).

19. The logistic service providers may become the owners of the goods before supplying them to the retailers (or directly to the end customers) and they may also incur transport and storage costs. In that sense, they bear a certain degree of "financial or commercial risk" in relation to the activities for which they have been appointed. That risk makes them look like independent resellers (paras. 13–16 of the Guidelines). The EC may therefore be reluctant to view their contracts with the suppliers as agency contracts that fall outside the scope of Art. 101(1) TFEU (Guidelines, para. 17) and the RPM clauses contained therein as being inherent to such contracts and thus falling outside the scope of Art. 101(1) TFEU (Guidelines, para. 18 *sub* c).

20. However, the two above-mentioned scenarios have in common that the suppliers of the goods will not have vested any price negotiation powers in the logistic service providers to whom they have outsourced the practical aspects of their sales. The suppliers will have completed the negotiation of the sales prices directly with the end customers or the retailers before turning to these logistic service providers to assist them with the supply of the goods.

21. Under these circumstances, the classic concern that RPM will eliminate intra-brand price competition among resellers of the suppliers' goods makes no sense. The only relevant price competition among logistic service providers relates to the cost of their own services, not to that of the goods supplied. These intermediaries only have independent decision-making powers for the former. In contrast, they are not in the business of trying to win their customers' goodwill by offering them a better price for the suppliers' goods. Put differently, there is no intra-brand price competition between them for the goods supplied.

22. In its SWD, the EC provides a fair and balanced summary of the stakeholder views regarding these fulfillment contracts (cf. pp. 149 and 174).

2. Principle: RPM a "by object" infringement of Art. 101(1) TFEU?

23. According to settled case law, an agreement between undertakings contains a "by object" restriction of competition if "*experience shows that* [it] *leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.*"[8] In other words, the "by object" qualification only applies to agreements which "*can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.*"[9]

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8 Cf. most recently, CJEU, judgment of 30 January 2020 in case C-307/18, *Generics and others v. CMA*, not yet published, para. 64.

9 Ibid., para. 67.

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24. In order to find out whether an agreement merits this "by object" label, the case law tells us that "*regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part.*"[10] An examination of this context requires that one "*take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.*"[11] Taking into consideration the contracting parties' intention — in addition to the content and objectives of the agreement that they have entered into — is not required but remains an option for a competition enforcement authority (or court).[12]

25. In *Cartes Bancaires*, the Court of Justice had overruled the General Court's judgment upholding the EC's qualification of a pricing arrangement as a "by object" restriction under Art. 101(1) TFEU. The main ground for the overruling was that the General Court had — like the EC — confined itself to highlighting the restrictive effects of that arrangement on competition in the card issuing market. By only looking at the economic and legal context (i.e., the third factor in the analysis), the General Court had, in fact, conducted an effects analysis. It should first have looked at the content and the objectives of that agreement (and, had it done so, it may have reached a different conclusion). As Advocate General Wahl explained in its opinion in *Cartes Bancaires*, "*consideration of the economic and legal context in order to identify an anticompetitive object must, at the risk of introducing a shift that is detrimental to a proper reading of Article* [101(1) TFEU] *be clearly distinguished from the demonstration of anticompetitive effects under that provision*" and "[c]*onsideration of the context in identifying the anticompetitive object can only reinforce or neutralise the examination of the actual terms of a purported restrictive agreement*" and "*certainly cannot remedy a failure actually to identify an anticompetitive object by demonstrating the potential effects of the measures in question.*"[13]

26. More recently, in its preliminary ruling in *Generics*, the Court of Justice pointed out that the "by object" characterization of a patent settlement agreement between pharmaceutical companies "*must be adopted when it is plain from the analysis of the settlement agreement concerned that the transfers of value provided for by it cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits.*"[14]

27. To our knowledge, the EC has never convincingly explained why "pure" RPM arrangements, i.e., not used by a manufacturer as a tool to limit parallel trade between Member States, always lack a plausible explanation and are therefore — in light of their content and objective and the context in which they arise — so harmful for competition that they should be labeled as "by object" restrictions under Art. 101(1) TFEU.

28. In para. 224 of its Guidelines, the EC explains that RPM "*may restrict competition in a number of ways*." However, when it gives examples (seven in total), it either does not explain the theory of competitive harm behind these examples (let alone whether "experience" shows that any such harm is always significant) or, when it does articulate a theory of harm, it seems to accept that the materialization of such harm will depend on specific market conditions and thus that this would require a proper effects analysis.

29. Examples falling in the first category are RPM schemes that "*may facilitate collusion*" among suppliers of branded goods and restrict inter-brand competition (example No. 1) or that "*may be implemented by a manufacturer with market power to foreclose smaller rivals*" by offering its dealers better margins (example No. 6). These are legitimate concerns but in both instances it would seem that one would need to conduct an effects analysis to find out whether these concerns are warranted in the case at hand.

30. An example in the second category refers to the fact that "*the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand*" (example No. 4). This merely describes the fact that RPM eliminates price competition at intra-brand level but the EC does not explain why this is always harmful for consumers. The EC does state that "*the direct effect of RPM is a price increase*." However, this is — as such — an unsubstantiated assertion.

31. In fact, as the EC acknowledges in para. 225 of its Guidelines, "*RPM may not only restrict competition but may also, in particular where it is supplier*[-]*driven, lead to efficiencies, which will be assessed under Article 101(3)* [TFEU]". By pointing at these potential efficiencies, the EC effectively accepts the need for a balancing of the anticompetitive and pro-competitive effects of RPM.

32. Even accepting that the seven examples in para. 224 of the Guidelines might be sufficient to consider RPM schemes as presumptively anticompetitive under Art. 101(1) TFEU, we argue that an analysis of the legal and economic context in which a manufacturer operates these schemes is capable of rebutting or neutralizing this presumption. It may not be possible to exhaustively list these contextual elements in the VBER. However, the EC could envisage a carve-out in Art. 4(a) VBER based on a 15% *de minimis* market share held by the manufacturer or its dealers.

33. A different issue is whether RPM schemes involving parties with market shares between 15% and 30% should continue to remove the benefit of the block exemption for

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10 Cf. CJEU, judgment of 11 September 2014 in case C-67/13 P, *Cartes Bancaires v. EC*, *ECR*, p. 2204, para. 53. *See also* its judgment in *Generics*, op. cit., para. 67.

11 Ibid. (para. 53 in *Cartes Bancaires* and para. 68 in *Generics*).

12 Cf. para. 54 in Cartes Bancaires.

13 Opinion of 27 March 2014, para. 44.

14 Op. cit., para. 87. *See also* in the same vein, para. 89: if the patent holder makes a significant transfer of value to generic manufacturers and the "*sole consideration* (…) *is their undertaking not to enter the market and no longer to challenge the patent, that indicates, in the absence of any other plausible explanation, that it is not their perception of the patent's strength, but the prospect of that transfer of value which has induced them to refrain from entering the market and challenging the patent*."

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the entire distribution agreement in which they are found, as is currently the case for RPM and all other blacklisted restrictions in Art. 4 VBER. It has never been clear to us why RPM (or, in fact, any other restriction of intra-brand competition listed in Art. 4) should potentially affect the validity of the entire distribution agreement. In recital 10 of the VBER, the EC describes these restrictions as "*severe*" restrictions without further explanation. For the potentially more harmful restrictions of inter-brand competition, these are only grey-listed in Art. 5 of the VBER as "*excluded restrictions*" (e.g., exclusive-dealing or non-compete clauses) and here the EC does provide an explanation: these restrictions do not benefit from the block exemption (without affecting the validity of the rest of the agreement) "*in order to ensure access to or to prevent collusion on the relevant market*" (cf. recital 11 of the VBER).

3. Carve-out: Recommended or maximum resale prices block exempted

34. Our comments regarding the existing carve-out in Art. 4(a) for recommended or maximum RPM schemes that are not the "*result of pressure from, or incentives offered by, any of the parties*," will be brief.

35. This carve-out will not apply if the manufacturer provides its dealers with incentives to follow its recommended price because, according to the EC, such incentives will likely turn the recommended price into a fixed or minimum resale price. However, it is unclear how one should understand the term "incentives."

36. In our view, this term should not deprive a manufacturer from putting into place a price monitoring system to figure out which resale prices make most sense. If the manufacturer subsequently recommends these prices to its dealers and shares the results of its market intelligence efforts that support its recommendation, this strikes us as a perfectly legitimate incentive.

37. In our mind, such a price monitoring system would have nothing in common with the use of a monitoring system to "*identify price-cutting distributors*" or encourage abiding distributors to report "*other members of the distribution network* [that] *deviate from the standard price level*," as referred to in para. 48 of the Guidelines.

38. In this context, the EC's current statement that maximum or recommended prices may "*work as a focal point for the resellers and might be followed by most or all of them*" (para. 227 Guidelines) is ambiguous. If the supplier has shared the results of its price monitoring system with the dealers, leaving them entirely free to take into account these results or just ignore them, we see no reason why the EC would want to intervene, even if most dealers have actually followed the supplier's price recommendations.

39. The reference to "pressure" from any of the parties would also benefit from a clarification. In our view, it would make perfect sense for the EC to stop recommended or maximum resale prices if they are the result of a dealer cartel or a "hub-and-spoke" cartel whereby the dealers use the manufacturer as a hub for an alignment of their resale prices, so they can avoid having to talk to each other. However, outside these specific examples, we do not see what other type of pressure should keep the recommended or maximum RPM scheme in the blacklist set forth in Art. 4(a) of the VBER.

4. The free-rider rationale for RPM schemes under Art. 101(3) TFEU

40. As already mentioned in the introduction of this contribution, the EC has acknowledged in para. 225 of its Guidelines that, in principle, the free-rider rationale might justify RPM under Art. 101(3) TFEU. However, it also raises two caveats: "*The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers* (…)"

41. The first caveat appears to be linked to the first condition set forth in Art. 101(3) TFEU pursuant to which the parties must demonstrate that their agreement "*contributes to improving the production or distribution of goods or to promoting technical or economic progress*," while the second caveat clearly relates to the second condition in Art. 101(3) TFEU, which requires that the agreement will "*allow consumers a fair share of the resulting benefits.*"

42. In its five prohibition decisions from 2018 (*Asus*, *Denon & Marantz*, *Philips*, *Pioneer* and *Guess*), the EC summarily rejected the parties' free-rider justification. In none of these decisions does the EC explain whether the RPM schemes even met the first two conditions of Art. 101(3) TFEU. The EC merely observes that there were "*no indications that* [the conduct] *was indispensable to induce retailer investment in certain promotional measures or pre-sale services or to alleviate the repercussions of free-riding between online and offline sales channels*." It therefore seems that the EC rejected the free-rider justification on the ground that the parties failed to meet the third condition of Art. 101(3) TFEU, i.e., that the RPM schemes were really necessary to achieve the claimed efficiency. However, it provides no explanation. Nor does it identify a less restrictive, but equally efficient, alternative to achieve these efficiencies.

43. Perhaps the EC took inspiration from its reasoning in para. 52(d) of its Guidelines, where it explains that "an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline" amounts to a restriction on passive sales, i.e., sales to customers

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who visited their website and ordered the goods online, and then adds that this "*does not exclude the supplier agreeing with the buyer a fixed fee (i.e. not a variable fee where the sum increases with the realised off-line turnover as this would amount indirectly to dual pricing) to support the latter's off-line or online sales efforts.*" In other words, the EC identifies a — in its view — suitable less restrictive alternative: instead of imposing RPM on all distributors, suppliers can compensate distributors for their investment of time and technical expertise in presale services.

44. Not surprisingly, some retailers — presumably online retailers — side with this view. In its SWD (p. 171), the EC reports about stakeholder feedback on RPM and notes that retailers "*pointed out that there are less restrictive means* [than RPM] *to improve the services offered by distributors and retailers, including special compensation mechanisms for the underlying costs*."

45. However, in its summary of the stakeholder workshop on the evaluation of the VBER (p. 5), the EC reported that the roundtable participants — presumably suppliers — expressed a different view. According to them, a fixed fee "*does not allow to take into account the efficiency of each store and is impossible to operate in practice for suppliers relying on a large number of stores for the distribution of their products*." These stakeholders also reject other alternatives, such as marketing promotions or rebates in exchange for investments in good consumer experience, as insufficient means of protecting the service-oriented dealers against opportunistic price drops caused by free-riders.

46. In light of the above, it seems clear that additional policy guidance on the free-rider rationale for RPM would be very welcome.

47. An amended version of the Guidelines would constitute the most traditional "vehicle" for such guidance and might be useful if it contains language that is a lot more specific than the caveats in para. 225 of the current Guidelines concerning incentives and consumer benefits and assists companies in understanding the scope of their burden of proof.

48. Better even would be that companies can obtain informal guidance from the EC by invoking the "genuine uncertainty" around RPM, given that the question of how RPM could meet the conditions of the balancing test set forth in Art. 101(3) TFEU remains "unresolved" (cf. recital 35 of Regulation No. 1/2003). We may be daydreaming. Since the entering into force of Regulation No. 1/2003, the EC has provided such informal guidance only once (on the back of a comfort letter for a Covid-19-related and output-increasing type of cooperation). Furthermore, given the EC's enforcement track record in RPM cases, companies will likely be extremely reluctant to seek informal guidance. In the pre-Regulation No. 1/2003 notification days, GSK once tried to justify a pricing strategy in Spain that impeded parallel trade within the EU under Art. 101(3) TFEU. The attempt failed. We are not so much referring to the fact that the EC dismissed GSK's justification for this vertical territorial restriction. After all, the General Court and the Court of Justice overruled the EC's Art. 101(3) TFEU reasoning. We are rather referring to what happened, or rather did not happen, thereafter. The EC never reassessed GSK's justification, possibly because the Court of Justice had at least confirmed that GSK's strategy constituted a "by object" infringement of Art. 101(1) TFEU. With five unchallenged decisions prohibiting RPM in 2018, we doubt that the EC would be willing to reassess the free-rider justification for vertical price restrictions — in which case "*l'histoire se répète …*" ■

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Most favoured nation clauses: in need of an effects-based approach

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I. Introduction

1. As is now well documented, the rise of e-commerce and online services has fundamentally changed business practices and consumer behaviour. The online environment has led to increased transparency and significant reduction in search costs for consumers, as well as increased opportunities for businesses to reach larger and more varied audiences. These changes have caused shifts both in consumer behaviour and in business practices including changes in entire distribution models used by suppliers.

2. There appears to be a broad consensus that revisions to the Vertical Block Exemption Regulation (VBER) and the accompanying Vertical Guidelines are needed to ensure that they remain relevant and effective.[1] Specifically, the increased scope of free riding by consumers potentially strengthens the pro-competitive justifications of many vertical agreements. At the same time, the benefits of higher online competition increases potential concerns around any restriction of this competition. These changes are relevant to most vertical agreements. For example, as found by the Commission's 2020 support study,[2] selective distribution systems are the most commonly used agreement in recent years, triggered by manufacturers' need to have more control of the distribution of their products online. The developments of the last decade have also seen a rise of other agreements that are not discussed in the current VBER. Most-favoured-nation (MFN) clauses or parity clauses is one such example. As the Commission's support study found, there has been a large-scale growth in the use of MFNs across sectors. We have also witnessed myriad MFN investigations in the online hotel booking sector by national competition authorities across Member States, which, according to some, led to widely different and sometimes inconsistent approaches and findings (as discussed below). The new VBER and guidelines will therefore be critical for developing a consistent approach towards MFNs across Europe.

3. In this article, we discuss some of the key economic aspects that are relevant for the assessment of these clauses, and should be taken into account in developing the revised guidelines in relation to MFNs and more broadly, in relation to free riding justifications. We show why it is critical that MFN clauses (both wide and narrow) benefit from the block exemption, and importantly, are assessed using an effects-based approach. In doing so, we comment on the latest empirical analyses of MFNs conducted in the support study. We also discuss the economic analysis of free-riding and posit that such analysis needs to be undertaken within the effects-based analysis of MFNs and other agreements such as selective distribution systems.[3]

1 *See*, for example, responses to the Commission's consultation by industry participants and practitioners, views from national competition authorities and findings of the survey conducted in the support study published by the Commission on May 2020. Available at: sections 2 to 5 of https://ec.europa.eu/competition/consultations/2018_vber/index_en.html, and summarised in the Commission Staff Working Document published on 8 September 2020. Available at: https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf.

2 European Commission (2020), Support studies for the evaluation of the VBER, Final Report, May. Available at: https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf.

3 This is consistent with recent commentary from legal practitioners, including recent case law such as *Budapest Bank* and *Generics (UK)*. Case C-307/18, *Generics (UK) Ltd and others v Competition and Markets Authority*; Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*. For a detailed legal analysis of this point, see '*Vertical restraints after Generics and Budapest Bank*' by Pablo Ibáñez Colomo, in *'The VBER and Vertical Guidelines: Revision or reform? Reflection on critical issues'*, Concurrences N° 1-2021, Art n° 98100.

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II. Most-favoured-nation (MFN) or parity clauses

4. The use and antitrust scrutiny of MFN clauses have increased significantly in the last decade. This includes the case of Amazon and publishers of e-books, which culminated in commitments by Amazon to remove their MFN clauses. National competition authorities have scrutinised MFN clauses in motor insurance, home insurance, and retailing of consumer goods such as running shoes. It would be fair to say that MFNs have been brought to the limelight most by the series of separate investigations by national authorities into MFN clauses between hotels and online travel agent (OTA) platforms.

1. Online hotel booking: comments on recent developments and learnings

5. The first of these investigations was led by the Bundeskartellamt (BKA), which was subsequently followed by multiple other investigations (e.g., in Austria, France, Italy, Switzerland and Sweden). While the precise scope varied, all of these focussed on the MFN clauses between OTA platforms and hotels, whereby a room of a specific hotel advertised on a specific OTA needs to be offered at a price that is no higher than the price of the same room at other distribution channels such as other OTAs and the hotel's own website.[4] The key concern was that these MFN clauses offer the OTA in question protection from competition from other OTAs and from the hotel's own website, and therefore, reduces intra-brand competition, which may increase the commissions the OTA charges the hotel.

6. Despite the number of investigations, it is questionable whether these have led to much clarity around when an MFN clause is likely to be anticompetitive. At one extreme was the BKA, which concluded, based on an extensive analysis of the German market, that the wide MFNs as well as the narrow MFNs between the hotels and the OTA platforms were anticompetitive. Another set of national competition authorities accepted commitments from platforms such as Expedia and Booking.com to remove the wide MFNs but allowed narrow MFNs to be applied. Yet some others, like the UK CMA,[5] considered various aspects of the agreements between hotels and OTAs and ultimately focused on resale price maintenance and not MFNs.

7. Overall, while there is some merit in such a tailored national approach due to differences in national markets (e.g., with respect to consumer behaviour), the use of commitments and lack of substantive decisions by authorities has resulted in significant uncertainty regarding the approach to MFNs, particularly as platforms often have a European-wide approach to such commercial agreements (which may have contributed to Booking.com and Expedia voluntarily committing to remove wide MFNs across Europe whether or not there has been a national investigation).

8. The debates in the hotel cases are far from over. The latest development on the BKA case adds further twists and shows that further guidance and clarity in the revised VBER is more important than ever. In particular, the BKA's decision to ban narrow MFNs (in addition to the ban of wide MFNs) was reversed in 2019 by the Düsseldorf Higher Regional Court following an appeal by Booking.com. The Court found that the narrow MFNs are not anticompetitive, and in doing so, accepted the reasoning put forward by Booking.com that these were needed to avoid free riding by hotels. In other words, the Court accepted that, without the narrow MFN clauses, hotels could use the OTA's service to advertise themselves but subsequently incentivise consumers to book directly on their own websites through the lower prices, which would reduce commission payments to the OTA.[6]

9. The other body of analysis of MFNs at the European level comes from *ex post* assessments of the interventions in the hotel sector. One was carried out by a group of national competition authorities and the European Commission to examine the effect of the ban of the wide MFNs (the ECN study).[7] The second and very recent analysis was undertaken as a part of the support study prepared for the evaluation of the VBER (this study includes an assessment of the impact of a ban on narrow MFNs in certain European countries).[8]

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4 If the MFN covers all other platforms and hotel's own website, this would be referred to as a "wide MFN," in that it covers a wider range of distributional channels. If the MFN only covers the hotel's website and not other platforms such that the hotel could offer a lower price through another OTA, this would be referred to as a "narrow MFN." The hotel booking cases variedly investigated one or both of wide and narrow MFNs.

5 The commitments were to remove all wide MFNs across Europe and to reduce the scope of narrow MFNs to only the hotel's price on its online direct sales channel. Therefore, following the commitments, hotels could set prices freely on other OTAs and on offline channels (such as telephones, walk-ins) and within their loyalty programs. The Europe-wide removal of wide MFNs followed Booking.com's commitments to the French, Italian and Swedish competition authorities in 2015. Subsequently, narrow MFNs were also banned in four specific countries (Austria, Belgium, France, Italy) through amendments in law.

6 This judgement is in the process of being appealed by the BKA at the time of writing this article. Interestingly, the BKA has recently made public an analysis of the narrow MFNs it conducted during the course of the proceedings, and the results of which the Court did not accept. While the last word has not been said about this study and the BKA's case, this publication is interesting for various reasons, including its aim of empirical measurement of issues such as free riding. Available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_VII.html.

7 European Commission and the Belgian, Czech, French, German, Hungarian, Irish, Italian, Dutch, Swedish and UK national competition authorities (2017), 'Report on the monitoring exercise carried out in the online hotel booking sector by the EU competition authorities in 2016', April.

8 European Commission (2020), Support studies for the evaluation of the VBER, Final Report, May 2020, https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf.

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10. Like the cases, these studies have contributed their fair share to the debate around the competitive effects of MFN clauses. For instance, some would argue that the ECN study (based on a survey of hotels and market data) showed that wide MFNs did not, in fact, have a harmful effect in the hotel sector; while some others may interpret the results as merely showing that the market was not functioning as it should have in the aftermath of the ban (for instance, due to lack of awareness of hotels regarding the ban) and this is the reason why the study did not find empirical evidence of clear positive effects of the ban of wide MFNs.[9] Overall, the results of this study were not strong enough to draw definitive conclusions about the effect of wide MFNs on commissions paid by hotels and on consumer prices.

11. The most recent analysis in the support study examines the prohibition of narrow MFNs in three countries (Austria, Belgium and Italy). The analysis is based on econometric models of hotel prices over time in these three countries relative to other (benchmark) countries where narrow MFNs continued to be used. It concludes that the ban was followed by significant decreases in hotel prices, thereby indicating the anticompetitive effect of narrow MFNs.[10] As with the ECN study, the analysis and approach of this recent study also suffer from potential limitations. For example, one of the models uses highly aggregated price indices for a set of countries, which can be influenced by a range of factors unconnected to MFNs. For instance, in some countries that are used as benchmarks in the model, the data shows an (unexplained) increase in this price index over time, while such an increase is not seen in the three countries (Austria, Belgium and Italy) where narrow MFNs were banned. This drives part of the finding that a ban on narrow MFNs in Austria, Belgium and Italy reduced prices relative to the benchmark countries without this ban. However, this upward trend was present only in some of the benchmark countries and could have been driven by reasons unrelated to MFNs. Similarly, there are questions around the sample size and representativeness of the part of the empirical analysis (the model which utilises granular, hotel-level prices, covers only 95 hotels across 28 European cities).

12. Overall, many open questions remain regarding the impact of MFNs (wide or narrow) on the competitiveness of the online hotel booking sector, and it remains to be seen what the final verdict turns out to be in this saga.[11] Nonetheless, these cases do inform, to some extent, the broad approach that is likely to be appropriate for MFNs in the context of the revision of the VBER.

9 For example, the results showed that there was no clear evidence that commission rates had changed between July 2015 and June 2016, and around 90% of hotels saw no difference in the commissions charged by the OTAs. In the survey, more than 80% of hotels that replied said that they did not change their behaviour after the MFN clauses were removed.

10 The support study notes that this result cannot necessarily be generalised across sectors and markets.

11 In July 2020, the Commission published a call for tender for preparing a market study on the distribution of hotel accommodation in Europe. Available at: https://ec.europa.eu/competition/calls/tenders_open.html.

2. How should MFNs be assessed under VBER?

13. The revision of the VBER needs to address this gap in the current regulations and guidelines. The first question one may ask is whether MFNs should benefit from the safe harbours of the VBER. Another question is whether MFN clauses can be assessed using a "by object" approach or whether an effects-based approach is warranted.

2.1 By "object" or by "effect"?

14. An economic approach would strongly support that MFN clauses benefit from VBER, i.e. they should not be considered hardcore restrictions. From a theoretical perspective, it is well recognised that MFNs can have both anticompetitive and pro-competitive effects, and that the impact of MFNs depends on a number of factors. In this respect, MFN clauses are no different to other vertical restraints such as selective distribution agreements.

15. The next question is about instances where such clauses cannot benefit from the exemption due to market shares being above the safe harbour thresholds. Can/should MFNs be assessed using a "by object" approach in these instances because they are anti-competitive by their "very nature"?[12] Or should they be assessed using only effects-based analysis? We posit that the lessons from recent cases, the wider economic literature and the various ex-post analyses all suggest the latter, i.e., the assessment of MFN clauses under Article 101 warrants an effects-based approach.

16. First, the academic literature shows that the effect of MFNs depends on a range of factors and the combination of these factors critically influence the net impact on end consumers. This literature includes theoretical papers which model MFNs in various settings, for example, in the context of agency agreements vs wholesale agreements, and with potential entrants with similar or different business models. While a number of these studies conclude that MFNs (particularly wide retail price MFNs) are likely to be harmful in their net effect, some find that MFNs would lead to lower prices (or not lead to higher prices) and can be overall beneficial for consumers.[13] Overall, the theoretical papers show that the results are dependent on the specific market and commercial setup assumed in the models.

12 *See* for example: Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission*, paras 56-58; Case C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, para. 76.

13 For example, some early work by Corts (1997) includes a theoretical model which shows that price-matching policies can lower equilibrium prices if firms are adopting a price-beating approach. Corts, K. S. (1997), On the competitive effect of price-matching policies, *International Journal of Industrial Organisation*. Johnson (2014) finds in a theoretical model that MFN clauses increase prices when used with an agency model (and not with a wholesale model), although even with an agency model, they may facilitate higher choice without higher prices under certain contractual settings (e.g., if retailers face market-entry costs and when parties use profit-sharing rather than revenue-sharing). There are some other recent theoretical models which show pro-competitive effects, for example when suppliers have a higher bargaining power (*See* Larrieu, T. (2019), 'Most Favoured Nation Clauses on the Online Booking Market', Working Paper).

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17. Indeed, this increases the importance of empirical testing of the effects of such clauses. In fact, there are many studies that do so, including a large number on the online hotel booking sector, taking advantage of the policy changes mentioned earlier. In addition, academics have examined MFNs clauses in e-books, consumer electronics and a range of other consumer goods. Similar to the theoretical papers, the empirical studies show that the effects of MFN clauses vary depending on the specific market context.[14] This would suggest that analysing the actual or likely effects of MFN clauses in the specific context of a case is important to be able to appropriately assess the risks and benefits and the net effect on consumers.

18. Second, the *ex post* assessments in the hotel sector as discussed above also provide broad support for an effects-based approach. Indeed, it is by itself interesting that the ECN study (assessing the impact of wide MFNs) and the support study (analysing the impact of narrow MFNs) both carried out extensive econometric modelling to assess the impact of the bans imposed. Whatever the technical merits and robustness of the models and results, at the very least, this provides support for the view that MFN clauses are not anticompetitive by their "very nature".

2.2 Implications of assessing market definition and market share thresholds in platform markets

19. The definition of relevant markets in the context of online platforms has been and continue to be a topic of much debate, among academics and practitioners alike. While different views regarding the precise boundaries of the relevant market, and therefore market shares, can arise in any market, these are particularly stark in digital markets. This increases the uncertainties around the assessment of market shares in platform markets and hence, the assessment of whether the market shares meet the exemption thresholds. We posit that this makes an effects-based approach even more important (for MFNs and for other vertical agreements).

20. The challenges around market definition for two- or multi-sided platforms was noted during the Commission's consultation with national competition authorities. For example, a key question is whether the relevant market should be defined on the basis of one side of the platform or both (or more) sides, which raises the question of whether the exemption assessment under the VBER should require the 30% market share threshold to be met on each side of the market or only one side.[15] There have been challenges in front of Courts as well. For example, in *Sabre/Farelogix* merger, the District Court of Delaware in the US based its conclusions on the finding that Sabre operated in a two-sided platform market, and two-sided platforms compete only with two-sided platforms. The implication was that Sabre and Farelogix did not compete because Farelogix was not a two-sided platform.

21. While this opinion has been criticised by the antitrust community, the learnings from this case are relevant to the assessment of MFN clauses and other vertical agreements such as selective distribution systems. In particular, the court's view that two-sided platforms can compete only with two-sided platforms may have arisen from an ongoing debate about whether there is a distinction between transaction and non-transaction platforms. Some have argued that the relevant market(s) is likely to be separate single markets on each side if it is a non-transaction platform, and a single market encompassing both sides if it is a transaction platform. However, others are of the view that using such a simplistic approach can lead one to ignore indirect network effects that may exist between the two sides of the platform and the wider competitive constraints on the platform (which is ultimately the purpose of the market definition in the first place).[16]

22. In the context of MFNs in particular, it is important to keep In mind that distribution platforms which may be facilitating a transaction between suppliers and consumers are often competing with the suppliers' own direct distribution channels (which are not considered platforms by definition). The interaction and competitive dynamics between the direct channel and the platforms is a key aspect to account for in the assessment of MFNs (and selective distribution systems) given the possibilities of free riding. Whether or not these other distribution channels are considered part of the relevant market, and therefore considered in the application of the 30% market share threshold, will depend on the specific case. In any event, these wider constrained should be accounted for in the overall assessment of these vertical agreements. In this context, a "by object" approach to scrutinising MFN clauses (and indeed, selective distribution systems) increases the risk of a false positive.

3. What factors are relevant to an effects-based analysis of MFNs?

23. As highlighted in the literature, there are a range of factors that affect the impact of MFNs on intra- and inter-brand competition. The support study has a

14 For example, one study by Chen et al. (2011) on the impact of Best Buy's MFN clauses on consumer electronics found that price decreased after the introduction of the clauses, while another study found that the price impact depends on whether consumers value the services offered in the physical stores. J. Chen & Q. Liu (2011), The Effect of Most-Favored Customer Clauses on Prices, *The Journal of Industrial Economics*, Vol. 59, No. 3, pp. 343–371; and C. Wu, K. Wang & T. Zhu (2015), Can Price Matching Defeat Showrooming? *See also* the Commission's support study, section 8.2.

15 Commission Staff Working Document published on 8 September 2020, p. 121.

16 For a discussion on market definition, *see*, for example, the main academic paper advocating the distinction between transaction and non-transaction market: L. Filistrucchi, D. Geradin, E. van Damme & P. Affeldt (2014), Market Definition in Two-Sided Markets: Theory and Practice, *Journal of Competition Law & Economics*, Vol. 10, Issue 2, pp. 293–339; and a response by G. Niels (2019), Transaction Versus Non-Transaction Platforms: A False Dichotomy in Two-Sided Market Definition, *Journal of Competition Law & Economics*, Vol. 15, Issue 2–3, pp. 327–357.

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comprehensive discussion of these factors, drawing from both theoretical and empirical studies. For example, the extent of use of MFNs is one of the factors commonly discussed (some show that use of MFNs by multiple platforms covering most of the market could amount to RPM) as is the use of agency model. Other relevant factors include: the relative position of the platform vis-à-vis suppliers; the incremental impact of additional platform competition; as well as any gaps in adherence to MFNs by suppliers. Whether these factors are all relevant will depend on the context of the specific market. For example, in insurance markets, it is relatively easy for suppliers, i.e., insurance providers, not to adhere to any MFN agreements because of the bespoke nature and fast-moving of pricing.

24. The relative position of the platform and the suppliers is likely to be an important factor to consider in most markets. This is because MFNs could help strengthen the position of one or a small number of larger platforms, which in turn could decrease search costs for consumers and increase competition between the suppliers. For instance, if there are four or five large suppliers with strong brands and significant direct sales, and barriers to switching exist on the side of consumers, online platforms such as price-comparison websites can play an important role in increasing competition between these suppliers. In this case MFNs could benefit consumers by increasing inter-brand competition even if there is a decrease in intra-brand competition.

25. Even in the case of a more fragmented supplier market, maintaining the incentives of platforms to invest in reducing search costs for consumers can be beneficial on balance to consumers if this increases inter-brand competition—for example, by promoting growth of smaller suppliers and challenging larger incumbents. In this context, it is interesting that the support study finds (based on interviews with accommodation providers) that OTAs are more important for the visibility of small hotels relative to larger ones. Small accommodation providers estimate their marketing and IT costs necessary for acquiring visibility to be higher than the commissions paid to these platforms.[17]

26. This relative size between platforms and suppliers is not discussed as widely as other relevant factors. For instance, the report Competition Policy for the Digital Era[18] discussed the extent of competition between platforms, stating that: "*If competition between platforms is sufficiently vigorous, it could be sufficient to forbid wide MFNs while still allowing narrow MFNs. If competition between platforms is weak, then pressure on the dominant platforms can only come from other sales channels and it would be appropriate for competition authorities to also prohibit narrow MFNs.*" This approach, however, offers only a partial view and significantly risks prohibiting beneficial MFN clauses, because it focuses only on intra-brand competition, and not on the overall impact on consumers through intra- *and* inter-brand competition.

27. There is also a broader question around the extent to which additional competition between platforms, especially platforms which facilitate price comparisons, improves consumer outcomes. While, in principle, higher platform competition should increase intra-brand competition, and potentially reduce commissions, there may be decreasing returns to additional competition if there are sufficient platforms in the market already. For example, it may be that an oligopolistic structure among platforms with three or four comparison websites allows for sufficient intra-brand competition while at the same time keeping each platform popular enough to facilitate and increase inter-brand competition. In this context, it is relevant to consider the potential effects on consumer trust because the quality of service provided by a small number of platforms could reduce consumer trust in the relevant platforms as a group.[19] This is another important aspect in striking the balance between the potential anti- and pro-competitive effects of clauses such as MFNs, and in ensuring that both both intra- and inter-brand competition is enhanced to the benefit of consumers.

III. Analysis of free-riding

28. As discussed above, the prevention of free-riding is one of the common pro-competitive benefits of MFNs, and indeed of many other vertical agreements. As shown by the German experience, the evidence of consumers' free riding on OTAs' investments was the key reason for the court to overturn the BKA decision.

29. In general, competition authorities, while recognising the free riding justification as one that could be at play in principle, often do not accept the argument because of lack of concrete evidence. This is not surprising. Showing that free riding is occurring in the context of an investigation into a specific vertical agreement in a specific market context (such as an MFN clause or a selective distribution system) is likely to be difficult because the existence of the agreement itself could be preventing such free riding. What is needed in this case is a counterfactual world without the specific agreement, which could be a challenge unless the specific agreement is limited to a few market players or few countries. A further challenge could be that the effect of consumers' free riding would likely materialise only in the medium to long term. As noted by the Dusseldorf Court in its ruling on the BKA decision on narrow MFNs, the free riding risk will materialise only over time as consumers lose

17 European Commission (2020), Support studies for the evaluation of the VBER, Final Report, p. 99.

18 European Commission (2019). Competition policy for the digital era. Available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

19 There have been concerns in the past about the reduction of consumer trust in comparison tools, for example, following proliferation of such platforms, and the European Commission led a number of initiatives to address this. *See* a discussion here: https://ec.europa.eu/info/sites/info/files/consumer-summit-2013-msdct-report_en_0.pdf.

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confidence in OTAs as offering the best prices, thereby switching away to the direct channel and weakening the extent to which OTAs can invigorate inter-brand competition.

30. Nonetheless, there is a range of evidence one can bring to bear on this question. Consumer surveys are an obvious one, where consumers are asked about their online searching behaviour including where they start their search, what subsequent steps they take, how many and which websites they use to search, and why they chose the website where they ultimately made the purchase. Data on actual consumer search and browsing behaviour are also available from various sources. These are particularly useful as these sources can indicate, for example, whether consumers typically visit the relevant distribution platform (e.g., OTA) and the suppliers' websites (e.g., hotels) on the same day. Such cross-visitations and audience overlap analysis indicate the scope of free riding in a world without the agreement (e.g. without MFN clauses or if the selection criteria for a selective distribution network is relaxed to include more online retailers).

31. Whatever the method, it is relevant to take into account the inherent challenges in providing concrete evidence of free riding occurring in the specific market. Arguably, what is necessary is to show the *scope* or *risk* of free-riding rather than actual free riding (assuming the MFN or selective distribution in place, one is less likely to observe actual free riding). It is also necessary to account for such free riding analysis in the competitive assessment of the relevant agreement under Article 101(1) and not only under Article 101(3). It is particularly relevant for vertical agreements also due to the various pro-competitive effects and rationale for such agreements.[20] ■

20 For a legal perspective on this issues, see '*Vertical restraints after Generics and Budapest Bank*' by Pablo Ibáñez Colomo, in *'The VBER and Vertical Guidelines: Revision or reform? Reflection on critical issues'*, Concurrences N° 1-2021, Art n° 98100.

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Agents and distributors: Should definitions be revised?

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I. Introduction

1. The European Commission ("the Commission") is currently evaluating the functioning of the Vertical Block Exemption Regulation (EU) No. 330/2010 (the "VBER") and the related Guidelines on Vertical Restraints (the "VGL"). It is considering, among other things, how vertical agreements that generally fall outside the scope of Article 101(1) TFEU ("Article 101(1)"), in particular "agency agreements" (covered in recitals 12–21 VGL), are addressed.

2. Whether a principal and its agent form an economic unit is important for the purpose of establishing if conduct falls within the scope of Article 101(1). The VGL currently provides guidance on when an agent forms with its principal one and the same economic unit on a defined market and can thus "escape" the application of Article 101(1).[1] The determining element is the unity of their behavior on the market, seen in the light of the agency agreement concerned.

3. Against this background, the existence of very rigid conditions to qualify as a "genuine" agent[2] and the increase in different forms of modern agents have generated widespread requests to clarify how the antitrust agency principles apply to new types of agency-like arrangements. The private sector has called for clarity,[3] also to avoid differing applications by courts and national competition authorities ("NCAs"). The risk of diverging outcomes is not remote as concerns over the interpretation of the rules have been raised even by NCAs in the context of the Commission's public consultation on the VBER and VGL.[4] Most of these discussions focus on whether the conditions that the intermediary must not bear any significant risks and that generally no transfer of title can take place for there to be a "genuine" agency relationship still fit in well with the economic reality of certain sectors.

4. In its current evaluation of the functioning of the VBER and VGL, the Commission is thus called upon to decide whether changes are needed to answer more clearly the question of when distribution arrangements

1 Commission Notice, Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1–46, recital 12: "*An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the: – purchase of goods or services by the principal, or – sale of goods or services supplied by the principal.*"

2 The VGL no longer uses, as its predecessor did, the term "genuine" agency agreements, however, for ease of reference, it is used throughout the article to refer to agency agreements that are exempt from the application of Article 101(1).

3 *See* Summary of the stakeholder workshop on the evaluation of the Vertical Block Exemption Regulation (EU) No. 330/2010 held in November 2019 (the "Summary"): "*Participants in one roundtable discussed the agency concept as set out in the Vertical Guidelines. The roundtable participants indicated that the agency exception is positive and should be kept, but that there is currently a lack of clarity as regards the underlying requirements and their application to fulfillment agents and online platforms. The roundtable participants pointed in particular to a lack of clarity regarding the notion of* 'market specific' *investments, the number of principals that an agent can have and the impact of the transfer of the title or possession of the goods concerned from the principal to the agent. They also pointed to a need to address specific situations in the Vertical Guidelines on the basis of worked examples. The roundtable participants argued that the resulting increased clarity and legal certainty would help businesses to provide the most efficient distribution service for consumers.*" *See also* Annex II to the Summary "Ideas": "*Adapt definition of 'genuine agent' to online world and give note certainty to suppliers and intermediaries / Clarify definition of 'genuine agents' in the online environment / Keep + clarify agency exemption in a digital context.*" The Final Report of the Support studies for the evaluation of the VBER, published by the Commission at the end of May 2020 (the "Final Report"), is, on the other hand, silent on the topic of agency as it focuses on "*selective distribution, exclusive distribution, resale price restrictions, most favoured nation clauses and cumulative effects, while taking into account additional related vertical restraints, identified in the process of conducting the study.*"

4 As stated in the Commission's Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No. 330/2010: "[W]*ith regard to online platforms, there seem to be diverging views among NCAs as to whether they can qualify as genuine agents. Some NCAs consider that certain characteristics of online platforms indicate that they cannot form an integral part of the principal's distribution system and should therefore not be treated as genuine agents (e.g. platforms usually bear the entire risk of investing in their infrastructure, deal with many different – often smaller – principals and can have a strong bargaining position). Other NCAs take the view that, depending on the circumstances, online platforms could qualify as an agent, with the result that Article 101 (1) TFEU does not apply to intrabrand restrictions agreed between the platform and the principal. In light of the above, NCAs advocate for more guidance on relevant factors to be taken into account in the assessment whether online platforms can qualify as agents, which should be carried out on a case-by-case basis.*"

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with new forms of modern intermediaries (such as online platforms or fulfillment wholesalers) constitute "genuine" agency agreements. As literature on the distinction between "genuine" and "non-genuine" agents is extensive, this article aims to give an overview of the recent discussions, and reaches the conclusion that the existing definitions do not need to be revised, as the VGL already provides an exhaustive framework for analysis. Accordingly, interventions (if any) on the part of the Commission should arguably be minor.

II. Increasing digitalization and the emergence of new forms of distribution

5. Traditionally, the notion of agent encompasses commercial agents looking for buyers or sellers on behalf of the company in whose name they are acting: the company being the real seller or buyer. Today market reality has become more complex and many sectors of the economy use agreements that involve intermediaries whose role is essentially that of providing marketplace and/or logistics services. These distribution models, characterized by the presence of an intermediary whose role is that of facilitating the supply/purchase relationship between a supplier and a customer, flourish in both the online and offline sphere.

6. Online, the increasing digitalization of distribution has enabled the emergence of platforms capable of attracting customers and of providing advanced intermediation and logistics services. Some of these have characteristics that differentiate them greatly from the traditional agent,[5] such as: being influential intermediaries capable of exercising significant buyer power; bearing substantial financial risks, for example investments in IT infrastructure and digital marketing campaigns to increase their attractiveness and user base; and the fact that their strength relies on the more principals they have.[6] Moreover, the increased shift towards access to services has complicated the assessment as to who is the supplier and who is the buyer, also due to the increased "de-materialization" of goods and the facilitated division between sales, payments and delivery activities.[7] Nowadays online agency-type relationships often foresee both models where the customer pays the agent or where the customer pays the principal (the commission being retained or paid off depending on the model used). This calls for a more careful assessment of the role of the intermediary, and in particular whether the intermediary is a distributor, an agent or a provider of an upstream input (e.g., online marketing or booking services). The proliferation of online platforms, which are often very big, has further exacerbated these issues, as business models now range from pure marketplaces, to players that act as online distributors, to providers of traditional distribution activities (such as inventory or delivery).

7. Offline, in traditional forms of distribution there has been a rapid increase in so-called "fulfillment wholesalers." These are third-party logistics companies that handle the receipt of goods, detailed inventory management solutions, shipping and fulfillment to customers, and are remunerated for their wealth of experience with shipping partners and investment in systems for accurate shipment. In this context, the relationship with the customer is often dealt with directly by the manufacturer or brand owner, including in relation to the negotiation of prices (where volumes may be negotiated in a centralized manner for price reduction purposes). In contrast, the fulfillment wholesaler's role, even in cases where ownership passes on an instantaneous basis, often remains that of providing a logistical service and, in practice, of applying the trade conditions negotiated and contracted between the manufacturer or brand owner and the customer.

8. The above business models, whether offline or online, often have the objective of facilitating the sales between supplier and purchaser (and of being paid a fee to manage this process); not necessarily that of influencing the commercial strategy related to the sale itself and thus not that of acquiring to resell in order to make a profit. These distribution formats have the pro-competitive effect of bringing facilitators and logistics providers into the distribution chain. This helps suppliers balance their commercial risks, as outsourcing frees up their time so they can focus on growing their business and break into new markets and, as their business grows, they do not have to worry about the added cost of purchasing technology to meet demand. Inter-brand competition is also normally preserved by the negotiations between manufacturers/brand owners and customers, while competition between intermediaries continues in parallel to be strong, stimulated by factors related to the quality of the services provided.

9. Some people assert that, on paper, the VGL criteria may be excessively rigid in relation to these new forms of online and offline distribution, which can lead companies to consider too systematically in their self-assessment that there is a non- "genuine" agency contract.

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5 On the absence or rareness of the textbook model of agency as the exact equivalent of vertical integration, *see* R. L. Smith & A. Merrett, Representing Colin Firth or Mr Darcy: can competition law handle the reality of modern agents?, *European Competition Journal*, Vol. 13, No. 2–3, 2017, p. 316 onwards.

6 Interestingly, the staff working document accompanying the EU Commission's e-commerce inquiry observed that agency agreements are not commonly used in the product categories covered by the sector inquiry and less than a fifth of respondent manufacturers use this type of agreement while less than 1 in 10 marketplaces would act as an agent for their professional sellers; *see* A. Lacresse, Agency agreements: An overview of EU and national case law, *e-Competition* Agency Agreements, December 19, 2019, www.concurrences.com, p. 6.

7 For an interesting discussion on the "service-ization," "de-passivation" and "platformization" of online sales, *see* J. Hederström & L. Peeperkorn, Vertical Restraints in On-line Sales: Comments on Some Recent Developments, *Journal of European Competition Law & Practice*, Vol. 7, Issue 1, 2016, p. 14 onwards.

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III. The agency analysis for online platforms

10. The complexity and variety of activities offered by online distributors (e.g., retail activities, intermediation activities and provision of platform services to enable retailers to market and distribute products) raise the question of whether and when online platforms can qualify as "genuine" agents. Although, in a number of cases, NCAs and the Commission have been confronted with agency models involving sales over the internet, to date the question of whether these agreements can be considered "genuine" agency agreements under EU competition law has not yet been answered by the Commission.[8]

11. So far, in a number of national precedents on MFN clauses in agency agreements concerning hotel bookings over the internet, both in cases leading to infringement decisions and to commitment decisions, NCAs have considered the relevant market to be that of the supply of online platform services to suppliers.[9] One question is therefore whether it can be stated, and should be spelled out more clearly, that such activities can never fall within the "genuine" agency framework. However, the introduction of a similar universal rule is not warranted, as it runs the risk of introducing erroneous generalizations and crystallizing rules that may not correspond to market developments. Moreover, ultimately, it runs counter to the acknowledgment that the judgment with respect to the choice of distribution model must be neutral, as it is the effects of any restrictions that should be considered rather than form. Otherwise suppliers will be forced to use suboptimal forms of distribution only to remain within the Commission framework.

12. Furthermore, as will be explained, the current VGL framework provides exhaustive criteria to answer the questions of whether and when similar intermediaries can qualify as "genuine" agents and, in most cases, likely rules out this possibility, without the need for additional legislative interventions. The most contentious issues for the purpose of the analysis concern market-specific investments, and the existence of strong bargaining power, multiple principals and the intermediary's autonomous business. These will be examined in turn.

8 These issues were not dealt with by the Commission in Commission Decision C(2013) 4750 of 25 July 2013, *E-Books*, Case COMP/39.847. Aside from this being a commitment decision, the main issue concerned a horizontal concerted practice between a number of publishers and Apple to switch collectively to an agency model and use a retail MFN clause.

9 *See* Final Report, p. 108. Regarding the distinction between distributors and providers of an upstream input or service, an effective parallel has often been drawn between online platforms versus retail suppliers and shopping malls versus retail shops, to advocate that online platforms are comparable to shopping malls that provide the environment where retailers can operate without involvement in the individual customer transactions or distribution functions; *see*, among others, M. Bennet, Online Platforms: Retailers, Genuine Agents or None of the Above?, *CPI*, June 20, 2013.

1. The relevance of significant risks and investments borne by the intermediary

13. According to recital 13 of the VGL, the determining factor for the definition of an agency relationship is the commercial or financial risk which the agent bears in relation to the activities for which the principal has appointed it. Recital 14 states that there are three types of financial or commercial risks that are relevant to the definition of an agency contract: (i) the risks specific to each contract (costs relating to the supply/purchase of the products, in particular the costs of transport, financing of the stock, loss or deterioration of the products, unsold goods, product liability, responsibility for customers' non-performance of the contract, sales promotion, such as contributions to the advertising budgets of the principal, etc.); (ii) the risks linked to market-specific investments—that is, investments specifically required to enable the agent to perform the activity for which it is appointed, such as investments in equipment, premises or training of personnel, e.g., the petrol storage tank in the case of petrol retailing or specific software to sell insurance policies in the case of insurance agents (these investments are usually sunk, i.e., irrecoverable upon leaving that particular field of activity); and (iii) the risks linked to other activities carried out on the same product market insofar as the principal requests the agent to undertake these activities not on its behalf but at the agent's own risk (e.g., after-sales services). Recital 15 specifies that the agreement will be considered as an agency contract if the agent does not bear any risk, or only bears a negligible part of it.[10]

14. For online platforms, a contentious aspect concerns the assessment of the risks linked to marketing and technology investments. In particular, whether these should be considered risks related to the activity of providing agency services in general, which are not material to the assessment and do not affect the "genuine" agency analysis (typically, among these there is the risk of the agent's income being dependent upon its success or general investments in equipment, premises or personnel or insurance against theft and possible damage to the goods); or whether they should be considered risks linked to market-specific investments, which would require an analysis of whether the risks borne are significant.[11]

10 Recital 16 of the VGL establishes that an agreement will generally be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not itself supply the contract services. It also suggests that it is sufficient that only one of the risks listed in the VGL is borne to a significant extent by the agent to consider that an agreement does not constitute a "genuine" agency contract. Furthermore, recital 17 recommends assessing, first, contract-specific risks, then the risks related to market-specific investments and, lastly, the risks related to other required activities within the same product market; where the agent incurs one or more of these risks or costs to a non-insignificant extent, the agreement will not be classified as an agency agreement.

11 Contract-specific costs tend to be less of a factor in the agency analysis for online activities, as they are more often borne directly by the principal, e.g., for unsold goods and product liability, or they are remunerated as consideration for a specific activity performed, e.g., for stocking/inventory fees and transportation. Likewise, risks linked to other activities carried out on the same product market (such as after-sales services) also tend to be less of a factor in the analysis as they are less widespread or, again, remunerated to the agent as consideration for the specific activity performed or even, often, directly borne by the principal.

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15. The analysis necessarily turns on the facts. Certain investments, for example in computer and software requirements or IT infrastructure, can be resold at a profit and are thus not sunk costs. Accordingly, their qualification as risks related to the activity of providing agency services in general (not relevant for the "genuine" agency analysis) or as market-specific risks (relevant for the analysis only to the extent the risks borne are significant) is not decisive, as the analysis in either case is not affected and will need instead to be carried out in relation to the remaining investments made and risks borne.

16. In contrast, advertising and marketing expenditure for the agent's brand and services—albeit, theoretically, close to risks related to the provision of agency services in general that influence the success of the agent—cannot be analyzed in a vacuum. It is necessary to take into account the specific characteristics of the activities they are meant to favor. Although business models and activities can be diverse, all online platforms have in common the need to bring attention to the platform. This objective is achieved, among other things, by making substantial marketing investments to gain publicity and visibility over the internet (such as in search engines and on price comparison sites or through marketing campaigns) and client-driven investments to improve the purchase experience and target individual customer needs in order to create a comprehensive and attractive environment.[12]

17. Such investments are made to allow the intermediary to perform the activity for which it is appointed, creating a specific ecosystem tailored to the goods and services sold in order to attract customers.[13] They are also often substantial and cannot be recouped, which is a typical feature of market-specific risks. This makes them more akin to risks linked to market-specific investments than to the provision of agency services in general and, accordingly, necessarily affects the "genuine" agency analysis. The analysis could be more contentious if the investments were made exclusively to advertise the agent's brand and services in order to improve its competitive position in the market for agency services. This, however, is arguably an oversimplification for online platforms, as their investments aim to attract clients to their environment also in the principals' interest,[14] and thus it is unlikely to be the case for most of them.

18. The analysis thus turns on whether or not the intermediary bears the market-specific investments alone or only in a negligible part. As these investments tend to be very large,[15] the fact that online platforms often use several principals becomes relevant when analyzing risk compensation. It would be too simple to claim that these investments are automatically compensated by the remuneration (in the form of commission) subsequently received from all principals, as even if money is made on the sales this does not mean that the original investment made was risk-free. Also, the investments should be proportionally allocated among principals; however, it is evident that if the contractual relationship is subsequently scrutinized by an antitrust authority, the existence (or absence) of risk compensation would be challenging, if not impossible, to demonstrate for any principal.

2. The relevance of bargaining power exercised by the intermediary

19. For there to be a "genuine" agent, recital 18 of the VGL also requires that the principal must be in a position to determine the commercial strategy in relation to the contract goods and services sold through the agent's intermediation.[16] This raises the question of whether the size and bargaining power of online platforms, and their subsequent ability to impose restrictions on the principal, mean that it is the agent rather than the principal that determines the overall commercial strategy.

20. There is the line of reasoning that the capacity of the agent to extract concessions in return for becoming an agent may be relevant before entering into the agreement, but should not be relevant for the analysis after, as principal and agent may still act as a single economic unit following signing of their agreement.[17] This may be the case for concessions related to the agent's remuneration (e.g., commission fees). It also has the advantage of avoiding distortive outcomes as concessions extracted by the agent (i.e., restrictions on the principal) that concern activities of third parties outside the agency relationship (e.g., prices applied on other platforms) continue to be

12 Not surprisingly, as indicated by certain hotels in relation to hotel online travel agents ("OTAs"), "*the business model of these platforms ensures that they focus exclusively on their marketing investments*"; *see* Final Report, p. 105.

13 In the *Mango/Punto FA* case the French Competition Authority ("FCA") reached the conclusion that even investments in physical sales layout (the fitting of premises to have a Mango-uniform layout) were to be considered market-specific investments (FCA, Decision No. 09-D-23 of 30 June 2009 on practices in the sector of clothes' distribution). A parallel can be drawn with the creation of online ecosystems tailored to specific brands and customer needs.

14 The activities that platforms today carry out to attract customers to their ecosystem are very diverse, ranging from targeting strategies, to the integration of stylists and influencers to integrate new visual aspects, to loyalty programs, and to access to additional digital content (such as audiobooks, digital video, e-books and digital music).

15 By way of example, hotel OTAs' advertising expenditure is estimated to be about 1 billion euros; *see* Final Report, p. 105.

16 "*In the case of agency agreements (…), the selling or purchasing function of the agent forms part of the principal's activities. Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1). The following obligations on the agent's part will be considered to form an inherent part of an agency agreement, as each of them relates to the ability of the principal to fix the scope of activity of the agent in relation to the contract goods or services, which is essential if the principal is to take the risks and therefore to be in a position to determine the commercial strategy* (…)."

17 *See*, among others, M. Bennet, Online Platforms: Retailers, Genuine Agents or None of the Above?, cited above.

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scrutinized under Article 101(1).[18] However, in relation to concessions extracted by the agent that affect the goods and services sold through the agent's intermediation, it is at odds with the VGL and EU case law.

21. In early cases, decisions and judgments focused mainly on the auxiliary character of the role played by the commercial agent.[19] In particular in *Suiker Unie*[20] the Court of Justice decided that the agent, which was required to follow the instructions of the principal, and not responsible for the financial risks linked to the sale which it negotiates or to the execution of the contracts which it concludes with third parties on behalf of the principal, must be regarded as an auxiliary organ integrated in the enterprise of the principal and forming with it an economic unit.[21] Early case law indicated that both conditions (that "genuine" agents do not bear any significant risks and operate as auxiliary organs) had to be met for a "genuine" agent to be treated as such.[22] The condition that "genuine" agents operate as auxiliary organs was interpreted as requiring that "genuine" agents do not act for several principals and/or do not carry out independent activities on the same market.[23] Later, consistently with the Commission's objective of allowing "genuine" agents to have several principals, thereby fostering inter-brand competition, the requirement that the agent operate as an auxiliary organ forming an integral part of the principal's business was dropped under the 2000 VGL and the current VGL (creating the dichotomy existence of auxiliary organ versus existence of multiple principals). However, the General Court in *DaimlerChrysler*[24] and the Court of Justice in *CEPSA*[25] have continued to refer to the "auxiliary organ" criteria as a necessary condition for the existence of a "genuine" agent under competition law; while also recognizing that such criteria can be fulfilled even if an agent has several principals (*Voestalpine*).[26]

22. Against this background, the key question is whether the concessions extracted by the agent effectively affect the way in which the contract goods or services are commercialized. If they do, the agent will be influencing, if not even determining, the commercial strategy of the principal, contrary both to the requirement that the principal decide its own commercial strategy autonomously, as set out in recital 18 VGL, and to the "auxiliary organ" criteria still in the case law.[27]

23. The need to analyze the agent's ability to influence the commercial strategy in relation to its own activities is also consistent with the more pragmatic approach adopted by the EU courts in recent case law. In particular, it is consistent with the above-mentioned judgments of the General Court in the *DaimlerChrysler* case[28] and the *Voestalpine* case.[29]

24. As usual, the analysis requires a careful case-by-case assessment, as there may well be instances in which online platforms do not have bargaining power or have it but do not exercise it in a meaningful way in their contractual relationships.

18 The application of Article 101(1) is only excluded in relation to the restraints imposed on the agent concerning the contracts concluded and/or negotiated on behalf of the principal, while it continues to apply to other obligations such as exclusivity or non-compete obligations, and also retail MFN or retail parity clauses relating to price and/or other terms and conditions. If the agent holds a dominant position, the restrictions at issue will be examined under Article 102; *see* the EU Commission's recent decision concerning Amazon's possible abuse of its dominant position on the markets for the retail distribution of English and German language e-books to consumers by requesting parity conditions in its e-books agreements with publishers (Commission Decision C(2017) 2876 final of 4 May 2017, *E-book MFNs and related matters (Amazon)*, Case AT.40153).

19 For an overview of the evolution of the integration criteria in early EU cases, *see also* E. Dieny, The Relationship Between a Principal and its Agent in Light of Article 81(1) EC: How Many Criteria?, *European Competition Law Review*, Vol. 29, Issue 1, 2008, pp. 5–10.

20 CJEC, 16 December 1975, *Suiker Unie and Others v. Commission*, Joined Cases 40/73–48/73, 50/73, 54/73–56/73, 111/73, 113/73 and 114/73, *ECR* 1663, EU:C:1975:174, para. 539.

21 After *Suiker Unie*, early cases focused on whether the agent was integrated into the principal's business like an employee; for a detailed overview of the evolution of EU jurisprudence on agency agreements and on the economic foundations for exempting agency relationships, *see* A. Huyue Zhang, Toward an Economic Approach to Agency Agreements, *Journal of Competition Law & Economics*, Vol. 9, Issue 3, 2013, p. 564 onwards.

22 *See* CJEC, 24 October 1995, *Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*, Case C-266/93, *ECR* I-3477, EU:C:1995:345, para. 19: "*Representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking.*"

23 CJEC, *Suiker Unie*, cited above, paras. 546–547; CJEC, 1 October 1987, *ASBL Vereniging van Vlaamse Reisbureaus v. ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, *ECR* 3801, EU:C:1987:418, para. 20; and CFIEC, 11 December 2003, *Minoan Lines SA v. Commission*, Case T-66/99, *ECR* II-5515, EU:T:2003:337, para. 129 (appeal dismissed, Case C-121/04 P, EU:C:2005:695).

24 CFIEC, 15 September 2005, *DaimlerChrysler AG v. Commission of the European Communities*, Case T-325/01, *ECR* II-3319, EU:T:2005:322, paras. 87–88; for a commentary *see* P. Henty, Agency Agreements – What are the Risks? The CFI's Judgment in Daimler Chrysler AG v Commission, *European Competition Law Review*, No. 3, 2006, pp. 102–107.

25 CJEC, 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA (CEPSA)*, Case C-217/05, *ECR* I-11987, EU:C:2006:784, para. 43.

26 GCEU, 15 July 2015, *Voestalpine AG and Voestalpine Wire Rod Austria GmbH v. European Commission*, Case T-418/10, EU:T:2015:516, paras. 153–160.

27 By way of example, MFN clauses obtained by an online platform that limits the principal's pricing options at other retailers can be viewed as a concession extracted by the agent that has an impact on the principal's commercial strategy, as pricing decisions on that platform are inherently impacted by prices set elsewhere (e.g., because discounts granted elsewhere need to be granted also on the MFN-protected platform). This approach was followed by the German authority in the *OTA HSR* case, which found that the "auxiliary organ" condition was not satisfied because the agent decided the strategy of the principal by imposing an alignment of commission fees through MFN clauses. For an interesting commentary on how the decision of the EU courts to "hold on" to the "auxiliary organ" condition may prove particularly useful today with the proliferation of online platforms with a bigger size than their principals and significant buyer power, *see* P. Goffinet & F. Puel, Vertical Relationships: The Impact of the Internet on the Qualification of Agency Agreements, *Journal of European Competition Law & Practice*, Vol. 6, No. 4, 2015, pp. 242–249.

28 CFIEC, *DaimlerChrysler*, cited above, para. 88: "[W]*here an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions given to him by his principal, the prohibitions laid down under Article 81(1) EC do not apply to the relationship between the agent and the principal with which he forms an economic unit.*"

29 GCEU, *Voestalpine*, cited above, para. 153. The Court, investigating whether the economic risk borne by the agent is such that the contract binding it to the principal confers or leaves it functions which are economically close to that of an independent trader stated the following principle: "[I]*n order to determine the existence of an economic unit between the agent and one of his principals, it is necessary to ascertain whether that agent is in a position, as regards the activities entrusted to him by that principal, to act as an independent trader free to determine his own business strategy. If the agent is not in a position to act in that way, the functions which he carries out on behalf of the principal form an integral part of the latter's activities.*"

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3. The relevance of the existence of multiple principals or of the intermediary's autonomous business

25. As mentioned, both the Commission's decision-making practice and the courts' case law have found that "genuine" agents can act for multiple principals. However, if there are competing demands from multiple principals and no objective and non-discriminatory mechanisms in place to resolve such conflicts (e.g., auctions for a prominent placement in online activities), the intermediary is unlikely to qualify as a "genuine" agent, as the agent's own interests can hardly align to those of all its principals. This may be particularly relevant for online platforms which, in order to increase their attractiveness, undertake specific investments to appeal to more customers and increase the volume of transactions, which thereby enables them to gain more commission. It is therefore hard to see how such market-specific investments could be transferred to each single supplier and it would be very difficult to demonstrate that each principal bears all the risks and costs relating to its own activity. There are rare scenarios in which it could be demonstrated that market investments are supplier-specific and reimbursed entirely by the principal in whose interests they are made (e.g., training employees to better promote certain brands). However, even in these cases, to the extent that the resolution of competing demands still requires the intermediary to make its own independent upstream decisions on who to "favor," when the interests of all principals cannot be satisfied, the intermediary will necessarily be more akin to an independent trader that freely determines his or her own commercial strategy.

26. Likewise, intermediaries that act both as facilitators and retailers that sell in competition with their principals, and thus also transact on their own behalf, have similar conflicts to resolve, and this may well rule out the existence of aligned interests that characterize "genuine" agents.[30] Such issues will inherently arise every time an agent performs a variety of functions, which is often the case with online platforms. Unsurprisingly, the General Court reached a similar conclusion in the *Voestalpine* case also recalling earlier jurisprudence on the point.[31] In this scenario, it is all the more difficult to imagine how the market-specific investments can be transferred to each single principal, as the intermediary also benefits from them. Also, the potentially conflicting goals pursued lead to non-alignment of incentives and therefore the impossibility to act as a single economic unit.

IV. The agency analysis for fulfillment wholesalers

27. As indicated, fulfillment wholesalers are intermediaries whose role is essentially that of providing logistics services (with activities involving sourcing products, managing inventory, picking, packing, shipping, processing returns, etc.). Often, although the main role of these intermediaries is to provide similar services, they also take over ownership of the contractual goods and/or take on certain risks that do not clearly fit with the traditional interpretation of the agent/principal relationship and for this reason tend to be automatically treated as wholesalers/retailers.

28. Some claim that these business models—even when the ownership of the goods passes on an "instantaneous" basis—have the objective of facilitating the sales between supplier and purchaser and the logistics process. They claim that they do not have the objective of influencing the commercial strategy related to the sale itself and acquiring to resell in order to make a profit. According to this line of reasoning, in such cases, the intermediaries at issue, even if they legally buy the goods for resale, simply apply the commercial policy agreed between suppliers and final customers, while focusing on logistical functions. They should therefore be considered "genuine" agents in order to not run an unjustified risk of penalty, in particular for imposed resale prices. For these reasons, requests have been made for the Commission to intervene to indicate that these types of agreements must be considered "genuine" agency contracts.

29. In relation to the analysis of these types of agreements, in most cases the issue of ownership will continue to remain a key consideration, as ownership that remains with the principal inherently reflects the purpose and scope of the traditional agency model.[32] However, although this is an important consideration for the agency analysis, recital 16 of the VGL recognizes that an agreement will "generally" be considered an agency agreement where property in the contract goods bought

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30 Even situations in which the intermediary deals in non-competing activities can be problematic, in light of the ambivalent relationship this creates, in particular if these activities are carried out to the extent permitted by the principal; *see* CJEC, *Suiker Unie*, cited above, para. 547. The competition issues that arise in the context of dual distribution systems are outside the scope of the present analysis but are at the forefront of the debate on vertical and horizontal restrictions that may arise with intermediaries that act both as facilitators and retailers and are a current enforcement priority of the EU Commission (*see*, for example, the EU Commission's formal antitrust investigation against Amazon launched in July 2019 to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace infringes EU competition rules).

31 GCEU, *Voestalpine*, cited above, para. 141: "*As regards the exclusive nature of the services provided by the agent, it has also been held that where, at the same time as it conducts business for the account of its principal, an agent undertakes, as an independent dealer, a very considerable amount of business for its own account on the market for the product or service in question, that tends not to suggest economic unity (judgment in* Suiker Unie*, cited in paragraph 89 above, EU:C:1975:174, paragraph 544, and judgment in* Minoan Lines*, cited in paragraph 89 above, EU:T:2003:337, paragraph 128).*"

32 When property rights are retained by the principal, a presumption arises that an agreement is a "genuine" agency agreement, as property rights increase the risks borne by the principal. When property rights are retained by the agent, they increase the possibility that the agent will behave opportunistically; *see* I. Lianos, Commercial Agency Agreements, Vertical Restraints, and the Limits of Article 81(1) EC: Between Hierarchies and Networks, *Journal of Competition Law & Economics*, Vol. 3, Issue 4, 2007, pp. 663–664.

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or sold does not vest in the agent, thus acknowledging the possibility of the existence of "genuine" agents vested with ownership.

30. Moving the analysis away from ownership, the examination will necessarily turn to whether the agent bears the commercial responsibility and thus risk in relation to the sale. In this regard, everything claimed so far in relation to online platforms applies in the same way to offline distribution formats, as the criteria for analysis should apply equally to offline and online conduct.

31. The purpose of the analysis in this scenario is to verify whether, notwithstanding the passage of property to the agent, the agent effectively does not bear any significant risk in relation to the sale. In particular, whether the contract with the principal not only covers investments but, more importantly, affords the agent far-reaching protection through a "back-to-back" arrangement that essentially keeps the agent unscathed by any contractual risk or subsequent claim of the purchaser. On close inspection, this outcome is not inconceivable, as private law confers far-reaching powers on the negotiating autonomy of private companies, at least when principles of public order are respected, and various examples exist of inverse cases where risk passes without property, e.g., in leasing arrangements and installment sales. Derogations from the legal risk allocation criteria in the context of purchase contracts do not thus encounter insurmountable obstacles from a private law perspective.

32. In light of the above, arguably there may be situations in which, notwithstanding the transfer of ownership to the agent, the latter does not bear significant risks. However a careful case-by-case assessment will be needed to determine what the business rationale of the contract is and who is the ultimate control rights holder, and thus whether these conditions are fulfilled.[33] This assessment will have to be overly cautious in order to avoid legitimizing sham agreements used to evade the application of competition law. The need for such a case-specific analysis supports, all the more, the conclusion that the introduction of a generalized exception for fulfillment wholesalers is unwarranted, also because the VGL sets out exhaustively the criteria needed to conduct the assessment.

33 For a discussion on why title matters, on the key features of ownership in agency agreements and on the economic analysis on who effectively bears control rights and risks, *see* A. Huyue Zhang, Toward an Economic Approach to Agency Agreements, cited above, p. 581 onwards.

V. Conclusions: The lack of need to revise the traditional interpretation of the agent/principal relationship

33. Even with the emergence of new distribution formats, the analytical framework of the VGL continues to be comprehensive and appropriate to avoid the abusive use of agency agreements, also considering that any exception to the general application of the Article 101(1) prohibition must be interpreted restrictively.[34] Moreover, over time, EU decision-making practice and case law have evolved, pursuing a pragmatic approach to the agency analysis, in particular when assessing the risks run by agents and their negligible or non-negligible nature.[35] It is therefore well equipped to apply the VGL's interpretative criteria to less traditional agency formats. Moreover, the VGL preserves, at least on paper, the need to carry out a careful case-by-case assessment.[36]

34. In light of these reflections, in the context of its revision work, the Commission should arguably pursue a "hands-off" approach in relation to the "agency" section of the VGL.[37] One specific area, though, where its intervention could be useful, is in the development of the

34 This restrictive approach is necessary also considering the implications and consequences of the principal's liability for the agent's conduct in cases in which an expansive interpretation of the "genuine" agent analysis is applied. In the context of attribution of cartel participation of an agent to its principal, the EC Court of First Instance has stated that "*where an agent works for his principal, he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking*"; *see* CFIEC, 11 December 2003, *Marlines v. Commission*, Case T-56/99 *ECR* II-5225, EU:T:2003:333, para. 60 (appeal dismissed, Case C-112/04 P, EU:C:2005:554); *see*, similarly, CFIEC, *Minoan Lines*, cited above, para. 121 onwards (appeal dismissed); and, more recently, GCEU, *Voestalpine*, cited above, para. 134 onwards. Similar principles on liability of the principal have recently been confirmed by the Court of Justice for the anticompetitive behavior of independent contractors who essentially act as employees; *see* CJEU, 21 July 2016, *SIA "VM Remonts" (formerly SIA "DIV un KO") and Others v. Konkurences padome*, Case C-542/14, EU:C:2016:578.

35 In the *DaimlerChrysler* case, cited above, the EC Court of First Instance considered that each of the risks retained by the agent of the Mercedes-Benz brand and considered significant by the Commission was in reality negligible (i.e., the risk linked to the sale price insofar as discounts granted to customers without the principal's agreement were deducted from the agent's commission, the risk linked to vehicle transport costs, the risk linked to promotion costs, the risks linked to interventions under warranty, and finally the risks linked to after-sales activity and management of stock of spare parts purchased), specifying for some of them that the Commission had significantly exaggerated their importance. In *Voestalpine*, cited above, the Court of Justice considered that the resellers were not "genuine" agents as they repurchased the vehicles from VAG Leasing upon expiry of the leasing contracts and thus assumed non-insignificant financial risks linked to the transaction.

36 Recital 17 of the VGL states that "*the question of risk must be assessed on a case-by-case basis, and with regard to the economic reality of the situation rather than the legal form.*"

37 Considering that the VBER does not refer to agreements between commercial agents and their principals (as they fall outside the scope of Article 101(1) by their nature), new guidance, if any, could effectively be limited to the VGL.

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concept of negligible or economically insignificant risk. In particular addressing when the risk borne by the agent is material enough to exclude the "genuine" nature of the agency, as in most cases this is what any analysis will need to consider. The current silence of the VGL on this point raises substantial interpretative issues for companies and their legal advisors and the introduction of clear-cut thresholds would have the beneficial effect of ensuring legal certainty. In order to set the "adequate" value, useful lessons could be drawn from national practice.[38] In this vein, the Commission could, for example, consider clarifying in the VGL that overall risks (i.e., contract-specific risks, market-specific risks, and risks linked to other activities) borne by the agent alone that do not represent more than 10 or 15% of its turnover can be considered insignificant. ■

38 In the *Mango/Punto FA* case, the French Competition Authority in assessing the affiliation-commission contract put in place by the company Punto FA with regard to the Mango brand noted in its decision a certain number of financial risks run by the "partner distributor"—namely, an entry fee of 100,000 euros, the financing of fittings, all equipment, consumables and clothing, transport costs, a bank guarantee up to the value of the stock as well as the insurance subscription. However, it considered, for each risk, that as a percentage of turnover, these were not significant risks. In particular, the risks borne by the distributor were estimated to represent overall 0–10% of a point of sale's turnover and were thus considered insignificant (FCA, Decision No. 09-D-23 of 30 June 2009 on practices in the sector of clothes' distribution).

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Exchange of information in dual distribution systems

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I. The special features of dual distribution systems

1. Manufacturers and suppliers have two choices for distributing their goods. They can either vertically integrate and distribute directly to final customers or they can distribute indirectly through independent distributors. But there is a third choice, quite rare in the past but becoming more and more common now; manufacturers may also distribute both directly and through independent distributors at the same time. This latter choice, which is a mixture of the former two, is referred to as "dual distribution system."

2. Dual distribution systems can take different forms:

– The network of independent distributors may be formed by wholesalers, retailers or both. The network may be more or less formally organized: it may include exclusive or non-exclusive distributors; it may be a loose network or be organized as a selective distribution system or a franchised network. Retailers can be small retail shops or large chain stores. Retailers can operate offline, online or both.

– The manufacturer/supplier may directly sell to its target market by means of its own online shop and/or its own network of retail shops, which will compete with the independent retailers, as the case may be franchised or authorized shops.

– The manufacturer may establish an independent exclusive distribution system but by preserving certain territories for its own shops, etc. In short, all combinations and modalities are possible.

3. The increase of dual distribution systems in recent times is due mainly to the growing importance of online sales: information and communication technologies have become, in a very short time, widely available for companies and customers, in terms of accessibility, as well as in terms of costs. Electronic commerce eliminates the barriers of time, space and distance. Purchasers and companies are free to buy and sell anything they want with only a single mouse click from anywhere. Consequently, more and more manufacturers decide to start their own online sales operations as a means to sell directly to end customers without having to invest in their own brick-and-mortar retail network (an investment that may be too costly and complex for most manufacturers).

4. In addition, the COVID-19 crisis has had a negative impact on retail, a factor that has encouraged manufacturers to enhance (or launch for the first time) their online sales services as a means to set off the loss of brick-and-mortar sales.[1] The general thinking that "going digital" is key for companies to survive and succeed has created an atmosphere that encourages this strategy.

5. In this context, manufacturers that engage in dual distribution systems come under competition law scrutiny because they compete at two different levels in the distribution chain: (i) At the production level, they compete with other manufacturers of the same generic or competing products; (ii) At the distribution level, the manufacturers enter into competition with independent distributors of their own brand.

6. In the traditionally grey area of information exchanges, competition authorities have mainly focused on the first level of competition (at the production level). However, there is little (if any) guidance on the treatment of such exchanges of information at the second level (within the dual distribution system) in the case law of the European

1 Eurostat reported on August 5, 2020, that between February and June 2020, the internet sales volume in the EU increased by 17.4% while the sales volume of textiles, clothes and footwear in specialized shops dropped by 22.4%. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Impact_of_Covid-19_crisis_on_retail_trade.

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Court of Justice, in Regulation (EU) No. 330/2010[2] on vertical agreements ("VBER") or the Commission Guidelines on Vertical Restraints ("the Guidelines").[3]

7. In dual distribution, as in all types of distribution systems, it is usual for the supplier to require its distributors to provide certain information: information about stocks, product sales, product demand and preferences, etc. Usually, this information refers to the manufacturer's own products, but also to the commercial strategy of the distributor when selling those products. This is our focus in this paper, although we will also refer to information on the products of other manufacturers below. In almost all cases, this information requirement is unilateral and not a true exchange; the distributor provides sales information to the supplier, but the same does not happen the other way round.

8. Sometimes, the supplier provides a consideration to the distributor (in the form of cash, discounts or other commercial advantages) for the information provided. In our analysis, we do not consider any such payment or consideration a relevant factor.

9. While this vertical information exchange is very common in "classic" distribution relationships and does not raise any concern under competition law, in the case of dual distribution, the information requested and provided could be considered "confidential" or "sensitive" information, to the extent that the supplier also acts as a distributor and is considered a "competitor" of its own distributors in the distribution market. This way, the vertical intra-brand competition, which is inherent to all distribution systems (i.e., the competition of suppliers versus retailers over the sharing of the profits of the vertical chain), is enhanced.

10. The question then arises about the compatibility of this information requirement/supply with competition law. Should this situation be treated as horizontal agreement, or should it deserve a special treatment because it intervenes in a vertical relationship? What are the competition concerns arising therefrom? To which criteria should this information supply be subject to, in order to avoid any such competition concerns? The answer is not straightforward, but we provide an outline on how we consider competition law should approach this phenomenon.

2 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, pp. 1–7.

3 OJ C 130, 19.5.2010, pp. 1–46.

II. Why dual distribution and how does the supplier compete?

11. It is important to understand first why certain manufacturers decide to set up a dual system and what the resulting competitive situation is.

12. As mentioned above, dual distribution is, to a large extent, a new phenomenon: manufacturers that traditionally used independent distributors to access the market have decided to develop, for the reasons referred to in section I herein, a new direct-to-market business to enhance sales. The fact is, however, that any distribution network implies an inverse association between the margins of manufacturers and retailers. Therefore, engaging the manufacturer in a direct-to-market business may be a first step taken by the manufacturer to reduce strategically the dependence on third-party retailers, gradually switching the bulk of the sales to its own retail operations to the detriment of independent distributors.

13. Nonetheless, experience also shows that, in the vast majority of cases, dual distribution strategies form part of a multi-channel strategy where the manufacturer tries to find the "right" balance and enhance the global volume of sales of its products through various online and offline modalities acting simultaneously. The examples are abundant: food producers selling through their own shops as well as in supermarkets or food stores, fashion brands operating their own flagship stores while also selling through independent or franchise shops, supermarket operators supplying products to franchised or affiliated stores, to quote some.

14. In all these cases, the supplier competes indeed with the retailer, but there is one feature in this competition that makes it somehow special:

- In a purely horizontal competition relationship, competing manufacturers A and B have all incentives to increase the sales of their own products and reduce the sales of the competitor's products (the more A wins, the more B loses, and the other way round); any €10 sale that manufacturer A "steals" from manufacturer B is a €10 net gain for manufacturer A, and the €10 loss of manufacturer B in no manner impacts negatively on manufacturer A. The intention of manufacturer A is to increase its business and reduce that of manufacturer B, through competition on the merits, ultimately resulting in manufacturer B failing to succeed (and exiting the market as the case may be) because of the legitimate superiority of manufacturer A's products and services.

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– In a dual distribution system, this does not work exactly in the same manner, precisely due to the vertical intra-brand competition, which is inherent to all distribution systems, as explained above. Manufacturer A competes with retailer B (both selling the products of supplier A), but the incentives are not the same as in purely horizontal competition: if retailer B fails to sell a €10 product of manufacturer A, and A's product is sold instead by the manufacturer directly, the net gain of manufacturer A will not be €10, but only the margin of the product that retailer B usually gains on the resale of the product (say, €2). More importantly, if retailer B experiments a reduction in sales of product A, retailer B may become less interested to sell product A and may choose not to promote product A any longer or even to discontinue product A. This will harm manufacturer A because the sales of its products through retailers will be negatively affected. Ultimately, if retailer B exits the market, manufacturer A will be losing one of its distribution channels, which is not what manufacturer A in principle wants (if manufacturer A, in addition to direct sales, maintains an independent distribution network, it is because it considers that this is an appropriate means to sell the products).

15. Therefore, unlike in a purely horizontal competitive situation, in a dual distribution system, the manufacturer/supplier will naturally be willing to allow its distributors/competitors to enjoy a share of the market (through legitimate competition). Where the manufacturer organizes and keeps a dual distribution system, its intention will not be to annihilate its retailer/competitors and monopolize the sale of its products. The legitimate goal of the manufacturer is to achieve a situation in which its products meet market demand in the best possible manner, through a combination of direct sales and a network of independent distributors with the appropriate degree of capillarity, expertise and/or advisory/after-sales services that could not be otherwise be reached.

16. In sum, we consider that any assessment of vertical information exchange under competition law must take into account the following aspects:

– Each manufacturer should be free to decide which type of distribution system is more suitable for its products.

– It is not unusual for a manufacturer to combine different channels, including direct sales and various forms of independent distributors.

– There are no reasons to think that such combination gives rise as such to competition concerns. On the contrary, those combinations are pro-competitive to the extent that they allow to meet consumer demand more successfully.

– In dual distribution systems, the manufacturer will try to find a proper balance between direct sales and sales through distributors. The manufacturer has a legitimate interest to keep distributors successful, even if those distributors are its competitors in the sale of the contractual products.

17. The hybrid relationship of dual distribution systems may be a source of confusion to enforcers, as they need to decide which, horizontal or vertical, dimension should prevail in order to assess the competition concerns arising therefrom. For all the reasons stated above, it makes sense to consider that the relationship between manufacturers and distributors in dual distribution systems should be primarily assessed as vertical relationships, rather than horizontal ones, even if both parties compete for the sale of the manufacturers' products to final customers. The reason is that, since the overarching economic and commercial objectives of dual distribution belong to the "vertical world," competition between manufacturers and retailers in this context does not have exactly the same features as competition in a pure horizontal context. Unlike the conventional horizontal competition between suppliers, the dual distributing manufacturer creates competition with itself by supplying a dealer.

18. As explained in the Commission Guidelines, in these types of agreements the vertical aspects of the relationship between a supplier that also sells directly and its distributor prevail over the horizontal aspects. Paragraph 28 of the Guidelines states that "[i]*n case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level.*"

19. This approach should also apply to the assessment of vertical information exchanges, as we propose below.

III. Application of the vertical block exemption regulation

20. According to Article 2(4) VBER, although vertical agreements entered into between competing undertakings are not exempted from the prohibition of anticompetitive agreements, dual distribution agreements are covered by the exemption.[4] As a matter of principle, below a 30% market share of supplier and buyer, exchanges of information within a dual distribution agreement should be covered by the exemption. Beyond this market share, they should be assessed under the Guidelines and the case law on vertical agreements.

4 Article 2(4) VBER states: "*The exemption provided for in paragraph 1 shall not apply to vertical agreements entered into between competing undertakings. However, it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and: (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.*"

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21. Having said that, doubts have arisen as to whether an exchange of information in this context can be considered part of the "vertical agreement" subject to the exemption. In effect, Article 1(1)(a) VBER defines "vertical agreements" as those that refer to the "*conditions under which the parties may purchase, sell or resell certain goods or services.*" The question has been raised as to whether an exchange of information can be considered as "relating to the conditions" in which the parties can acquire, sell or resell the contractual products.

22. We are of the opinion that the contractual provisions between manufacturer and distributor dealing with the information that the latter must provide to the former on the retail sales and stocks of the manufacturer's products should indeed be seen as a "vertical agreement" in this sense. Such information is directly related to the sale of the products that make the subject matter of the distribution agreement and serves a legitimate goal: it helps the manufacturer to plan production, stocks and understand in a more complete manner how the market reacts to the products, thus allowing it to adapt to the market needs and innovate.

23. Besides, any lessening effect on competition would only affect intra-brand competition and not inter-brand competition, and may even favour inter-brand competition. In this regard, the decision of the Spanish Competition Authority ("CNMC"), in case S/DC/0539/14 *Veterinary Drugs*,[5] provides interesting views. In this decision, the CNMC closed the complaint of the National Association for Animal Health (association that includes both wholesale distributors of veterinary drugs and retail stores) against several manufacturers of veterinary drugs that also sold these drugs directly to certain customers. Several of these manufacturers requested information from their distributors about the quantities sold and/or the resale prices applied. The CNMC considered that these exchanges took place within the framework of a vertical relationship between producer and distributor, relationship of complementarity, not competition, between the parties. Thanks to this information, the manufacturer knows the evolution of its sales and its customers and also strengthen its commercial strategy against its competitors, which benefits the consumer through lower prices and better service. Although the case was not of pure dual distribution,[6] the reasoning underlying the CNMC's approach is fully applicable to dual distribution systems.

24. Exchange of information between the manufacturer and its distributors within dual distribution systems does not only offer an opportunity for the manufacturer to monitor the performance of its retailers, it also allows the manufacturer to adapt its manufacturing and commercial behaviour in the market and react to market changes and environment. This can happen in many different forms. However, generally, there are two types of reactions, and none of them should be seen as anticompetitive as such, provided they remain unilateral:

– The manufacturer could compete more aggressively with the distributors (and this behaviour, in its turn, entails a more aggressive competition with its own competitors): the information received may allow the manufacturer to identify better the best-selling products, to target more accurately customer groups and focus on certain promotion tactics or territories, thus enhancing its own direct sales. However, in the absence of dominance, this competitive reaction of the manufacturer should be seen as pro-competitive. In addition, it is difficult to imagine, for the reasons stated above, that the manufacturer will be willing to impoverish its own distributors, which may account for a significant part of its sales that cannot be totally replaced by direct sales. Such "more aggressive" competition by the manufacturer may result in repositioning the balance point between direct sales and distribution sales, which (again, in the absence of dominance) belongs to the freedom that manufacturers must enjoy in defining their distribution systems. By being present at the distribution level, the manufacturer will be able to collect information on the optimal level, to double-check this information with those obtained from its distributors and take this information into account in order to adapt its distribution strategy and contracts.

– If, conversely, the concern is that, knowing the distributor's prices and other relevant information, a manufacturer could compete less aggressively with its distributors (for example, by applying less attractive prices for a given product in direct sales, in order not to cannibalize distributors' sales), this potential "lesser" degree of competition (unilaterally decided by the manufacturer) should not be problematic either, since nothing in the VBER prevents the manufacturer to refrain completely from competing with its distributors.

25. We consider that vertical information exchanges could only give rise to competition concerns in four situations, but none of them would imply that the VBER should not apply or that such exchanges are problematic by themselves. Those four scenarios are:

– When the information exchange is a tool to implement a hub-and-spoke scheme between the manufacturer and different retailers. In this scenario, the exchange of information on price intentions by the distributors, under the coordination of the manufacturer, may be used to coordinate pricing strategies. However, normally, collusion at the retail level will not be in the interest of the manufacturer.

5 CNMC, decision of 4.10.2018, case S/DC/0539/14: *Medicamentos Veterinarios*.

6 The drug manufacturing companies did not sell the products directly to the final customer (veterinary hospitals and doctors) in competition with the distributors. Their commercial relationship with final customers (granting them bonuses or technical support) was complementary to that of the distributors. However, the distributors resold different product brands while the commercial activity of each manufacturer obviously concerned only their own products, so the interests of manufacturers and distributors were not totally aligned.

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– When the exchange is a tool to control compliance with a pre-existing resale-price maintenance strategy or a horizontal price agreement between distributors (or the manufacturer and distributors).

– When the exchange may lead to the coordination of other non-price commercial aspects. For instance, to carry out a promotion on a given product, distributors sometimes request the financial support of the manufactures in the form of an extra discount. In such cases, the distributor would inform the manufacturer of the promotion details: products concerned, dates, and often the target price sought. This may facilitate coordination on the timing and scope of the promotions by the distributors and the manufacturer itself. The information required in this context should be the minimum needed to allow the manufacturer to decide whether to financially support or not the promotion. Also, if the manufacturer's financial support is not requested, then the distributor should not inform the manufacturer of its intentions.

– When distributors are requested to provide the manufacturer with information about the sales of products of the manufacturers' competitors. The unilateral offering of information by the distributor about competing products should not be problematic (for instance, showing the terms and conditions offered by manufacturer B in order to convince manufacturer A to offer better terms), but an agreement to provide information on stocks, sales data, prices or other commercial information on competing products should not be covered by the exemption provided for in the VBER. However, in this case, one might even wonder whether such an agreement would be a "vertical agreement," since it does not concern the acquisition, sale or resale of the products of the manufacturer, but of competing products. A case-by-case analysis should be done.

IV. Dual distribution is not platform distribution

26. Before coming to a conclusion, we think it is useful to distinguish dual distribution from online platform distribution. Some statements made by the Commission in the framework of the sectoral investigation on electronic commerce seem to challenge the legality of exchanges of information, but we do not think they would apply to dual distribution.

27. In its 2017 report on the E-commerce Sector Inquiry,[7] the Commission noted that "*the exchange of competitively sensitive data, such as on prices and sold quantities, between marketplaces and third party sellers or manufacturers with own shops and retailers may lead to competition concerns where the same players are in direct competition for the sale of certain products or services*" (para. 56).

28. In this sense, according to the Working Document of the Commission services accompanying the said report, in the absence of any safeguard, these data can be used by the platforms to increase their retail activity and, similarly, the data obtained by the suppliers that sell online directly could be used for anticompetitive purposes.

29. However, platform/marketplace distribution schemes and dual distribution systems are not similar. The situation of the marketplace operator and the independent vendor that uses the marketplace, on the one hand, and that of the manufacturer and the retailer belonging to a dual distribution system, on the other hand, are different. They have different incentives in the manner they compete against each other. The difference stems from the fact that, while the retailer in a dual distribution system resells the product of the manufacturer, the independent reseller in a marketplace is not selling the product of the platform operator.

30. The marketplace operator has a greater incentive than the manufacturer to try and divert sales from the independent vendors: any sale diverted to itself entails a high net gain (it forfeits the commission on the sale by the third-party vendor, but represents a small amount compared to the gain of selling the product directly). The platform operator has an interest in keeping independent vendors afloat, but losing some of them (because they lose interest or cannot succeed) should not entail a harm as serious as in a dual distribution system: the number of independent vendors in a marketplace is normally much higher than the number of retailers a manufacturer may have. It may have cost significant time and effort for a manufacturer to build a successful relationship with a retailer, thus creating a deeper and more complex relationship than the one existing between the marketplace operator and the independent vendor.

31. We are therefore of the opinion that the assessment of information exchanges should be kept separate from the ongoing discussion on the competitive aspects of online platforms and marketplaces.

7 Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry [SWD(2017) 154 final], Brussels, 10.5.2017, COM(2017) 229 final.

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V. Conclusion

– Currently, vertical information exchanges are to be covered by the VBER below the 30% market share, and should be assessed under the Commission Guidelines above the 30% market share.

– The exemption provided for in the VBER should only concern agreements to provide information on the manufacturer's own products. Where the agreement on exchange of information refers to products of competing manufacturers, it should be assessed on a case-by-case basis.

– Vertical information exchanges should only be considered as problematic when they are the tool for implementing or controlling a pre-existing anticompetitive agreement, be it horizontal or vertical price-fixing, hub-and-spoke or a coordination of other aspects of commercial policies. However, this should not automatically justify any negative view on vertical information exchanges as such, in the absence of evidence about such pre-existing anticompetitive agreement.

– This framework of analysis should not change in the ongoing review of the VBER and Guidelines. It should actually be explained in a clearer and more detailed manner, with a new, specific section on vertical information exchanges in the new guidelines on vertical restraints. ■

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The prohibition of resale on marketplaces at the time of the Vertical Block Exemption Regulation 330/2010's recasting

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1. Beyond the intrinsic characteristics of products and services, the way they are distributed is crucial for their accessibility to consumers and their purchasing experience. While trademarks are free to organise the distribution of their products, competition law limits vertical restraints in their distribution schemes.

2. Assisting companies in this analysis, the Vertical Block Exemption Regulation 330/2010 (hereafter the "VBER") and its guidelines on Vertical Restraints of 10 May 2010 have been undergoing a review process for several months as the VBER will expire on 31 May 2022. Launched on 3 October 2018, this process included a public consultation in the first half of 2019 and a workshop in November 2019.

3. More recently, the European Commission published on 8 September 2020 its staff working document on the evaluation of the VBER.[1] This in-depth process aims at ensuring that the new exemption regulation will comprehensively address all currently identified vertical restraints but also those that will arise in the future.

4. In this respect, the developments surrounding the possibility of prohibiting the distribution of products on marketplaces within the framework of a selective distribution network show the interest of anticipating as effectively as possible the evolutions of the business.

I. Initially, the limitation of online sales in the context of a selective distribution network

5. The Court of Justice of the European Union (CJEU) considers that the establishment of a selective distribution network does not in itself fall within the prohibition of anti-competitive agreements of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) as long as three cumulative conditions, known as the "Metro Conditions,"[2] are met:

- resellers are selected according to objective, qualitative, uniform and nondiscriminatory criteria;
- the characteristics of the product in question require such a distribution network in order to preserve its quality and ensure its proper use;
- the criteria defined are proportionate.

1 Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, SWD (2020) 172 final.

2 CJEU, 25 October 1977, *Metro SB-Großmärkte*, Case 26/76.

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6. Where these conditions are not met, the organisation of a selective distribution network must be considered as falling under the prohibition of anti-competitive agreements of Article 101(1) TFEU. It, however, remains eligible for exemption from the application of this article provided that it fulfils the conditions for an individual (TFEU Art. 101(3)) or block exemption.

7. Case law has repeatedly held that these criteria are met in particular for luxury goods or high quality or high technology products.[3] Some suppliers with a selective distribution network then wished to restrict their products' distribution on the Internet, considering it was not compatible with the luxury image or the high technicality of their products.

8. However, European case law has held that the absolute prohibition, in the context of a selective distribution network, of online sales is a hardcore restriction, unless it is objectively justified.[4] In practice, such an objective justification seems rather difficult to demonstrate. In other words, while a supplier is allowed to impose certain conditions on the sale of its products on the website of an authorised distributor, it cannot prohibit it.

9. Having been settled regarding sales on distributors' websites, the question shortly arose again with regard to marketplaces.

II. The jurisprudential journey of restrictions on sales on marketplaces

10. While the VBER is silent regarding marketplaces, the Vertical Guidelines[5] state that "*a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.*"[6]

11. The interpretation of these provisions by the courts has led to several decisions which, in line with the *Pierre Fabre* case law, seemed to drastically limit the possible restrictions on sales on marketplaces.

12. In the *Samsung* case of 2014, the French Competition Authority (FCA) did not rule out the possibility that the restrictions placed by Samsung on the sale of its products on marketplaces could reveal indications of vertical restraints on the active and passive sales of retailers active on the relevant market.[7]

13. Subsequently, in a press release dated 18 November 2015, the FCA announced that it had closed an investigation initiated against Adidas after the latter had removed from its contracts any clause prohibiting its distributors from using marketplaces.

14. Similarly, the Bundeskartellamt has obtained that the manufacturers Sennheiser and Adidas allow the resale of their products on marketplaces. The Asics brand was also targeted for having introduced clauses prohibiting the sale of Asics products via price comparison websites.

15. Above all, in the *Caudalie* decision dated 2 February 2016, the Paris Court of Appeal considered, in summary proceedings, that the prohibition in principle of distributors of Caudalie products, essentially pharmacies, from using an online platform, whatever its characteristics, is likely to constitute, unless there is an objective justification, a hardcore restriction excluded from the benefit of the individual exemption.[8]

16. However, this decision was overturned by the French Supreme Court (Cour de cassation),[9] which considered that the decisions of the FCA and the Bundeskartellamt to which the Paris Court of Appeal referred to were not sufficient to justify the infringement of Caudalie's selective distribution network, the lawfulness of which had been accepted by the Competition Council (former denomination of the FCA).[10]

17. These various decisions thus suggested a certain reservation on the part of the competition authorities regarding clauses restricting the sale of products on marketplaces.

18. However, in the *Coty* case, the CJEU ruled on the legality of a clause prohibiting the resale of products on third-party platforms in the specific context of the distribution of luxury goods.[11]

19. In this case, the Court held that a supplier may prohibit the resale of its products on marketplaces if the brand image of those products requires so. More specifically, the Court considered that the purpose of prohibiting the resale of the supplier's products on third-party platforms is to preserve their image of luxury and prestige and that

3 Ibid., and CJEU, 25 October 1983, *Telefunken*, Case 107/82.

4 CJEU, 13 October 2011, *Pierre Fabre*, Case C-439/09.

5 European Commission, Guidelines on Vertical Restraints, OJ C 130, 19.5.2010.

6 Ibid., pt 54.

7 French Competition Authority, Decision No. 14-D-07 of 23 July 2014. pt 184 (*révéler des indices de restrictions verticales sur les ventes actives et passives des détaillants actifs sur le marché pertinent*").

8 Court of Appeal of Paris, 2 February 2016, No. 15/01542.

9 French Supreme Court, Commercial Chamber, 13 September 2017, No. 16-15.067.

10 French Competition Council, Decision No. 07-D-07 of 8 March 2007.

11 CJEU, 6 December 2017, *Coty*, Case 230/16.

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this prohibition is formulated objectively and uniformly and applies without discrimination to all authorised distributors.

20. However, the judgment emphasises that the products concerned by the disputed prohibition were luxury and prestige products, so it is not clear whether the solution adopted applies to other categories of products or whether a differently worded restriction would be allowed by the CJEU.

21. Following the *Coty* ruling, the Commission published a competition policy brief in April 2018 in which it reviewed the facts and lessons of the *Coty* ruling. It welcomed the fact that the *Coty* ruling sets a clear framework for the analysis of marketplace bans.[12]

22. On that occasion, it described the method of analysis of a vertical restraint linked to a marketplace. Firstly, it must be determined whether this prohibition escapes the application of Article 101(1) TFEU by fulfilling the criteria of the *Metro* case law cited above. If this is not the case, it must secondly be established whether this prohibition is restrictive of competition, as this question only arises in practice where the market shares of the parties are above 30%. Indeed, if they are below this threshold defined by the VBER, the marketplace bans benefit from the block exemption.

23. In this respect, the Commission stressed that one of the *Coty* judgment's lessons was that prohibitions on the use of a marketplace did not constitute hardcore restrictions under Article 4(b) or 4(c) of the VBER.

III. Lessons from the Commission staff working document

24. On 8 September 2020, the Commission published its staff working document on the evaluation of the VBER. At a time when the VBER and its Vertical Guidelines are being rewritten, this document provides valuable guidance on the direction that the Commission might take.

1. A consensus on the need to take better account of marketplaces

25. First, there seems to be a consensus that the VBER and its guidelines should provide a better framework for the use of marketplaces. Many of the 164 respondents to the public consultation launched by the Commission stressed the need to revise the rules on online sales restrictions.

26. The growing share of online sales, especially those made through marketplaces, as well as the growing importance of online advertising,[13] rendered this revision necessary. In its working document's summary, the Commission notes in this respect that "*the growth of online sales and online platforms has had a significant impact on distribution models.*"[14]

27. The evaluation study carried out by the Commission shows that 23% of consumers use a marketplace in their customer journey[15] for cosmetics and hair care products, 28% for clothes and shoes, 47% for house and garden equipment and 50% for electronic products.

28. Building on their success, marketplaces' business models have also evolved. Most of them now assume a dual role, acting both as sellers on their own platform while hosting third-party sellers to achieve economies of scale.

29. In its survey on e-commerce published in May 2017,[16] the Commission had already noted that the development of marketplaces had enabled players with limited means of action to have easier access to potential customers.

30. However, the Commission also found that certain brands considered that the presence of their products on these marketplaces called into question their brand image and/or the level of service.[17] In response, the Commission has noted the introduction of bans on distribution on marketplaces, restrictions on price comparators and the exclusion of pure online players in selective distribution models.

2. The possible evolutions of the VBER

31. The broad consultation carried out by the Commission allowed the various respondents to suggest several modifications of the VBER and its guidelines. While it is impossible to know at this stage whether the Commission will take these suggestions into account, these are indicators of the possible evolution of the VBER.

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12 EU competition rules and marketplace bans: Where do we stand after the Coty judgment?, *Competition policy brief*, 2018-01, April 2018.

13 Factual summary of the contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation (EU) No. 330/2010, 8 September 2020.

14 Commission Staff Working Document, Executive summary of the evaluation of the Vertical Block Exemption Regulation, 8 September 2020, SWD(2020) 173 final.

15 Inspiration, information and evaluation, purchasing.

16 Commission Staff Working Document, Accompanying the document Report from the Commission to the Council and the European Parliament, Final Report on the Sector Inquiry on Electronic Commerce, 10 May 2017, SWD(2017) 154 final.

17 Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, 8 September 2020, SWD(2020) 172 final, p. 32.

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2.1 A redefinition of the notions of “vertical agreements,” “buyers” and “customers”

32. Respondents pointed out that the emergence of both marketplaces and price comparators has highlighted the need to clarify several concepts defined in the VBER.

33. Regarding the concept of vertical agreements, some consider that the current guidelines do not provide sufficient guidance to determine the nature of the relationship (horizontal or vertical) between these platforms and their various user groups.[18]

34. In addition, respondents noted that the current definition of vertical agreements only refers to “*the conditions under which the parties may purchase, sell or resell certain goods or services*,” which may exclude certain agreements entered into by marketplaces. A reference should therefore be introduced to vertical agreements making the supplier’s products available to third parties.

35. Similarly, the notion of buyer, currently defined as one who “*sells goods or services on behalf of another undertaking*,” would not take sufficient account of the situation of marketplaces. It would be here appropriate to add the one who makes the supplier’s products available to third parties[19] to this definition.

36. In addition, other respondents alerted the Commission on the concept of customer referred to in Article 4(b) of the VBER, which withdraws the benefit of the exemption from agreements restricting the territory into which, or the customers to whom, a buyer party to the agreement may sell the contract goods or services (subject to the exceptions set out in that Article). In their view, as things currently stand, customers who buy on a specific marketplace could be defined as a separate customer group. If this were the case, allowing only one or a limited number of authorised resellers to sell on a marketplace for a given territory (e.g., a Member State) could be considered as a territorial restriction within the meaning of Article 4(b) of the VBER. However, these respondents consider that it is legitimate to be able to control the resale of products on marketplaces notably in order to protect their brand image.[20]

2.2 Differences of opinion on the lessons of the *Coty* case law

37. In general, respondents and national competition authorities regretted a lack of guidance on restrictions that may affect sales on marketplaces and the need to update the VBER and the guidelines in the light of the *Coty* judgment.[21]

38. Nevertheless, the Commission notes that the different respondents have different interpretations of this judgment, in particular regarding the applicability of the judgment beyond luxury goods or to authorised distributors’ own websites.

39. Some respondents consider that the restrictions on marketplaces are justified by the need to protect the brand image and quality of a product, while others argue that they restrict the access to consumers of small and medium-sized enterprises that do not have the financial and logistical means to develop their own website.

40. Similarly, the Commission’s work has revealed divergences between national competition authorities in the assessment of certain restrictions imposed on marketplaces. Indeed, some authorities consider that the protection of brand image is often a pretext to reduce the number of online sellers and marketplace bans should therefore be considered as hardcore restrictions within the meaning of the VBER. On the contrary, other national competition authorities lead a case-by-case analysis of such bans in order to assess whether such a restriction could be objectively justified.

41. In addition, some respondents regretted the lack of explanation as to the difference between the criteria applied to online and offline sales. Further clarification would be needed to ensure that providers do not impose restrictions on online sales that go beyond the requirements for offline sales.[22]

42. Others argued that there were major differences between the different online sales channels (marketplaces, customer reviews, search placement, etc.), which would require specific sets of criteria to be established.[23]

43. Finally, respondents to the market test pointed out that some marketplaces also control search engines and other social networks, allowing them to collect and analyse large amounts of data. Clarification of the rules on data collection and information exchange in distribution agreements is therefore likely to be needed.[24]

44. The most difficult task will be to include these new headings in the VBER and the Vertical Guidelines, giving priority to a fairly broad wording, in order to anticipate new forms of business still unknown to date, but sufficiently precise to enable operators to check whether their vertical agreements can benefit from the exemption of the VBER. ■

18 Ibid., p. 152.

19 Ibid.

20 Ibid., p. 177.

21 Ibid., p. 204.

22 Ibid., pp. 202–203.

23 Ibid.

24 Ibid., p. 226.

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