OECD

POLICY ROUNDTABLES

Vertical Restraints for On-line Sales

2013

Introduction

The OECD Competition Committee discussed vertical restraints for on-line sales in February 2013. This document includes an executive summary of that debate, a detailed summary of discussion and the documents from the meeting: written submissions from Australia, Austria, Canada, Czech Republic, European Union, France, Germany, Japan, Korea, Norway, Chinese Taipei, Turkey, United Kingdom, United States and BIAC, a background paper prepared by Paolo Buccirossi as well as a contribution by Michael Baye.

Overview

The development of the internet and e-commerce is having a profound impact on firms' business models, consumers' behaviour and the overall economy. That should improve competition among suppliers and yield higher consumer and social welfare. Yet, digital ecosystems present some competitive risks. This greater availability of information may allow firms to monitor each other more easily, thereby facilitating collusive conduct; also, strong network externalities may tip markets toward creating dominant players; consumers may be deceived more readily by misleading and non-verifiable information. Moreover, manufacturers and distributors have strived over the years to create distribution systems that offer consumers pre-sale and post-sale services that enhance the consumers' evaluation of goods and services, increase their welfare and make all market players better off.

The diffusion of on-line sales, however, may disrupt or jeopardise this system and harm firms and consumers alike in the medium/long-run. Arguably for that reason, manufacturers might limit their online distributors' ability to compete on price. Whether such limitations are generally pro- or anti-competitive was a hotly contested issue at the roundtable, but a consensus did emerge that the framework for analysing that question should be the same in both the on-line and off-line contexts.

Related Topics

The Digital Economy (2012)
Competition, Patents and Innovation (2006)
Competition Issues in Electronic Commerce (2000)

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

12-Sep-2013

English, French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

VERTICAL RESTRAINTS FOR ON-LINE SALES

JT03344296

DAF/COMP(2013)13 Unclassified English, French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Vertical Restraints for On-line Sales held by the Competition Committee in February 2013.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur restrictions verticales dans les ventes en ligne qui s'est tenue en février 2013 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

In light of the written submissions and the oral discussion, the following points emerge:

(1) The developments of e-commerce have impacted the way competition works and the type of competition concerns that may arise.

The literature on e-commerce has reviewed four issues: (i) search costs, (ii) how e-commerce affects the geographic scope of transactions, (iii) the distribution cost and (iv) how e-commerce affects the existence of information asymmetries between consumers and suppliers.

Regarding (i), the Internet has lowered search costs but not to zero because consumers have exogenous search costs and firms adopt tactics to make more difficult for consumers to compare prices. As for (ii), although the Internet has expanded the geographic scope of transaction, most of the e-commerce still takes place within neighbouring areas because consumers prefer to shop within limited distances both for cultural and for security reasons. For (iii), distribution costs were generally lowered as the Internet allowed manufacturers and consumers to trade directly and online retailers to carry a much wider variety of products. Finally, as for (iv), buying on-line may create information asymmetry because consumers cannot test the product they are going to buy and so it is more difficult for retailers to build a reputation.

As a result, Internet is making price competition more intense, geographic markets are becoming wider and it is also allowing consumers to buy products that would not be available in the physical world. While these developments should lead to an increase in consumer welfare, the emphasis on price competition may in some cases reduce the ability and willingness of retailers to undertake investments that can improve consumers' welfare. Moreover, due to network externalities it may be harder for new firms to enter electronic markets and thus e-markets tend to be more concentrated.

(2) In spite of the observed impact of e-commerce on the way competition works, most authorities agree that e-commerce in general does not require the application of a specific regulatory regime.

As a general rule, it was accepted that the efficiency justifications that have been discussed in the economic literature equally apply to on-line and to off-line sales. This is also true for the anticompetitive motives underlying the adoption of vertical restraints. For this reason, in spite of the developments in the economy caused by the expansion of the Internet, most delegates agreed that a new economic and regulatory framework was not needed to assess the competitive implications of vertical restraints. The general view was that the present framework is still valid and can be adapted to the new environment.

(3) *It was generally accepted that most competition concerns raised by vertical restraints in the traditional commerce will also occur in e-commerce although they may have different implications.*

The traditional competition concerns that are generally associated with vertical restraints are (i) the risk of facilitating collusion and (ii) the risk of softening competition.

These anticompetitive motivations for firms to engage in vertical restraints apply equally to e-commerce. In particular, there are situations where the imposition of vertical restraints like resale price maintenance (RPM) will reduce competition between brands and therefore harm consumers.

However, regarding the classic arguments about RPM as a collusive mechanism, it is not clear that these would actually work in an on-line environment. There is already a lot of price transparency in this environment and thus vertical restraints cannot act as a way to make it easier to enforce the collusive output of a cartel. Therefore there should be fewer reasons for concerns from RPMs in an online environment.

There are also pro-competitive reasons why manufacturers might impose vertical restraints which are particularly relevant in an online world. These can mitigate service-related free-rider problems where, for instance, an online retailer of TV sets may free-ride on the services delivered by an off-line shop. Although the price paid by the customer for the TV set may be lower, this can lead to the off-line store no longer stocking this brand in the future or even to the shop closing down. Vertical restraints can help address this problem by providing incentives for the retailers to engage in costly demand-enhancing activities like servicing or advertising.

It is also possible that vertical restraints can be pro-competitive even in the absence of service-related and free-rider issues. A manufacturer may want to provide retailers an incentive to promote its brand. In an online world, a retailer can promote a product by showing it on top of the page display or in the search results. In that situation, RPM may be a way to ensure a margin for a retailer and to provide an incentive to promote a brand instead of demoting it to page three of search results on an online retailer's website.

(4) *On the other hand, some novel types of vertical restraints are particularly relevant for online markets and they raise their own specific competition concerns.*

There is a new pricing policy for the e-market place called "across platforms parity" agreements or "retail most favoured nation" clause (retail MFN). It is an agreement between a seller and an electronic trade platform where the seller undertakes not to charge on that platform a price that is higher than the price that he charges on other platforms.

The competition problems that this practice may cause are similar to the problems raised by a "best price guarantee" that a retailer will either match the lower price of a rival or refund the difference to the consumer. These concerns are the softening of competition and reduced incentives for on-line retailers to lower their commission rates (because they get no benefit in competition terms as a result). Both practices have also a significant potential for facilitating collusion with the most potential harm being the foreclosure or deterrence effect to potential discounters.

These are the potential anti-competitive effects that can arise both from unilateral best price guarantees and retail MFN clauses. Generally, though, competition authorities consider that best price guarantees lack a certain amount of credibility since the commitment may be undermined

when the incumbent may chose not to match the price. However, in an on-line environment that credibility can be generated through the use of the retail MFN clauses. This is particularly relevant in a situation where several on-line retailers have a MFN clause with the same supplier. In that situation, they are fixing the price between retailers.

The question is whether competition authorities can tackle retail MFN in the same way as they would tackle RPM. However, the harm that arises from retail MFN can go beyond the harm that arises from traditional RPM. This is because the on-line retailer is controlling the minimum price that is being set in the market and it can manipulate that price by increasing its commission. This is an additional element of harm that may arise with retail MFN.

(5) Some specific analysis would be required to assess the potential anti-competitive impact of vertical restraints.

It was found that vertical restraints can often lead to an increase in the retail price. In fact, economic theory suggests that, by restricting the number of retailers that can sell a certain product via vertical restraints, one limits intra-brand competition and that will have the effect of raising the price. Similarly, by definition, restricting the price from falling below the minimum resale price will also have the effect of raising the price.

However, negative effects of a price increase on consumer welfare would need to be compared to any efficiency benefits vertical restraints bring. One would have to control for product quality, service quality, matching consumers with the items they want, etc.

One should keep in mind that a manufacturer earns a profit off the wholesale margin. A vertical restraint is going to be profitable for a manufacturer only if it allows him to sell more units or reduces his cost - through scale economies or through lower distribution costs - or somehow raises the wholesale price.

Therefore, the focus of the analysis should not be on the retail price but on the wholesale price. So, if it were suspected that a particular vertical restraint was not designed for efficiency reasons, but to somehow soften competition among brands, the most direct way to assess its impact would be to look at the wholesale price. This would be a simpler screen than requiring the parties to prove efficiencies. However, several delegates considered that, in most situations, even observing wholesale prices would prove to be difficult.

BACKGROUND NOTE

By Paolo Buccirossi [*]

1. Introduction

The increased transparency and cost efficiency brought about by the electronic commerce (hereinafter e-commerce) is often seen as a positive evolution of trade towards increased competition. The Internet is generally considered as a catalyst for consumers purchasing ability. Consumers can easily access a huge amount of information, can compare prices, have a wider choice of products, virtually reach any seller around the world, and their purchasing choice is aided by intermediaries often providing pre- and post-sales information and services. Search costs are dampened on the consumer side, besides operating costs for firms are often lowered thanks to the shift from paper-based transactions to electronic transactions. By and large, e-commerce is believed to have pro-competitive effects, and it enjoys a special protection in the European Union (EU) as it is consistent with the political goal of the Internal Market. E-commerce has transformed also marketing and distribution systems. Many producers capitalized on this new distribution channel that is often linked to cost-saving and an enlarged consumer base.

Relatively few industries have not been affected by this novel distribution prospect. Leaving those minority aside, today's trade is characterized by three predominant situations: 1) products that are available only on the Internet -e.g. some software, games or magazines can be bought only on-line, (pure on-line sales); 2) products that are available in the same format from physical and on-line distributors (mixed sales/same format); and 3) products that are available in different formats in the two distribution systems - e.g. home video and streaming, (mixed sales/different formats). Such categorization shows that it is common to see traditional distribution networks working in parallel with direct e-tailing networks, as defined in Kirsch and Weesner (2005). This paper explores the conflicts that may arise between these two competing distribution networks and discusses whether vertical restraints (VRs) imposed on e-commerce may work in the interest of consumers or may be aimed at depriving them of the benefits that an increased competition can bring about.

The paper is organized as follows. Section 2 gives a succinct overview of the economics of vertical restraints and explains how this literature has shaped the interpretation of competition law. Section 3 describes the main features of e-commerce that can affect retail competition. Section 4 discusses the most frequent restraints that are imposed on e-tailers. It builds on the two previous sections to understand whether the general approach developed in the economic and antitrust literature is applicable also to these vertical restraints and to what extent the peculiarities of e-commerce can further illuminate the competitive assessment of these practices. Section 5 summarizes the main decisions made by some national competition authorities and courts in Europe and in the US. Section 6 provides some conclusive remarks.

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2. An overview on the economics of vertical restraints

Vertical agreements are an essential element of a market economy. Firms at different levels of the supply chain deal with each other. Frequently this exchange occurs through spot transactions regulated by linear prices. However, in many instances, vertical relationships are disciplined by long-term contracts with complex pricing clauses and several obligations imposed on the contracting parties. This type of arrangement is common when the vertical relationship is between a manufacturer and its distributors.

In the vast majority of cases these restraints are an inherent part of the commercial relationship and aim at making it viable. However, in some instances they have as their object or effect to restrict or distort competition. The economic and antitrust literature has identified several economic justifications and anticompetitive motives behind vertical restraints and the conditions in which they can materialize. Although not all issues have been satisfactorily addressed and the debate is still on-going, a consensus was reached on the major competitive implications of vertical restraints. This allowed competition authorities to issue guidelines or other policy documents explaining how competition law should be interpreted and enforced in relation to these practices. In what follows, we will summarize this literature with the purpose of understanding whether the findings of the economic research on the subject can be extended to e-commerce. We will mainly focus on the relationship between manufacturers and distributors, the latter comprising retailers and/or intermediaries.

2.1 Two types of competition

A vertical agreement between a manufacturer and a distributor can affect competition in two distinct markets: the upstream market where the manufacturer competes with similar firms and the downstream market where retailers compete against other retailers. The former type of competition is called *inter-brand competition* as it occurs among various suppliers whose products are mainly identified through the use of specific brands. Downstream competition may also occur among retailers who sell the products of the same manufacturer; this form of competition is called *intra-brand competition*. It is generally believed that a reduction of intra-brand competition is unlikely to harm consumers if there is a strong inter-brand competition. For instance, the *EC Guidelines on Vertical Restraints*[1] (henceforth "*EC Guidelines*") state that "if inter-brand competition is fierce, it is unlikely that a reduction of intra-brand competition will have negative effects for consumers" (par. 102). The reason why inter-brand competition is deemed to have a stronger impact than intra-brand competition on consumer welfare hinges on two considerations. First, consumers derive most of their welfare from the characteristics of the products they consume and inter-brand competition guarantees that manufacturers will strive to innovate their products and to choose the features that meet consumers' preferences. Second, manufactures will also compete by offering consumers the lowest possible price; since consumers pay the retail price, they seem to have no reasons to limit price competition among their own retailers, unless this is the only way to induce retailers to provide ancillary services or to invest in promotional activities that benefit consumers more than a limited price reduction.

2.2 Various types of vertical restraints

To perform a competitive assessment of a vertical agreement we need to understand which are the efficiency purposes that it may pursue and which the anticompetitive effects that it may engender. Moreover we have to understand which type of restraints and in what market conditions are more likely to yield the former efficiencies and when and how the anticompetitive effects may occur. It is therefore useful to categorize the obligations that a vertical agreement can impose on the parties. These may concern:

[1] Commission notice - Guidelines on Vertical Restraints [2010] O.J. C 130.

- The scope of the transactions allowed to each retailer, in terms of territory or customers they are allowed to serve;
- The qualitative features of the retail services (e.g. size of the store; opening hours; parking facilities);
- The provision of complementary services (e.g. pre-sale or post-sale assistance; financial services);
- The undertaking of promotional activities (e.g. on-site advertising);
- The range of volume offered;
- The volume of products to be procured;
- The price charged to end consumers.

A general classification of vertical restraints distinguishes between: 1) price restraints and 2) non-price restraints. The former include all those agreements whereby the retailer agrees to charge a price that is: a) not higher than the price indicated by the manufacturer (**maximum Resale Price Maintenance**-RPM); b) equal to the indicated price (**fixed RPM**) or c) not lower than the indicate price (**minimum RPM**).

The major vertical restraints included in the non-price category are:

- **Exclusive distribution**: whereby each distributor is allocated a specific territory or a specific group of customers to which it can actively sell its products.
- **Selective distribution**: an agreement that restricts the number of authorised distributors based on selection qualitative criteria linked to the nature of the products and the complementary services that need to be provided to the buyers.
- **Single branding**: an agreement that imposes on the buyer an obligation to procure a product of a given category from a single supplier; the same situation may arise with a "quantity forcing" obligation whereby the buyer is forced or induced to buy (or stock) a predetermined minimum volume of product so that it will *de facto* limit its purchases from one supplier.
- **Exclusive supply**: an agreement whereby the supplier has an obligation to sell the relevant products to a single buyer; as in the previous case, the same effect can be obtained through some form of quantity forcing;
- **Tying and bundling**: whereby a manufacturer conditions the purchase of one product (the tying product) to the purchase of a second product (the tied product); when the two products are sold in fixed proportions this practice is normally called bundling.

Although this classification may help conceptualize the possible economic effects of these practices, it does not allow to form a conclusive opinion, as simple formal rules to discriminate pro-competitive and anti-competitive restraints based on this classification have not been found. It is now recognized that the proper application of antitrust rules in this matter has to be based on an effect-based approach. Therefore, it appears more appropriate to spell out the possible economic justifications and the theories of competitive harm that in general can apply and then try to identify observable factual elements that would allow the enforcer and the parties to find out whether the specific restraint in the specific market conditions in which it operates will likely do more harm than good to consumers or the opposite. In order to substantiate this approach, in what follows we describe the possible efficiency justifications and anticompetitive motives that may concern vertical restraints and provide a brief narrative of how they work.[2]

[2] For a survey of the economic literature on vertical restraints see Rey and Vergé (2008).

2.3 Efficiency motives

2.3.1 Specific investments and the hold-up problem

In some instances, two parties, such as a supplier and a retailer, can profitably deal with each other only if one of them makes investments that would have little or no value outside that specific commercial relationship. Once this specific investment has been made, the investing party finds itself in a weak bargaining position: it is hold up by the commercial partner, as it will lose the value of the investment if it does not accept the trading conditions the latter requests. This is the main reason why parties sign long-term contracts which define many aspects of their relationship before each party undertakes the required investments (Williamson 1985). Two qualifications are necessary. First, a large fraction of transactions that occur at the wholesale level requires some specific investments[3]. Second, on the one hand reputation mechanisms or social norms may guarantee that all parties behave non opportunistically so that in some cases contractual restraints are not indispensable. On the other hand, when the value of the specific investment is significant and an ex-ante contract is insufficient to discipline all the conceivable relevant situations, the only efficient solution might be a vertical integration.

2.3.2 Vertical externalities and vertical coordination problems

When a manufacturer and a retailer make independent and uncoordinated strategic decisions each of them considers only the consequences of these decisions on its own profits. Yet, whenever the decision of one of the two parties affects the volume of the product sold, it entails effects also on the profits of the other trading party. This effect is called a "vertical externality", as the firm making the decision does not take it into account. For instance, if a retailer offers a discount, end consumers buy extra units on which the manufacturer earns a margin. However, the retailer will not consider this effect and may decide not to lower the price if this does not increase its own profits, even if it would increase the profits jointly earned by the manufacturer and the retailer.

The best known vertical coordination problem is the so called "*double marginalization*"[4]. It occurs when both the manufacturer and the retailer enjoy some degree of market power and both make uncoordinated pricing decision. As a consequence the manufacturer adds a margin on production costs to set the wholesale price and the retailer adds a margin on the wholesale price to set the retail price. Hence, the price end consumers pay contains a double-margin and is set at a level that is higher than the level that would be set by a vertically integrated firm. If the manufacturer and the retailer decide to coordinate their pricing decision and charge a retail price that maximize their joint profits, they would lower the price, increasing their profits and benefiting consumers as well.

This coordination problem may affect all the strategic decisions that firms (especially retailers) have to make. They may all be conceived as demand-enhancing investments that create benefits also for the firm that operates at a different level of the supply chain and that, therefore, may be undertaken at a suboptimal level if the vertical effect remains an "externality". For instance, it may concern advertising, ancillary sale services (Marvel and McCafferty 1984), inventories (Krishnan and Winter 2007), the range of products offered, and so on.

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3 The sheer familiarity with the trading party and its operational routines entails a value that is lost when the commercial partner changes.

4 This pricing coordination problem for complementary products was discussed by Cournot (1838); for a formal treatment see Rey and Vergé (2008).

2.3.3 Horizontal externalities and free-riding

A similar problem occurs when investments made by a distributor affect the sales made by other distributors. For instance, a franchisee that makes investments that improve the attractiveness of the brand (e.g. McDonald's), benefit other franchisees as well, as consumers may decide to patronize other outlets of the same chain. Since this external horizontal effect is not taken into account by the franchisee, its investment may be too low and some form of coordination among distributors might be needed to bring it at an optimal level.

In some cases the horizontal external effect occurs through opportunistic behaviour of competing distributors. For instance, in industries characterized by significant non-price intra-brand competition, for a producer may be vital to increase demand through retail services (e.g. pre-sale assistance services, showrooms). However, retailers are aware that they will not fully internalize the value produced by their effort exerted to offer pre-sale services, if consumers then buy from retailers who do not undertake the same investments and can pass on the cost-savings to consumers in the form of a lower price. This type of free-riding depresses the level of pre-sale services offered by retailers, possibly harming both suppliers and consumers. Again some coordination may be required to solve the free-riding problem and induce all players to make efficient decisions.

By the same token, a producer may be willing to protect its investments (for instance, in the form of IP rights, patents, trademark or reputation) limiting the scope of action of its distributors, e.g. introducing exclusive dealing clause in the distribution contracts. Vertical restraints in both cases are a viable option to avoid underinvestment.

2.3.4 The use of dispersed and heterogeneous information

Suppliers and distributors might have heterogeneous information. On the one hand, distributors are better informed about local competitive conditions and about the specific preferences of local consumers. On the other hand, suppliers sell a sensibly lower number of products than the retailers and these products individually are likely to have a significant impact on their profits. Hence, they have a deeper knowledge than the retailers on specific products. Since both sets of information may be necessary to design and execute an optimal marketing strategy, a supplier may want to have some degree of control on the retail price, or at least the possibility to coordinate it with its distributors, because it may know better which price is more appropriate to maximize profits, given consumers' preferences and the price of competing products.

In this context even from the supplier's perspective a retail price may be inadequate because it is "too low", especially when the price is used to signal the quality of the product. Moreover, for some suppliers a retail price that is too low may prevent it from remaining in the market, either because distributors prefer selling competing products or even non-competing products that guarantee them higher margins, or because the manufacturer's margin is then forced below the level that makes production viable in the long run. Through a vertical agreement a manufacturer and its retailers may pool all the relevant information and make more efficient retail pricing decisions. To the extent that these decisions are still constrained by the competition stemming from other suppliers, the risk that consumers are eventually harmed is likely to be low.

2.4 Anticompetitive effects

Vertical agreements may affect competition both in the upstream market (i.e. inter-brand competition between manufacturers) and in the downstream market (i.e. intra-brand competition between retailers of the same manufacturer). Three distinct theories of competitive harm have been elaborated in the economic literature: VRs may a) foreclose the market; b) facilitate collusion; or c) soften competition.

2.4.1 Market foreclosure

The most feared motive by competition agencies is undoubtedly the foreclosure effect caused by VRs, especially in highly concentrated markets. Entry can be prevented at all levels of the supply chain, likewise exit can be driven at any of the vertical stages. Some VRs that mimic vertical integration, such us exclusive dealing (both single branding and exclusive supply), may discourage potential entrants as they anticipate that they will have limited access to distributors, and therefore it would be difficult for them to reach consumers.[5] In the same way, such restraints may be adopted in order to push competitors out of the market by squeezing their distribution possibilities, costs for competitors become too high for them to profitably remain in the market.[6]

2.4.2 Collusion

It is generally argued that some VRs may have the effect of facilitating collusion either in the upstream or in the downstream market. In the upstream market collusion may be hindered by the fact that suppliers do not observe wholesale prices, and, if retailing costs vary over time, manufacturers cannot correctly infer wholesale prices from retail prices. RPM agreements, as they make retail price less dependent on retail costs, improve price transparency, foster the ability of manufacturers to detect deviations and, thus, facilitate collusion (Telser 1960; Mathewson and Winter 1998; Jullien and Rey 2007). In downstream markets similar price arrangements, even if do not impose the retail price, may provide focal points to retailers and therefore increase their ability to coordinate on higher more profitable prices. Non-price restraints, such as exclusive distribution agreements, may similarly help distributors in sustaining a collusive equilibrium as they limit the scope for deviations from the collusive path.

2.4.3 Softening competition

While collusion indicates a dynamic phenomenon in which welfare reducing selling conditions are sustained through the threat of market punishments, competition may be softened also in static games by practices that lower firms' incentive to compete aggressively.[7]

Vertical restraints may have a direct and straightforward effect of softening intra-brand competition. A manufacturer imposing price restraints (e.g. RPM) tends to reduce the fierceness of competition among retailers; similarly, allocating exclusive territory rights to its distributors, the manufacturer, in a way, induce monopoly power for each retailer in the given territory.

These practices can also soften inter-brand competition. Rey and Stiglitz (1995) prove that through an exclusive distribution system a manufacturer may commit to price less aggressively and this, in turn, gives incentives to rival manufacturers to set higher prices.[8]

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5 A formal analysis of how exclusive contracts may foreclose the market has been proposed by Comanor and Frech (1985) and then developed by Mathewson and Winter (1998).

6 The "raising rivals' costs" theory was firstly and informally introduced by Krattenmaker and Salop (1986)

7 To clarify a collusive outcome refers to a market equilibrium in which sellers coordinate their behavior (in an infinitely repeated game) by adopting history-dependent strategies, whereas the "softening competition" outcome refers to a modification of the equilibrium of a one-shot game and does not require that firms monitor each other and punish deviations from the coordinated conduct. Some authors (e.g. Baker (1995)) refer to the latter effect as "dampening competition". This distinction can also be found in the 2010 *EC Guidelines*, where the Commission mentions as possible anticompetitive effects both collusive coordination and softening competition (see paragraph 100 ii) or iii).

2.5 Ambiguous effects on welfare

Some contributions in the economic literature show that some vertical restraints, such as exclusive dealing and tying, can be adopted by the suppliers to price discriminate (Burstein 1960; Chen and Ross 2005). However, the welfare effects of price discrimination are not clear cut and depend on the specific characteristics of the market, the heterogeneity of consumers, their demand elasticity and the degree of market power that can be exerted on each market segment (Armstrong, 2008).

2.6 How can we distinguish efficient (pro-competitive) VRs from anti-competitive VRs?

From the previous discussion it emerges a fundamental theme for the competitive analysis of vertical restraints: competition is a multifaceted phenomenon with many dimensions that, in some case, may conflict with each other. While in an ideal world we would like to have the highest level of innovation and the most qualified sale services coupled with marginal cost-pricing, this is simply not possible and in many instances the application of competition law requires to compare the likely anti-competitive effects of a practice on a market or on a specific dimension of competition with the likely pro-competitive effects of the same practice on another market or on another dimension.

Given this situation we need some operational tools to distinguish benign and malicious practices. The prevalent approach in several jurisdictions, as in the US, is that the assessment of vertical agreements is subject to a rule of reason which requires to balance, on a case by case basis, the effects on consumer welfare of the agreement.

In the EU, through the various regulations and guidelines the European Commission has built a series of relative presumptions (both of legality and of illegality). The general presumption is that, absent a significant market power either upstream or downstream, VRs are likely to be pro-competitive as they serve efficiency purposes. As market power is difficult to measure, it is proxied by the market share of the parties. This presumption explains the general rule which has been developed in the BER of the European Commission according to which if each of the parties has a market share below 30% a VR is, generally, supposed to satisfy the conditions set in Article 101(3) TFEU and therefore to be legal.

This general presumption admits some exceptions. Some practices are qualified as hard-core restrictions. For them the general presumption is reversed: even if none of the parties seem to enjoy market power, the agreement is presumed to fall within the scope of Article 101(1) TFEU and to fail to meet the conditions of Article 101(3) TFEU. In these circumstances the VR is presumed to be illegal, but the parties have the possibility to plea for a legal exemption in individual cases.

When the general presumption does not apply because one or both the parties have a significant market power (e.g. a market share above 30%) each practice must be assessed on its own merits balancing the evidence in favour or against its legality.

This approach is sensible. It provides as much legal certainty as possible without depriving the system of sufficient flexibility so as to adapt to specific circumstances. Of course the complexity of analysis remains when an individual assessment is required and when these rules must be applied to a new environment such as the Internet.

The assessment in individual cases must be carried out by confronting the possible economic justifications and the theories of harm that are applicable and by assessing to what extent the available

[8] This idea was initially explored formally by Bonanno and Vickers (1988) in a model in which producers for strategic reasons decide to delegate their marketing strategies to independent retailers. Further analyses are those provided by Lin (1990) and Shaffer (1991a; 1991b).

evidence supports each of them. The best way to follow this approach is to formulate a group of competing "stories" which describe the channels through which the VR would produce its pro-competitive or anti-competitive effects. These narratives would highlight some important elements that make each of them more or less plausible and that will have to be checked against the actual facts of the case, including the opinion of the market players.

Some elements that are likely to play an important role are: a) the market position of the parties and their competitors, b) the nature of the contract products and the relevance of the complementary services; c) the existence of factors naturally leading to concentration (economies of scale, network externalities); d) the presence of entry barriers. This list is not exhaustive and other factors will certainly enter the pictures in specific cases.

One element that is often neglected, but that in fact can provide an important guidance in the assessment of a vertical restraint, concerns the reason why the parties decided to ask for or to accept the specific restraints imposed by the agreement. Answering this question does not solve the legal problem because an anti-competitive intent is not required to find a violation of competition law. Yet an understanding of why the parties made recourse to a specific arrangement may shed some lights also on it likely effects.

In this respect, a striking characteristic of vertical agreements is that it is quite obvious that the parties have a convergent interest when they sign a contract that makes their transaction more efficient, but it is less clear why one of them may be willing to enter an agreement whose only or main purpose is to allow the other party to gain and exert market power. In principle, both suppliers and retailers take advantage of a competitive related market. Manufacturers generally benefit from a competitive retail market, because this brings retail prices down, spurring demand for their products at the wholesale level. Retailers benefit from upstream competition, as this brings down wholesale prices and make them earning larger margins.

Hence in a vertical relationship normally the parties have an incentive to limit each other's market power. However, this incentive is not sufficient to guarantee that a vertical agreement will never be anti-competitive. Several reasons to explain why this might happen have been proposed in the literature. First, one of the two parties may have such a strong bargaining position that the threat of terminating the commercial relationship is credible and sufficiently severe to force the other party to accept the anti-competitive arrangement. Second, the party that obtains or increases its market power through the VR may share some of the extra-profits obtained in this way with the other party. This compensation may occur through lump-sum payments or various types of discount (see Aghion and Bolton 1987). Third, when the anti-competitive effects stem from a number of vertical agreements concluded with different commercial partners, the latter can be played one against the others (as in a Prisoners' Dilemma game) as each of them, unilaterally, cannot avoid the anticompetitive effect (Rasmusen, Ramseyer, and Wiley 1991; Segal and Whinston 2000).

Rarely the analysis of a specific vertical restraint includes a fact-based assessment of whether one of these explanations applies to the specific situation under examination. Yet, we believe that this would be an important step to distinguish pro-competitive and anti-competitive circumstances. Indeed, the empirical literature has shown, quite consistently, that in most cases manufacturers and consumers have aligned interests and that when manufacturers voluntarily restrict the distributors' commercial freedom they do so to pursue these common interests. Lafontaine and Slade (2008) after a thorough survey of the available empirical literature on vertical restraints, conclude that "it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision. In contrast, when restraints and contract limitations are imposed on manufacturers via government intervention, often in response to

dealer pressure due to perceptions of uneven bargaining power between manufacturers and dealers, the effect is typically to reduce consumer well-being as prices increase and service levels fall" (p. 409).

3. How e-commerce affects competition

This Section explores the main features of e-commerce that may have an impact on competition with the aim of understanding in what respect these features may influence the assessment of vertical restraints. It has been argued that on-line sales affect retail competition by: a) lowering search costs; b) altering distribution costs; c) enlarging the geographic scope of transactions; and d) introducing new forms of information asymmetry or way to overcome the same asymmetry.[9] These features are discussed in the following subsections.

3.1 Search costs

It is generally believed that consumers incur near-zero costs when surfing the web in order to gather information for their purchasing decision. The web has generated an enormous amount of information, and some websites grasped the opportunity to offer an additional service to consumers, overwhelmed by the information overload. Nowadays, there are many reliable 'buyer agents'[10] presenting easily readable aggregated information, such as price quotes from different on-line retailers for the same good or service, which support consumers in comparing prices and finding the most appropriate solution for their purchase. The increasing use of these websites, also called shopbots, is demonstrated to reduce search costs. Brown and Goolsbee (2002) provide empirical evidence in the insurance sector, showing how increased use of the Internet reduces average price of term life insurance by as much as 5 per cent. On the contrary, an increased Internet usage, in sectors not covered in shopbots, will not lead to lower prices for consumers.

However, a growing number of empirical studies show that it might not always be true that price information services available on the Internet make search costs vanish. For instance, Brynjolfsson, Dick, and Smith (2010) develop a random coefficient model, in their study on price comparison websites, that show how the search cost of accessing the whole set of offers generated by a shopbots is non-trivial. Indeed, the maximum cost of searching a book in one of the major price comparison websites is estimated to be $6.45, while the benefit deriving from the possibility to access the whole set of aggregated information is estimated to be $6.55 for the median consumer. Similarly, with a different methodology, Hong and Shum (2006) apply a non-sequential search model to data on on-line bookstores prices, generating search cost estimates between $1.30 and $ 2.90.

A relevant body of literature is devoted to the study of Internet auctions. Bajari and Hortaçsu (2003) quantify the implicit cost of entering an eBay auction to be $3.20 in a dataset of eBay coin auctions. Hann and Terwiesch (2003), instead, analyse offers submitted by consumers on reverse auction websites, also called Name-Your-Own-Price systems, whereby the seller seeks to match the buyer price through repeated offers. The frictional costs, defined as the disutility arising from taking part to the on-line transaction, in this particular type of e-commerce is measured to range between €3.54 and €6.08, according to the financial value of the product being auctioned. Moreover, the research also presents a further interesting result; frictional costs are negatively correlated to the experience of consumers, in terms of transactions previously conducted on the same website. A similar conclusion is reached by Johnson, Bellman, and Lohse (2009). They show how learning plays a crucial role in e-commerce. Through a cognitive psychology model they demonstrate that as the consumer becomes more experienced about (or accustomed to) a website, the time spent on that website declines.

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9 For a rich survey of the literature on this subject see Lieber and Syverson (2012).

10 Intelligent software agents designed to retrieve information on the Internet according to the user search input.

The fact that search cost are not eliminated by search engines and shopbots is also proven by the permanence of a significant price dispersion among the offers of various retailers (Baye, Morgan, and Scholten 2006). One explanation for this finding is that firms' endogeneise lower search costs so that while search engines try to create a frictionless environment, retailers counteract by adopting price-obfuscation tactics. Ellison and Ellison (2009) describe some of these tactics such as making product descriptions complicated or creating multiple versions of products or adopting 'bait-and-switch' methods, i.e. offering low quality products to obtain better visibility on shopbots and then try to convince consumers to pay extra for the better quality product they really want. Different explanations of the persistence of price dispersion are: i) the relevance of non-price attributes, like delivery time, shipping costs and availability, or the brand reputation of the e-tailer (Brynjolfsson and Smith, 2003) ii) the presence of switching-costs due to the familiarity with a retailer's site and purchasing interface (Varian 1999); iii) the adoption of price discrimination policies allowed by new personalisation technologies which enable e-tailers to exploit information about individual consumers in order to tailor both products and prices to individual requirements (Shapiro and Varian 1998); iv) consumers' limited rationality (Baye and Morgan 2004).

Although all these studies prove that a totally frictionless environment is not possible, they do not put into question that the new technology allows consumers to shop around at a cost that is sensibly lower than the cost they would incur if they had to visit physical stores or compare prices through other means. Notwithstanding the tactics adopted by suppliers and retailers, the reduction of search costs can have an impact on prices, market shares and profitability.

3.2 Distribution costs

The Internet has caused many shake-ups in terms of distribution costs. In a way, it reshuffled the elements of a business cost structure. The net effect is mostly positive, thus there is general consensus to link the diffusion of e-commerce to the drop in distribution costs.

First of all, it should be noted how the Internet has changed the relationship between producers and consumers. Some markets have been hit by an abrupt process of disintermediation, which resulted in the reduction or the complete dismantling of one or more stages of the supply chain. The most striking example in the past few years has been the travel industry, where the role of travel agencies has been dramatically reduced, since Internet reservations have become available.

From another viewpoint, the Internet led to increased intermediation, for instance in the motor vehicle sector. In the US auto sales, physical middlemen are mandated by law. That is, all car sales must go through a physical retailer. Taking stock of this, on-line technologies have developed systems to help consumers in defining the car that best match their preferences, then, through the referral service, advice consumers on the most appropriate dealer where to purchase the desired car.

The Internet revolutionised also how orders are handled. Faster communication along the supply chain permits downstream firms to quickly turn demand into orders to their suppliers, significantly reducing their need for inventory stock. Indeed Retail inventory-to-sale data show a declining trend from 1992 to 2012, reaching a peak in April 1995 with an inventory-to-sale ratio of 1.74, and a drastic fall in October 2011 with a 1.32 ratio[11].

Numerous firms adapted their business models to make the most out of the opportunities brought about by the World Wide Web. Businesses tend to be more consumer-focused rather than product-focused, so that they can directly respond to consumer demand. As a result, the pull marketing strategy is now extremely widespread, especially in markets with high demand uncertainty. Other cost-saving practices

[11] http://www.census.gov/mtis/. Retrieved on 24\1\13

have been developed thanks to the faster communication between the different stages of the supply chain. For instance, under a 'drop-shipping' system wholesalers will directly handle the shipping to final consumers, hence the order, originated by the retailer, will be entirely fulfilled by the wholesaler, skipping the extra step of transporting the good from the wholesaler to the retailer. This system significantly reduces distribution costs and speeds up the whole process.

As often argued, one of the main advantages of the abovementioned practices is that they enable retailers to have a much wider product offering choice. Bricks-and-mortar retailers will only carry a product if it reaches a certain volume of sales, meaning that many low-volume varieties are not likely to be found in physical shops, whereas they are available on-line. Similarly, some very niche sectors that are no longer served by offline retailers are now able to survive thanks to the wide selection offered on the Internet. Brynjolfsson, Hu, and Smith (2003) argue that, since the introduction of the Internet, variety is the main factor driving consumer welfare gains. They estimated that the rise of on-line book retailers, increased consumer welfare by 7 to 10 times, and on average an on-line book retailer (e.g. Amazon.com) offers 57 times more book titles compared to a typical large independent bookstore.

It should not be neglected, however, that despite all the benefits produced by the Internet to distribution costs, there are a few drawbacks. For instance, delivery costs have now become a predominant heading in the company trade costs. That is, even pure on-line retailers, which are believed to have reduced distribution costs the most, typically face much higher delivery costs compared to off-line outlets.

3.3 Increased geographic scope for transactions

E-commerce is believed to reach anyone anywhere in the world, as long as it is possible to access a connected device, even in the most remote area of the planet. As the often-cited catch-phrase claims anything is 'just one click away', no geographical barriers seem to exist in electronic trade. This is not only due to the enhanced communication channel, but also to the drop in costs faced by businesses, which are now able to serve larger geographical markets.

In the early years of the Internet, some experts predicted that the web upheaval would have reduced the importance of cities for trade. Forman, Goldfarb, and Greenstein (2005) sought to give an empirical answer to this widespread belief. Their findings reveal high participation rate in the Internet in rural areas compared to the cities, especially in terms of business technologies. Consistent to that, Kolko (1999) finds that population living in more secluded cities tend to be more likely to connect to the Internet than citizens of metropolitan areas. The insight to draw from these findings is that the Internet helped individuals located in rural areas overcoming the problem of distance from physical retailers (Sinai and Waldfogel, 2004).

Nonetheless, there is a significant body of literature showing that Internet users (both consumers purchasing on-line, and firms making on-line transactions) do not truly exploit the potential of the virtually limitless reach of the Internet. Geographical distance still matters, and Hortaçsu, Martínez-Jerez, and Douglas (2009) show to which extent spatial factors still play such a central role and why. Analysing data from two major auction websites they demonstrate that most of the transactions occur when the buyer and seller are located in the same metropolitan area. The most likely justifications to such results can be found in cultural factors; indeed, in their results the highest coefficient for the same-city transaction data is attached to sport-related goods, or tickets. While the lowest coefficient corresponds to more rare and valuable goods. Another argument put forward by the authors is that local proximity of buyer and seller ensure easier contract enforceability.

Looking at data on taste-driven purely digital products (e.g. music, games, movies), Blum and Goldfarb (2006) find that US consumers have the tendency to visit websites from neighbouring countries, and a 1 per cent increase in distance causes a 3.25 percentage reduction of website visits. The latter

finding, according to the authors, cannot be fully explained with trade costs, therefore the most logical reason is that tastes are developed locally and nearby countries typically have similar tastes. They finally argue that as globalisation drives a convergence in consumer tastes, there will probably be a reduced distance effect on on-line trade.

Lieber and Syverson (2012), further, investigate the relationship between the place of consumers purchasing on-line and the location of pure-on-line sellers. A 10 per cent increase in the use of e-commerce by local consumers is followed by a 2 per cent growth in the number of pure on-line sellers in the local area.

3.4 Information asymmetry

On-line purchasing involves information asymmetries that do not exist when consumers physically visit a store and make the purchase after having inspected and tested the product. Information asymmetries are also driven by the fact that on-line retailers have generally less brand equity compared to traditional stores, chiefly because it takes time to build reputation, and e-tailers are all relatively new.

Such a gap between the buyer and seller knowledge might generate market inefficiencies, referred to as the problem of adverse selection. This situation is often pictured as the 'market for lemons',[12] where there are two types of sellers, high quality good sellers and sellers of lemons, and consumer, at the other end, seeking to detect the good quality seller. Under perfect information, inefficiencies would not arise. When information is asymmetric, instead, inefficiency costs appears leading to an increase in the proportion of lemons in the market, and to a reduction in the equilibrium price. Therefore, high quality sellers have the incentive to signal their high quality so as to help consumers distinguishing themselves from the bad quality sellers.

In the past few years pure on-line sellers have developed signalling devices in order to overcome the lemon problem. For instance, it is common to find on-line companies offering favourable shipping and return policies, to prove their commitment to the quality of their offerings. However, there is a further issue that would refrain a consumer from purchasing on-line rather than at the physical outlet, and that is the delay between the moment of purchase and the moment of consumption, which may be more or less costly depending on consumer preferences and also on the type of good purchased. Evidence shows, further, that consumers tend to be more security-concerned when making on-line transactions, the cost of information asymmetry is therefore larger.

Commonly, sellers try to mimic the purchasing experience that customers would get in the physical shop by providing detailed information about the good or service. Empirical studies support this idea. For instance, Garicano and Kaplan (2002), in their research on used car auction markets, find no evidence that the Internet increases adverse selection costs. The argument they put forward is that the auction website (namely, Autodaq) adopted measures aimed at reducing the information asymmetries caused by unobservable characteristics of the cars. The website displays detailed information about each car's features and conditions; in addition sellers are enabled to access a third-party inspection service. A similar mechanism was employed in the market for collectable baseball cards. Jin and Kato (2008) report that information asymmetries in this particular market where addressed thanks to a third-party certification system.

Other ways to overcome the uncertainty tied to e-commerce were developed throughout the years. The most effective one, to date, appears to be reputation building. In the on-line book market, for example, the major retailers seem to have a significant advantage compared to smaller, less known players. E-tailers that built a strong reputation for quality are less exposed to price competition, as risk-averse consumers are

[12] The obvious reference here is to the classical paper by Akerlof (1970) and to the vast literature spurred by this contribution.

willing to pay a price premium as long as uncertainty on the product quality is close to zero, as attested by Smith and Brynjolfsson (2001).

The reputational system adopted by eBay has been extensively covered in the literature. The feedback mechanism developed by eBay enables sellers to build their reputation. Resnick et al. (2006) carried out a very effective field experiment to test the impact of feedback rating on the price of the winning bid in eBay auctions. The same seller, selling homogenous goods, used two different accounts, one with very good feedback rating, and the other through a new identity with no feedback history. As predicted, the seller received higher bids (roughly 8 per cent higher) on the experienced account compared to the new account. Other studies have shown the risks of the feedback mechanism. Cabral and Hortaçsu (2010), for instance, presented evidence of the ambiguous effects of feedback, one single negative feedback to an eBay seller generates a plunge in the sales rate of a much greater magnitude compared to the positive effect produced by a positive feedback.

The Internet, moreover, set the stage for new peculiar services, which have no off-line replication. On-line blogs, video tutorials, user forums offer an incredible deal of extremely detailed and technical information for the very product\service that the consumer is looking for.

3.5 Conclusions on the impact of e-commerce on retail competition

Much of the conventional wisdom supports the view that the Internet acted as a catalyst for the erosion of geographical boundaries, paved the way for the emergence of a large number of start-ups taking advantage of the reduced trade costs of doing business on-line, and, besides, was crucial in the development of technologies that enhanced communication and information sharing. All these factors teamed up have a significant impact on retail competition on various dimensions.

First, traditional distribution systems now compete in a setting in which consumers have an increased ability to shop around and compare prices. This might induce some retailers to shift their marketing efforts toward those strategies that allow them to compete on prices rather than on other dimensions of their offer, such as the quality and the scope of their retail and ancillary services.

Second, e-tailers have a significant advantage on the range of products they can offer. Distribution and inventory costs prevent brick-and-mortar shops from presenting a comparable rich assortment of products.

Third, geographic markets are now less clearly confined to a local dimension. While this increases consumers' freedom of choice, and may contribute to the achievement of the political goal of integrating markets, it may also induce traditional distributors to pay less attention to the tastes and preferences of local shoppers.

All these factors are likely to benefit consumers. However, at least in some industries, manufacturers and distributors over the years have strived to set distribution systems that offer consumers services that enhance consumers' evaluation of the products they buy, increase their welfare and make all market players better off. The diffusion of on-line sales poses some threats to these systems and it is important to understand in what circumstances imposing some limits on on-line distribution may improve the welfare of firms and consumers as well.

Finally, it must be considered that e-commerce has created channel-specific competitive risks. Readily available information on any product and price transparency may facilitate collusion. Furthermore, the necessity to build a strong reputation and the existence of significantly high sunk costs related to the creation of a successful on-line retailer generate network effects, which in turns lead to high concentration and may favour the formation of dominant position and market power.

4. Most frequent VRs in e-commerce

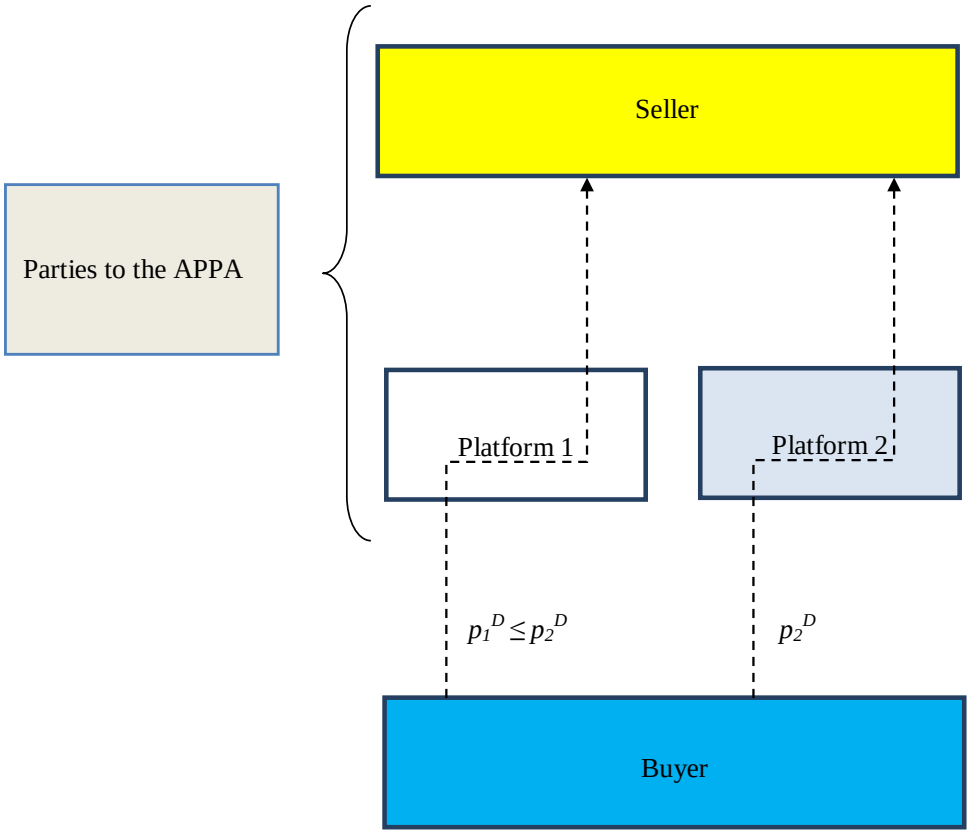
This section deals with the most frequent VRs that are imposed on on-line retailers and discusses to what extent the efficiency justifications and the anti-competitive concerns described in Section 2, could apply to these practices also in the light of the way e-commerce affects competition as reported in Section 3. For the sake of exposition the section distinguishes price and non-price restrains.

4.1 Vertical price restraints in e-commerce

4.1.1 Across-Platforms Parity Agreement

A pricing arrangement that appears to be becoming widespread, in particular in the on-line industry is embedded in contractual clauses between a seller and an electronic trade platform by which the seller undertakes to charge on that platform a price that is not higher than the price charged on other platforms, including the new entrants. These agreements have not been studied formally in the economic literature. Some initial reflections on their competitive effects are provided in a recent report prepared by Lear for the OFT (Lear, 2012). Following this analysis we can refer to these arrangements as Across-Platforms Parity Agreements (APPA). Figure 1 provides a schematic representation of an APPA concluded between a seller and the owner of Platform 1. Through the agreement these two parties stipulate that the price that Seller would charge to Buyer when the purchase occurs through Platform 1 (p_1^D) will not be higher than the price that Seller would charge to the same buyer for the same product is the truncation occurs through any competing platform such as Platform 2 (p_2^D).

Figure 1: An across-platforms parity agreement



This arrangement has been referred to as a type of Most Favoured Nation Clause (MFN) further qualified as Retail-MFN.[13] A MFN is a clause normally embedded in long-term contracts between two firms for the provision of intermediate goods or raw materials whereby the supplier undertakes to apply to the buyer the best price conditions among those applied to any other buyer. Although some similarity exists between MFNs and APPAs, the two have to be distinguished and it would be wrong to derive clear policy implications from the literature on MFNs.[14] The main difference between the two arrangements is that with a MFN clause the parties discipline the price of their own transaction, whereas with an APPA, the parties agree on a pricing obligation that does not concern their transaction but rather a transaction that one of them (the seller) will conclude with a party outside the agreement (the buyer). In this respect an APPA is similar to a RPM. However, an APPA differs from a RPM because the agreement does not fix a price or a limit to the price charged to the buyer, as the seller remains free to set whatever price it chooses, provided that the same item is not offered on other platforms at a more convenient price.

The main efficiency justification that would be applicable to APPAs hinges on the objective of the platform owner to protect the investment it undertook to develop the platform, especially if the success of the trading platform depends on a number of ancillary services that might reduce the asymmetry of information that afflicts on-line sales. Suppose that an on-line platform offers (for free) a number of pre-sale services and a rich assortment of products. If buyers use this high quality/high cost platform to search and then buy on a lower quality/lower cost platform, the high quality platform will not be able to obtain a return from its investments. Similarly, if the platform has invested over time in building a reputation for its services (e.g. how it selects the sellers present on it, how it grades their reliability, the quality of its reviews and so on), it may not want retailers to benefit in attracting buyers, but then have buyers make their purchases on the lower quality/lower cost platform.

This effect may be particularly important for trading platforms as they present the typical features of two-sided markets.[15] Indeed, platforms need to attract sellers and buyers at the same time; hence, losing some buyers may have a tremendous impact on the viability of the platform as it may make the platform less appealing for sellers, which in turn diminishes the value of the platform for buyers, and so on. Indeed, although the APPA imposes a constraint on the price charged by the seller to the buyer and hence the platform neither pays, nor receives the price to which the agreement refers to, there is a potential externality for the platform. The price paid by a buyer to a seller when he purchases a good or a service through the platform influences the willingness of buyers to make purchases through that platform and, therefore, the attractiveness of that platform. Hence, since the seller's pricing decisions entail adverse

13 See, for instance, the presentation made by Nelson Jung of the OFT at the workshop held by the US DoJ and the FTC in Washington on 10 September 2012 available at http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CD8QFjAC&url=http%3A%2F%2Fwww.justice.gov%2Fatr%2Fpublic%2Fworkshops%2Fmfn%2Fpresentations%2F286773.pdf&ei=QvIPUaPCIcX5sgbjpoHwDQ&usg=AFQjCNHV3Ue0gg0c9LEQy782IcWxHxEX6A&bvm=bv.41867550,d.Yms&cad=rja.

14 For instance MFNs have been considered an effective way to solve the problem faced by a monopolist seller of durable goods, known as the Coase conjecture (see Butz, 1990), as a way to create price indexing mechanisms that mitigate problems arising from incomplete contracts (Goldberg and Erickson 1987) or as a device to signal some unobservable characteristics in the quality of the seller's product (Levy 2004). Moreover, it has been suggested that an MFN may be adopted with the aim of improving the seller bargaining position (Neilson and Winter 1993; Cooper and Fries 1991). These explanations do not seem applicable to APPAs. Indeed, they require that the price that is set in the contract containing the MFN clause acts as a commitment for prices set in subsequent transactions, whereas when the parties sign an APPA they do not set the price that is constrained by the agreement.

15 For a definition of two-sided markets and their economic implications see Rochet and Tirole (2003); Rochet and Tirole (2006); Armstrong (2006). A recent discussion of this economic literature is Rysman (2009).

(external) effects that are borne by the platform, the former will try to find some means to influence it and, therefore, may ask the sellers to agree to an APPA.

APPA may also have adverse effects on competition especially in the market were platforms compete. First, it may foreclose entry. Indeed, a new platform may decide to enter the market by charging a lower transaction fee to the sellers, so as to allow them to charge lower prices and attract buyers to the new platform. However, if the incumbent platform has signed an APPA with its sellers, covering also new entrants, these sellers cannot charge lower prices on the new platform. This reduces the ability of the new platform to attract buyers and sellers and, hence, may discourage it from entering.

Second, an APPA may soften competition among platforms, thus increasing the fees paid by the sellers and, as consequence, the prices charged by the sellers to the buyers. Indeed, as already argued, platforms compete also on the fees they ask to sellers. If a seller pays a lower usage fee on Platform 2, as its marginal cost decreases it will offer a lower price to buyers. However if it is prevented from price discriminating between Platforms 1 and 2 it will spread the price reduction across the two platforms. Hence, Platform 2 does not enjoy the entire advantages of its price reduction and Platform 1 benefits from the competitor's price move. As a consequence, both platforms have lower incentives to reduce the fee charged to the seller and, by the same token, a higher incentive to increase the same fee. Therefore, the market in which the two platforms compete would settle on a less competitive equilibrium.

Finally, APPA may facilitate collusion between platforms. If platforms set collusive fees to the sellers, the advantage of deviating by reducing the sellers' fee is strongly diminished by the parity agreements, because the fee reduction will be passed on also to the buyers that use other platforms. Moreover, an APPA improves the platforms' ability to monitor each other because, when a platform deviates, it is more likely that sellers will complaint against the higher fee that they have to pay on other platforms if they do not have the possibility to price discriminate across platforms.

4.1.2 Other price-restraints

Vertical agreements between suppliers and on-line distributors may contain other restraints on the distributor's pricing policy. When these restraints take the form of RPM, their competitive effects can be assessed as in the off-line environment.

Maximum or recommend resale prices are generally considered to raise weak competition concerns. In principle they could create focal points that might facilitate coordination among retailers. However, since they do not eliminate the retailers' ability to cut prices, nor seem to provide any new means to monitor each other pricing policy, these price restraints should not make collusion more stable. At the same time maximum RPM may be useful to alleviate a double-margin problem and recommended prices may be a useful tool for the supplier to convey its superior marketing information to its retailers. There is no clear evidence that agreements containing RPM clauses occur frequently in e-commerce.

A different restraint that is more often imposed in an on-line setting is the one that requires the e-tailer that operates also a brick-and-mortar outlet not to price discriminate between the two distribution channels. However, this condition is typically one of the restrictions set in a selective distribution system and will be discussed in the next subsection.

4.2 Vertical non-price restraints in e-commerce

4.2.1 Exclusive distribution

The protection of territories or costumer groups exclusively allocated to specific distributors may serve the purpose of inducing the latter to make investments in ancillary services that would be undertaken

at a suboptimal level otherwise. In the EU this pro-competitive effect is balanced against the risk of attributing market power to each distributor over the allocated territories or customers. Therefore exclusive distribution agreements are generally accepted if the restriction concerns only *active sales* and, therefore, it does not prevent distributors to make *passive sales* outside the allocated territories or customers.

One of the main features of e-commerce is that at least part of the transaction that occurs on-line (visiting the shop, acquiring information, inspecting the good, etc.) becomes immaterial and, therefore, the geographic dimension of the retailer's activity completely changes its meaning. The consequent enlargement of the geographic scope of the market seems to be one of the most important advantages of the Internet, as it largely increases the possibilities open to consumers. Yet, to the extent that an exclusive distribution system is needed to guarantee that distributors offer to buyers the services they value, e-commerce might jeopardize the well-functioning of this system. The new balance that has to be found requires on one side to allow suppliers and retailers to adapt the exclusivity constraints within the digital environment, and, on the other side, to preserve the liberty of consumers to shop wherever they want. Hence, the distinction between *active* and *passive* sales must be revised and made applicable to e-commerce. In the EU the followings are considered hardcore restrictions of passive on-line selling:

- market partitioning: agreements preventing costumers located in another territory from viewing a website or being rerouted to the website of the e-tailer which has been assigned that exclusive territory; or agreements requiring the retailer to terminate an Internet transaction once the credit details of the customer show that he\she is located outside the retailer's exclusive territory;

- sales quantity limit: agreements limiting the proportion of on-line sales against off-line sales;

- dual pricing: agreements containing higher wholesale prices for goods to be sold on-line compared to the price for the goods to be sold off-line.

In some cases, 'dual pricing' may have objective justifications. For instance, the manufacturer might have to bear considerably higher costs for products to be sold on-line with respect to costs for off-line sales, because off-line retailers offer also post-sale services, while the on-line sale does not, leading to a greater number of customer complaints and warranty claims.

Vertical agreements within an exclusive distribution system may also contain restrictions on the form of advertising that are permitted to the on-line retailer. Also in this case the criterion that may be adopted to distinguish legal and illegal restraints is to understand whether a form of advertising can be considered an active or a passive form of selling. In general, targeted advertising, which includes territory-based banners on third party websites or advertisements displayed to users in a particular territory, is generally considered a form of active selling. When instead, the advertisement is not targeted to specific customers or specific territories and the retailer undertakes an advertisement investment that would be financially attractive even if it would not reach customers in other distributors' exclusive territories, the retailer's initiative is considered a form of passive sale. Finally, manufacturers may restrict the use of trademarks and other IPRs in relation to on-line advertising. For instance, it can restrict the use of its trademark as a keyword for paid listings in search engines. However, a complete prohibition of the use of the trademark as a keyword may be equated to a prohibition of passive selling.

4.2.2 Selective distribution and general ban of on-line sales

The most common restriction imposed on retailers by the manufacturer is to limit the scope of their on-line offerings when distribution is organized through a selective distribution network. Such a distribution system is an effective means used by manufacturers to build a brand image, especially for luxury, experience and credence goods.

For luxury goods, the right brand image is an inherent characteristic of the product. Suppliers need that potential buyers associate the right image to their products and therefore must guarantee that the point of sale will provide a shopping experience that is consistent with the product brand and reputation. The investments that each outlet undertakes to promote its own brand, as well as the brand of the products that are sold there, will also benefit other outlets that offer the same products. Analogously, if a retailer does not meet the same quality standards, the negative impact on buyers' evaluation will spill over other retailers selling the same brand. To preserve the value of the brand, suppliers must be able to select only distributors with the right features and impose restraints that preserve the retailers' incentives to undertake investments in promotional activities and sale services. Moreover, the price charged for a luxury product is often an essential element of its brand image. Therefore, suppliers may want to avoid that their products are sold at a relatively low price that would endanger their exclusive, high-class image.

Experience goods are those products for which consumers can observe their quality and value only upon consumption. Health and beauty products are frequently cited as examples of experience goods, but they also include products such as food and books. When even the act of consuming a good does not provide sufficient information to assess its value, we have a credence good. In this case consumers have to rely on the opinion of experts. Typical examples of credence goods include professional services, automobile repairs and dietary supplements.

The sale of experience and credence goods requires that consumers must be in the position to acquire the information they need to make their decisions and therefore is largely improved by the offer of complementary services that allow buyers to experience the good or to obtain expert recommendation before purchasing. Again, a selective distribution system guarantees that the authorized distributors have the right incentives to provide these services.

In some cases, these potential efficiencies brought about by selective distribution have to be balanced against some competitive risks. The main concern stemming from a selective distribution system is that it may reduce intra-brand competition. This risk however, as already argued, is of minor importance if there exists sufficient inter-brand competition. This is why, when the vertical agreement has a limited ability to alter the upstream competition among different brands, there is a general presumption that its benefits overcome the competitive risks.

A different competitive problem concerns the risk that a selective distribution system may foreclose certain type(s) of distributors, especially in case of cumulative effects of parallel selective distribution networks in a market. This is probably the main issue that emerges in relation to e-commerce.

As discussed in Section 3, on-line sales present some characteristics that may conflict with the objectives of a selective distribution organization. Indeed, e-commerce tends to increase price competition and poses some problems of asymmetry of information that may exacerbate the difficulties that selective distribution is meant to overcome. Hence, for some products the Internet may be an inadequate marketplace and this, in principle, explains why a supplier may want to completely prevent on-line sales. As will be clarified in the next section, in the EU the attitude toward this restraint is strongly negative. An outright ban of on-line sales within a selective distribution system is considered a hard-core restriction which amounts to an infringement by object of Article 101(1) TFEU, unless it is justified by "objective reasons". This approach might be too strict. Indeed, one may wonder in what respects a decision to sell some products (e.g. toothpaste) only in one distribution channel (e.g. pharmacies) precluding their sales in other channels (e.g. supermarkets) is really different from the decision to prevent the sales of the same products over the Internet. Since a distribution system that excludes supermarkets is not in general presumed to unduly restrict competition, it is not clear why such a general presumption is valid when the excluded distribution channel is the electronic one.

Given this negative attitude toward an outright ban of on-line sales, selective distribution agreements typically imposes less stringent limitation on Internet retailing.

The most frequent restrictions for luxury goods are: (a) only a retailer with an authorised bricks-and-mortar presence can be active as an Internet retailer; (b) the price charged for Internet sales has to be the same as in the bricks-and-mortar store; (c) quantitative restrictions on Internet sales that establish a maximum share of Internet sales in total sales for a retailer. Such restraints directly tackle the free-riding issue as well as incentive problem, as when the same retailer jointly owns physical and virtual stores (i.e. restriction *a*) it will internalise both retail effort costs and on-line sales benefits. The uniform pricing clause (i.e. restriction *b*) is important to avoid forms of arbitrage and to guarantee that discounts would not negatively affect the brand image. The alignment of incentives only occurs, however, if the Internet sale limitation is implemented (i.e. restriction *c*). That is, it is fundamental to avoid 'cheating' retailers that do have a physical point of sale, so that they qualify for the selective distribution network, however mainly sell over the Internet so to minimise their retail effort. However, according to the *EC Guidelines* the supplier cannot force the distributor to limit the proportion of sales made on-line, but it is possible to require an absolute amount of sales to be made off-line.

For experience and credence goods, further restrictions may directly target the need for consumers to have access to information that would allow to assess the value of the product and to assure that they would purchase the product that fits to their needs. For instance, the on-line sales of health product may be restricted to those on-line outlets that provide the possibility for consumers to consult a dedicated medical staff before making the purchase.

As noted in Section 3, e-tailers have developed their own methods to overcome the asymmetry of information that affects on-line sales so as to allow consumers to try the product before buying or to get the opinion of other consumers or of experts (Weathers, Sharma, and Wood 2007). These methods work especially well for those products that have a specific electronic format. For instance, on the web consumers can browse books and listen to portions of songs before deciding to buy these items. For e-books, consumers can also receive a sample of the book on their e-book reader and then decide whether to buy the book. If these systems to provide potential customers with the information they need work properly, any restriction on on-line sales becomes less justified.

5. Case law

This section presents a summary of the most relevant cases related to VRs in the context of e-commerce to date, from a selection of jurisdictions. Given that most of the cases are relatively recent, it is easy to predict that the jurisprudence will be enriched in the future, although some authorities have taken measures aimed at creating more transparency and enforcement predictability which should, on the contrary, reduce the number of judgements related to this topic.

Cases have been grouped into two subsections. The first contains two examples of APPAs that is an instance of price restraints that may be prevalent in e-commerce. The second subsection includes various judgements and authority decisions related to selective distribution systems limiting or banning the use of the internet as a distribution channel. We will see that Courts as well as antitrust agencies around the world had varying approaches and, in some cases, even within the same jurisdiction one could find divergences in judgments. Another distinguishing element of this part of the case law is that it mainly covers high-end consumer goods. From the analysis of the cases it emerges that those who struggled the most, since the rise of the digital market place, are indeed producers of luxury, experience and credence goods.

5.1 Across-Platforms Parity Agreements

APPAs have been at the centre of two recent antitrust cases. The first one is about the sale of e-books and was partially closed with two settlement procedures. The second one concerns the market for on-line travel agent services and is still on-going. These cases are summarized in the following paragraphs.

- **E-book cases**[16]

  The *e-book* cases are probably among the most interesting cases in the antitrust field of vertical restraints concerning on-line sales. They received worldwide coverage because they involved very renowned parties. iBookstore, Apple's e-book on-line retailer, and five major international publishers (Hachette, France; HarperCollins Publishers., UK; Simon & Schuster, US; Macmillan, Germany; and Penguin Group, UK).

  The case encompasses parallel investigations by the European Commission and the Department of Justices of the United States.

  In March 2011 the European Commission carried out unannounced inspections in the premises of some major publishers in several Member States. This was followed by the opening of formal proceedings on e-books pricing practices, suspecting that the publishers with the help of Apple engaged in illegal agreements that would have the object or the effect of restricting competition in the EU.

  In the US, the Department of Justice (DOJ) charged five of the largest international publishers (Hachette Book Group, HarperCollins Publishers, Simon & Schuster, Macmillan and Penguin Group) and Apple for conspiring on e-book pricing. The alleged aim of such conspiracy was to limit intra-brand price competition among e-book retailers in order to raise prices. These practices were considered violations of Section 1 of the Sherman Act.

  Before the entry of Apple in the e-books market, publishers typically adopted wholesale contracts with their retailers. Pursuant these contracts, publishers charged a wholesale price for each e-book, and the retailers retained full discretion on the retailer price to set. In some cases, retailers would set a retail price below the wholesale price as a marketing strategy to stimulate sales of related products (e.g. Amazon promoting its e-book reader, Kindle). Publishers feared that such discounts would hinder their traditional business model. According to the allegations, they teamed up with Apple with the aim of limiting e-book retail price competition. According to the DOJ, Apple and the publishers agreed to alter the business model governing the relationship between publishers and retailers.

  As a matter of fact, short after Apple's entry, publishers sought to renegotiate their distribution agreements, now imposing agency agreements on all their retailers (e.g. Amazon and Barnes & Noble). In so doing, they were able to limit retailers' ability to reduce prices and offer discounts on their title offerings, to the advantage of Apple's iBookstore.

  Apple negotiated a different type of agency agreement with publishers. As in the other cases, publishers had direct control on retail prices on the iBookstore, and Apple would collect its 30% fee on the top of book revenues. Moreover, the publishers agreed what they called a Most Favoured Nation (MFN) clause with Apple, ensuring that no other retailer would sell an e-book title at a lower price than Apple. This clause is indeed an Across-Platforms Parity Agreement (APPA).

[16] United States v. Apple Inc., et al., Civil Action n. 12-cv-2826 (DLC) (SDNY); Case COMP/C-2/39.847

Both the European Commission and the DOJ believed that such practices could infringe competition law, since they would have the object or the effect of softening of competition.

To date, Hachette, HarperCollins and Simon & Schuster reached settlements with the DOJ. The proposed settlements impose the publishers to terminate their contracts with Apple, and to enter a strict antitrust compliance program preventing them from conspiring again or sharing sensitive information with competitors for five year. The three publishers are not prohibited to make agency contracts, however these must not include any constraint on retailers' price setting ability or APPA. No settlement has been reached yet with Macmillan, Penguin and Apple.

Similarly, in the EU, the European Commission, through a decision issued in December 2012, accepted legally binding commitments proposed by Apple and four out of the five publishers involved – Simon & Schuster, Harper Collins, Hachette, and Macmillan – which entail the termination of existing price-restricting agency agreements. Akin to the DOJ commitments, publishers are prohibited from entering any agreements that include an APPA for five year. No commitments were proposed by Penguin.

- **On-line travel agents**

In 2010, the UK Competition Authority, the Office of Fair Trade (OFT) received a complaint from a small on-line travel agent, which was prevented from offering discounted price by some hotel chains. The OFT, therefore, started investigating into the hotel on-line booking sector. The main focus of sector investigation was to shed light on the relationship between hotels and on-line travel agents.

In 2012, the OFT issued a Statement of Objections against Booking.com, Expedia and Intercontinental Hotels Group (IHG). The major on-line booking companies allegedly entered into agreements with IHG aimed at limiting other agents' ability to discount hotel accommodations.

The companies involved in the proceeding so far are: Booking.com, world's leading on-line hotel reservations agency (and its American parent company Priceline.com active in the market of on-line travel sales); Expedia, a major travel-related booking service website; and Intercontinental Hotels Group (IHG), the world largest hotels company owning major hotel brands, such as Crown Plaza, Holiday Inn, and InterContinental.

The three companies are accused of infringing competition law for unlawful practices carried out between October 2007 and September 2010. The alleged agreements (that may fall within the definition of APPAs) are believed to be anticompetitive because they are aimed at limiting price competition among on-line travel agents. Moreover, according to the available information, the OFT fears that these agreements may increase barriers to entry and expansion for online travel agents that seek to gain market share by offering discounts to consumers.[17]

Although the case concerns some major companies in the market for on-line travel agent services, it is not yet clear whether the theory of harm that the OFT has envisaged would require that the parties enjoy a substantial market power. In the press release issued in July 2012,[18] the OFT states that it "limited the scope of its investigation to a small number of major companies, with a view to achieving a swift and effective outcome. However, the investigation is likely to have wider implications as the alleged practices are potentially widespread in the industry". This suggests that this practice may be considered unlawful even when adopted by smaller players.

17 At the time of writing, the case is pending and the OFT estimates to close it by June 2014.

18 Available at http://www.oft.gov.uk/news-and-updates/press/2012/65-12#.URDklGerh8Y.

The e-book and on-line travel agents cases deal with a pricing arrangement that is relatively new and that has not been studied in depth in the economic literature. Moreover, as pointed out by the OFT, this practice is likely to affect many on-line sales whenever the Internet provides the opportunity to develop platforms that act as intermediaries.

According to the limited information available so far, it seems that competition authorities are mainly concerned with the risk that APPAs may limit the scope for price competition and allow both the platform owners and the sellers to coordinate their pricing decision. It is interesting to note that in the e-book case the sellers' policy appears to be a response to the perceived threat that the new electronic format was posing to the traditional format. Indeed, the practice did not have an impact on the on-line sale of traditional books, but only affected e-books. It is possible that a rapid diffusion of e-books, especially if sold at a significant discount, would put a pressure on the price charged for traditional books, and would also make traditional bookstores vulnerable, which in turn would have added some pressure on the ability of publishers to set wholesale prices for traditional books.

In the on-line travel agent case competition between the traditional and the new format does not seem to be an issue. Indeed, the off-line traditional services have been already largely superseded by on-line services and hotels do not obtain any apparent benefit from defending the old environment. In this case, it seems more plausible that the APPA is meant to pursue the interest of the platform owners either by facilitating price coordination across intermediaries, or by creating barriers to entry. Of course it might also be that the price arrangement serves efficiency purposes as it aims at protecting the specific investments made by the platforms.

Another issue that emerges from both cases is how to identify a genuine agency relationship in the on-line setting. According to the EC *Guidelines* on VRs, an agreement "will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market" (par. 15). In the two cases just discussed, it seems that the electronic platforms – that in principle could be qualified as agents of the sellers (publishers or hotels) – made substantial market-specific investments that would probably preclude a finding of a genuine agency relationship. Moreover, in the on-line travel agents case, there is evidence that the APPA was actually requested by the electronic platform and it seems unreasonable that an agent dictates an essential element of the principal's pricing policy.

APPAs are not specific to e-commerce. Similar arrangements could also be found in relation to other "platforms" such as shopping malls, or credit cards. Yet, the Internet, with the development of electronic marketplaces, is a context where these schemes may occur frequently. Our current understanding of the competitive implications of this practice is still limited and it is likely that new cases will arise. Hopefully, this will spur some new theoretical and empirical research on this subject.

5.2 Selective distribution and outright ban of Internet sales

Competition authorities and courts have already dealt with a significant number of vertical restraints imposed on on-line sales by suppliers who adopted a selective distribution system. These cases mostly concern products that can be qualified as luxury, experience or credence goods. A number of decisions or court judgements examine the distribution of perfumes or high-end cosmetics. It is no surprise that Paris took centre stage.

- **Yves Saint Laurent Perfumes**[19]

  In 2001 the European Commission approved Yves Saint Laurent Parfums (YSLP) selective distribution system as it satisfied the conditions set out in the Vertical Block Exemption Regulation (Regulation 2790/99 was in force at that time). Under the authorised system, Internet retailing was allowed, however on-line sales were only permitted to those retailers already operating a physical sales point.

  Selective distribution is commonly found in the luxury cosmetic products market, where YSLP competes, as it is believed to help preserving brand equity, which is of critical importance in this sector, as previously argued.

  From 1991 until 1997, YSLP's selective distribution benefitted from an individual exemption. The exemption, granted by the Commission[20], was then upheld by the *Court of First Instance* in the Leclerc case[21]. The Commission's decision was based on the fact that, although selective distribution systems affected competition, in the case of YSLP the tangible and intangible product features had to be taken into account. In the decision the Commission stated: "*It has always been recognized that certain products which are not ordinary products or services have properties such that they cannot be properly supplied to the public without the intervention of specialized distributors*".[22]

  The Commission argued that a system of selective distribution might be considered beneficial to consumers if:

  – The system is needed in order to preserve the quality of the products and ensure their proper use.

  – The system entails objective qualitative criteria related to the technical qualifications of the reseller.

  – Conditions are laid down uniformly and not applied in a discriminatory way.

  The Commission considered that the YSLP's system fulfilled those conditions, and could therefore benefit from an individual exemption.

  In 2010, when the new Block Exemption Regulation[23] entered into force, YSLP had already submitted its distribution system for the Commission approval. This time the Commission had to assess it from a new perspective. The new Regulation would not cover a ban on Internet sales, even within a selective distribution system. However, YSLP allowed retailers to generate on-line sales according to some selective criteria, i.e. retailers already operating a physical point of sale were allowed to distribute the contract products also on the web. Therefore the system was considered to be covered by the BER[24].

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19 Commission press release, 17th May 2001, 'Commission approves selective distribution system for Yves Saint Laurent perfume', IP/01/713.

20 16 December 1991, Commission Decision 92/33/EEC, IV/33.242 – Yves Saint Laurent Parfums, (Decision YSLP).

21 Case T-19/92 *Groupement d'achat Edouard Leclerc v Commission of the European Communities*. [1996] E.C.R. II-01851

22 Decision YSLP, Section II.

23 Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] O.J. L 336.

24 *EC Guidelines,* par. 51.

- **Pierre Fabre Dermo-Cosmétique** [25]

  In 2009, the European Court of Justice (ECJ) was called to give preliminary reference on whether a ban on Internet sales was to be considered a restriction to competition within the meaning of Article 101(1) TFEU, and whether it could be covered by the Block Exemption Regulation or benefit from individual exemption under Article 101(3) TFEU.

  Pierre Fabre Dermo-Cosmétique is a cosmetic and personal care products manufacturer. It markets its products through a selective distribution network. Distributors are selected on the basis of the quality of the physical point of sale and the requirement of a qualified pharmacist to assist the sales. The latter criterion was believed to indirectly limit the possibility for a distributor to sell products on-line.

  The *Conseil de la Concurrence* held that this agreement was anticompetitive under French and European competition law and did not fall within the scope of the Block Exemption nor could benefit from individual exemption. Therefore, it ordered to amend the distribution agreements so to enable retailers to sell products on-line. Pierre Fabre claimed that banning on-line sales was justified by health protection purposes (i.e. dermatological risk of using the products without appropriate pharmacist advice) and by the need to prevent counterfeits. However, in its decision[26] the *Conseil* rejected those justifications as immaterial because parapharmaceutical products were not medicines, and selecting specialist distributors was sufficient to guarantee product quality.

  Pierre Fabre appealed to the *Cour d'appel de Paris*, which in turn referred the underlying point of law to the ECJ for interpretation. The ECJ ruled that the restraint imposed by Pierre Fabre, being a *de facto* ban on the use of the Internet as a channel of sale, amounted to a restriction by object, within the meaning of Article 101(1) TFEU, not objectively justified. The block exemption, therefore, did not apply, while it was for the company to demonstrate that such restraints were individually exempted within the meaning of Article 101(3) TFEU.

  On the 31 January 2013 the *Cour d'appel de Paris* rejected the appeal[27]. In its judgement, the *Cour* confirmed that a *de facto* prohibition of on-line sales of cosmetics is to be regarded as an infringement "by object" of Article 101(1). It recognised that Pierre Fabre has a 20% market share and is exposed to a lively inter-brand competition where the quality of the products and innovation play a major role. However, it opined that preventing consumers from buying on the Internet would limit their ability to shop in more distant geographic areas and to compare prices and, therefore, would result in a reduction of intra-brand competition. The *Cour* also rejected the request for an individual exemption as it argued that Pierre Fabre had failed to meet the standard required to prove the existence of the claimed efficiency gains and that, moreover a complete ban of on-line could sales was not indispensable to achieve these efficiencies.

- **Bijourama v. Festina** [28]

  A pure on-line retailer specialised in the sales of watches, jewellery and silverware (Bijourama) tried unsuccessfully to enter the Festina France selective distribution system in the market for

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25 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.*[2011] O.J. C 355/04.

26 Conseil de la concurrence, 29 October 2008, Decision n° 08-D-25, regarding practices in the sector of distribution or personal care and cosmetic products sold upon pharmaceutical advice, *Pierre Fabre Dermo-Cosmétique.*

27 Cour d'appel de Paris, 31 January 2013, RG n° 2008/23812, *Pierre Fabre Dermo-Cosmétique*.

28 Conseil de la concurrence, 24th July 2006, Decision n°06-D-24, *Festina France*. Upheld by Paris Court of Appeal in *Bijourama v. Festina*, 16 October 2007.

watches. Bijourama submitted a complaint to the *Conseil de la Concurrence*, alleging that Festina denied access to the selective distribution network on the grounds that Bijourama would exclusively generate on-line sales.

Festina's refusal to give its consent to Bijurama could not be justified by the requirements included in the selective agreements as there was no provision limiting on-line sales. Indeed, some of the existing retailers were granted the permission to do part of their sales on-line.

The *Conseil de la Concurrence* accepted Festina's commitments consisting in amending and completing the distribution agreements with provisions regarding on-line sales which, however, maintained a clause according to which Internet sales were permitted only to retailers with a physical point of sale. This contractual clause *de facto* prevents pure on-line retailers.

The French authority devotes one section of its decision[29] to review the relevant European law in force at that time[30], stressing the fact that a producer whose market share does not exceed 30% is allowed to set criteria on how to select its distributors, and these criteria may include vertical restraints (also limitation to on-line sales) as long as these are transparent and applied consistently throughout the system. According to the *Conseil de la Concurrence* the commitments proposed by Festina addressed the competition concerns given the limited market share Festina held (below 30%). Bijourama, nonetheless, was still excluded from Festina's distribution network.

The *Conseil de la Concurrence* confirmed this approach short after in a decision regarding several selective distribution systems of high-end cosmetics and personal hygiene products.[31]

- **PMC Distribution v. Pacific Création** [32]

Pacific Creation produces and distributes perfumes, among which the perfume Lolita Lempicka, marketed in France through a selective distribution network. The other party, PMC Distribution runs a website (www.club-privè.fr) where it posts offerings at very attractive prices. The producer became aware that in September and October 2006 PMC Distribution organised discounted sales of Lolita Lempicka on their website, without being part of the authorised distribution network nor receiving Pacific Creation's consent.

On the grounds of unfair competition and misleading advertising, the Court held that Pacific Creation was entitled to be repaid for the damages caused. The *Cour d'appel* upheld the judgement of the lower Court on the lawfulness of the selective distribution system. It opined that luxury perfumes and cosmetics form markets where a selective distribution system does not constitute an appreciable restriction on competition, since: 1) the nature of the product requires a selective distribution system, in order to preserve the quality and ensure the correct use of the product; 2) distributors are selected on the basis of objective qualitative criteria, uniformly applied to all potential distributors in a non-discriminatory way; 3) the criteria do not exceed what is necessary.

29 Conseil de la concurrence, 24th July 2006, Decision n°06-D-24, *Festina France,* section B.

30 In particular, Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] O.J. L 336, and *EC Guidelines*.

31 Conseil de la concurrence, 8th March 2007, Decision n° 07-D-07¸ *Bioderma et al.*

32 Cour d'appel de Paris, 16 April 2008, RG n° 07/04360, *PMC Distribution v. Pacific Création*.

- **Makro v Beauté Prestige** [33]

  The *Liège Cour d'appel* was called to assess the legality of an Internet ban imposed by Makro on its selective distribution network in the market for luxury perfumes and cosmetics. The case was referred to the Belgian *Cour de cassation* that stated that restrictions on Internet sales are illegal unless there is an objective justification. In the specific case, according to the *Cour de cassation*, the restraints imposed by Makro were justified because of the nature of the products marketed, requiring personal expert guidance, that imposed methods of sale that could not be replicated over the Internet.

The case law on perfumes and high-end cosmetics supports the argument that, whenever a selective distribution system is justified for luxury or experience goods, suppliers may impose restrictions on Internet sales that have the objective to protect the demand enhancing investments made either by the manufacturer or by the retailers. One way to achieve this objective is to allow only those retailers that also run a brick-and-mortar outlet to operate on the Internet. The idea is that these retailers have an interest in preserving the value of the investments that they have made in the physical point of sale and that they would internalize, at least partially, the negative effects that inappropriate e-commerce practices would have on these investments. In order to have an effective alignment of interests, sales in the physical shop must be relevant and this justifies also the imposition of quantity limits on Internet sales.

These restrictions prevent the operation of a pure on-line distributor. However, a complete ban of on-line sales or the application of discriminatory conditions that would impede their development is still presumed to be illegal and the parties have the burden to prove that there exist "objective" justifications for such measures. This approach seems quite extreme. A general (but rebuttable) presumption that a ban of on-line sales has an anti-competitive object, irrespective, for instance, of the manufacturer's market position, seems too stretched. Of course, much depends on the standard of proof that it will be required to prove the existence of "objective" justifications and whether the manufacturer will be also asked to show that any alternative and less restrictive measure would have been inadequate to achieve the intended goal. The *Makro* judgement suggests that, some courts will be satisfied with simple qualitative arguments and will not ask for an in depth analysis of the feasibility and the competitive effects of alternative restraints. However, this attitude differs from that adopted by some competition authorities and other courts in Europe, especially in the *Pierre Fabre* case. This will also emerge from the discussion of some other cases that do not relate to the sale of cosmetics. In particular two decisions are worth reporting. The first one was made by the French competition authority and concerns the sale of Hi-Fi and home cinema products; the second one was adopted by the German competition authority and was about the distribution of contact lens.

- **Selective distribution of Hi-Fi and Home Cinema products** [34]

  Proceedings against some Hi-fi and home cinema equipment producers were opened in France in 2002 by the *Conseil de la Concurrence* after a referral of the Minister of Economy following an investigation led by the DGCCRF (Directorate-General for Competition, Consumer Affairs and Fraud Control) in the sector.

  The undertakings, allegedly imposing anticompetitive vertical restraints on their distributors, were the major player in the French market for Hi-fi and home cinema equipment, namely, Bose, Focal JM Lab, Triangle Industries, Bang & Olufsen France.

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33 Cour de cassation Belgique, 10 October 2002, N° C.01.0300.F, *Makro v Beauté Prestige International AO*.

34 Conseil de la concurrence, 5th October 2006, Decision n°06-D-28, *Bose et al.* ; Autorité de la concurrence, 12th December 2012, Decision n°12-D-23, *Bang et Olufsen.*

The *Conseil* investigation confirmed the Commission's findings. Both Triangle and Focal JM Lab were imposing a ban on their distributors' possibility to sell on-line. Such a restriction was considered an unjustified limitation of trade, as it was neither proportionate to the objective nor equivalent to the limitations imposed on off-line retailers. Similarly, Bose's conditions on on-line sales were believed to be more restrictive than what was needed in order to preserve the brand image.

The Companies proposed commitments aimed at amending their selective distribution agreements allowing their approved distributors, in non-restrictive conditions, to sell their products on the Internet. In 2006, the *Conseil* accepted Bose and Triangle commitments. According to the *Conseil*, the new setup would have fostered intra-brand as well as inter-brand competition, for the benefit of consumers. That is, the drafted amendments to the selective distribution agreement would have led to a proper balance between the need to preserve the brand image, on the one hand, and the possibility for distributors to reach a greater number of consumers, on the other hand.

The proceeding against Bang & Olufsen has been dealt separately and finally concluded in December 2012 with the *Autorité de la concurrence* (which took the place of the *Conseil* in 2009) imposing a fine on the French subsidiary (Bang & Olufsen France) of the Danish parent company Bang & Olufsen A/S. The alleged anticompetitive practice, similar to that adopted by the other companies, was a *de facto* ban on sales over the Internet.

The French authority referred to the judgment of the European Court of Justice on a similar matter, in the *Pierre Fabre* ruling. The ECJ judgment clearly states that a general ban on the on-line sales in a selective distribution contract amounts to a restriction of competition by object, unless that clause is objectively justified.

According to the *Autorité*, Bang & Olufsen's unilateral actions were reckoned to limit the freedom of its distributors, hindering intra-brand competition at the expense of consumer welfare.

The Authority imposed a fine of €900,000 on Bang & Olufsen France and Bang & Olufsen A/S. It also required Bang & Olufsen France to amend, within three months, its existing selective distribution agreements, in order to make it clear that its approved distributors were authorised to sell on-line.

- **CIBA Vision** [35]

The *Bundeskartellamt* levied a fine of €11.5 million against CIBA Vision Vertriebs GmbH (CIBA), the German market leader of wholesale supply of contact lenses, for imposing price restraints and limiting Internet and wholesale sales of its products, infringing Article 81of the EC Treaty (now Article 101 TFEU).

Between 2005 and 2008, CIBA was found to take particular actions to monitor its on-line retailers' prices, called 'price management' measures. When the prices would be 10-15% lower than the Recommended Retail Price, CIBA personnel would contact the distributors to induce them to raise prices. Moreover, certain CIBA contact lenses were banned from on-line sales, and sales via eBay were also prevented.

Recommended Retail Price are not considered unlawful as such, however the *Bundeskartellamt* believed that the established procedures aimed at exerting pressure on retailers were clear indicators of a concerted conduct being in place between CIBA and its distributors.

35 Bundeskartellamt press release, 25th September 2009, 'Bundeskartellamt imposes fine on CIBA Vision'.

Moreover, CIBA was also accused of having restricted the Internet trade limiting the product range, and imposing a ban on sales through eBay. This was considered an anticompetitive practice. In particular, limitations on Internet sales under the 1999 Block Exemption Regulation were included in the black list of unlawful practices. Moreover, an individual exemption could not be applied because the *Bundeskartellamt* rejected the justifications presented by CIBA, which had stressed the necessity of a stationary optician at the moment of purchase to protect consumer health. The *Bundeskartellamt* contended that less restrictive options would have achieved the same objective, for instance, requiring at the moment of purchase proof of contact lens prescription.

Furthermore, the nature of CIBA products did not require a special regime for the launch of products, whereas, according to the *Bundeskartellamt*, a temporary ban on Internet sales would have been justified if investments were required on the optician's side, which was not the case.

These two decisions indicate that European competition authorities intend to interpret the requirement of "objective" justifications in a very strict way. In both cases much of the emphasis was on intra-brand competition with little consideration about the existing degree of inter-brand competition. Moreover, e-commerce was considered in its own terms a distribution channel that makes competition more intense irrespective of the nature of the product and the prevailing competitive strategies adopted by the manufacturers. Hence, a *de facto* prohibition of Internet sales is considered illegal unless there are no less restrictive options to pursue objectives that are not related to the marketing strategies of the supplier.

This attitude appears consistent with the European Court of Justice opinion in the *Pierre Fabre* case and the recent judgment of the *Cour d'appel de Paris*. The Court of Justice "in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales" (par. 44). It also added 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" (par. 46). Thus, it seems that the "objective" justifications to which the Court refers to are limited to those instances in which on-line sales are totally inadequate, given the nature of the product, because, for instance, they may be dangerous for consumers (e.g. prescription medicines). This would exclude marketing and economic purposes as "objective" justifications. The Court confirms the possibility that a vertical restraints banning Internet sales might benefit from an individual exemption when the conditions set in Article 101(3) TFEU are met. However, the French and German cases reported above reveal that proving that there are no less restrictive options to pursue efficiency goals when these concern the brand image or the provision of ancillary services will be very arduous.

A related issue is which "objective" justifications can be claimed to explain the adoption of different supply conditions to on-line and traditional retailers. This question was addressed by a Dutch court in a case concerning the distribution of electrical appliances.

- **Groen Trend v. Atag Etna** [36]

  The Dutch District Court of *Zutphen* ruled that the Block Exemption Regulation covers the issuance of dissimilar supply conditions from a producer to on-line retailers compared to retailers using traditional channels of distribution, conditional to the existence of an added value differential between the two channels.

[36] District Court of Zutphen (Rechtbank Zutphen), 30th December 2005, Case 74100, KG ZA 05-309, *Groen Trend B.V. and Schouten Keukens B.V. / Atag Etna Pelgrim Home Products B.V*

Groen Trend is an on-line retailer of large household electrical appliances, that buys directly or through third parties from producers in the Netherlands. *Schouten* markets its products (mainly home appliances) through retailers and it also supplies *Groen Trend*. *AEP* is a producer and importer of home appliances under the brand names *Atag*, *Etna* and *Pilgrim*. Both *Groen Trend* and *Schouten* had been *AEP* resellers for more than five years.

In 2005, *AEP* changed its policy and decided to charge higher price for products intended for on-line sales. Furthermore, consumers buying on-line were granted a shorter warranty (i.e. two years) compared to the warranty of products bought in physical outlets (i.e. five years).

The two above mentioned resellers sued the supplier for anticompetitive restrictions. The Court, however, held that such a different treatment had to be considered legitimate as it mirrored an 'added value' differential in the two channels of distribution.

A general requisite that a selective distribution system must satisfy is that supply conditions are not applied in a discriminatory way. However, this does not mean that these conditions must be the same for on-line and off-line retailers. Indeed, they may differ provided that the different treatment is objectively justified. There is a general consensus that this justification may stem from the different costs that a manufacturer incurs in dealing with the two distribution channels. The *Groen Trend* case is interesting because it also considers whether the two channels differ in the value they can generate for the manufacturer. Hence, to the extent that the traditional channel yields greater value, the supplier has a proper incentive to apply better conditions to traditional shops so as to encourage sales through this channel. While this approach might be interesting, its principle must be handled with care, as it is important to understand whether the greater value guaranteed by the off-line distributors is not the result of a market power that would be eroded by the development of e-commerce. In that case, it is apparent that the existing differences between the two distribution systems cannot be considered, for the application of competition law, an objective justification of a discriminatory policy.

The following two cases describe the approach of US courts in dealing with vertical restraints in e-commerce.

- **MD Products v. Callaway Golf Sales** [37]

MD products is a golf product retailer, owning two physical stores and selling products also through its website, other platforms or newspapers. For more than two years, MD products was able to sell Callaway Golf goods at discounted prices and through any distribution channel. In 2001, Callaway introduced a New Product Introduction Policy to address the problem it faced with retailers using discounted Callaway products to attract customers, then using a bait-and-switch tactic to direct customers towards a cheaper brand said to be comparable to Callaway. The new policy was aimed at retaining only retailers selling at full price, preserving the company's brand equity.

Consequently, Callaway stopped supplying MD products, and revoked its right to sell because it charged a retail price below the pre-determined one. The new policy also impeded MD products from advertising on Callaway's website, from selling Callaway's products on its own websites or on third-party website.

MD products filed an action before the U.S. District Court for W.D. North Carolina, asserting that Callaway policy amounts to a restraint on prices in breach of Section 1 if the Sherman Act as

[37] *MD Products, Inc. v. Callaway Golf Sales Co*., 459 F.Supp.2d 434 (2006).

well as of the North Carolina Antitrust statute. MD products also alleged that Callaway was interfering with MD products business impeding it to enter into contract with third parties.

Both claims were dismissed by the Court that confirmed that Callaway's ban on some retailers on-line sales through their own website or on third party platforms did not pose any significant constraint on competition and that a manufacturer that creates a selective distribution system is entitled to select, according to some criteria, those retailers which will be allowed to generate on-line sales.

- **Jacobs v. Tempur-Pedic** [38]

  This case was raised by two consumers (Benny and Wanda Jacobs) who after purchasing Tempur-Peding foam mattress through one of its brink-and-mortar retailers, sought damages from the company, allegedly caused by its anticompetitive distribution agreements.

  Tempur-Pedic North America, Inc. is a manufacturer of foam mattress, which are marketed through (brick-and-mortar only) authorized distributors and its own website. The Jacobs alleged that the company enforces a minimum resale price maintenance agreement with its authorized distributors, and at the same time reserved on-line sales for itself through its own website. The combination of the two practices was considered by the Jacobs as a horizontal price-fixing conspiracy, violating Section 1 of the Sherman Act.

  The Court of Appeal for the 11th Circuit argued that the plaintiff had failed to prove actual or potential harm to competition in the relevant market. According to the Court, Jacobs had not properly defined the relevant product market and, above all, had not provided evidence of harm to competition cause by the detrimental exercise of power by Tempur-Pedic in the market.

  In regards to the assessment of the alleged RPM, the Court argued that the plaintiff had the burden of proving the existence of an agreement in the meaning of Section 1 of the Sherman Act. It contended that the existence of similar prices for retailers and on Tempur-Pedic did not constitute sufficient evidence that such an agreement existed nor that prices were the result of a horizontal price fixing conspiracy.

  Finally, the Court of Appeals for the 11th Circuit confirmed that the manufacturer was entitled to keep on-line distribution for itself, and that, in principle, such dual distribution system did not lead to an illegal horizontal relationship between independent retailers and the manufacturer acting as an e-tailer.

In the US the competition authorities and the courts have traditionally shown a more permissible attitude toward VRs in general. This approach is confirmed in the analysis of restraints that concern e-commerce. An outright ban on Internet sales is usually subject to a rule of reason approach which means that it is compatible with competition law unless there is convincing evidence that it will yield anti-competitive effects that are not offset by efficiency gains stemming from the solution of free-riding problems, or the protection of brand equity. This analysis is in line with the general principle that producers are normally free to unilaterally reserve distribution channels for themselves or for appointed distributors, established in the case law on catalogue sales.

5.3 Some conclusive remarks on the case law

The decisions made by competition authorities and courts summarized in the previous sections show that vertical restraints concerning on-line sales are assessed applying the criteria generally used in the analysis of vertical restraints as established in the jurisprudence and through soft law. Hence, the development of e-commerce did not require the elaboration of new concepts or *ad hoc* rules. This also

[38] *Jacobs v. Tempur-Pedic Int'l, Inc*., 626 F.3d 1327 (2010).

means that the position that competition authorities have taken on these restraints reflect the traditional view on the right balance that has to be made between the freedom of the parties to choose the distribution systems that they think suit them and the need to protect some form of distribution or some form of competition that, according to the enforcer's view, is apt to increase consumer welfare. In this respect European competition authorities and courts seem more willing than the US authorities and courts to set more stringent limits on the choices available to suppliers and to scrutinize the details of vertical agreements. Although the two jurisdictions are converging over time, the area of what in the EU are referred to as "hardcore restraints" is still wider than in the US and the case law discussed above confirms that this is true also for the assessment of the organization of on-line sales.

Notwithstanding this comforting conclusion, the case law highlights also questions that are new or that deserve some further reflections.

First, the creation of electronic platforms that operate as intermediaries has induced firms that use these platforms to sell their products and the platform owners to conclude agreements that affect the sellers' pricing policy. The use of APPAs in the on-line setting may be more widespread than one can conclude from the limited number of litigated cases. These types of arrangements have not been studied yet formally in the economic literature and no clear policy indications should be drawn from the analysis of apparently similar practices. Both the European authorities and the US DOJ seem inclined to take a negative stance against these pricing schemes. Yet, no firm conclusions can be derived by the decisions reached so far. Some light will be probably shed by the OFT investigation on the on-line travel agents and, hopefully, by more research on the subject.

Second, at least in the EU there seems to be a general presumption that e-commerce is a powerful means to increase competition and to enhance consumer and social welfare. This belief is supported by some economic literature and the recent growth of on-line sales shows that consumers and firms derive substantial benefits from them. However, there might be industries in which the Internet may improve one form of competition, namely price competition, and reduce the intensity of other forms of competition based on the (true or perceived) quality of the products and the provision of ancillary services. There is no reason to believe that the former competitive effects will always be more important than the latter, both for firms and for consumers. Moreover, preventing the use of the Internet is likely to affect only or mainly intra-brand competition and there is now a wide consensus that this is unlikely to hurt consumers if competition among brands is strong. Therefore, the position of the European Commission and the ECJ that a decision of a supplier to impede on-line sales of its products amounts to a hardcore restriction, which may escape the prohibition set in Article 101 only when there are (narrowly defined) objective justifications, might be too severe.

The viewpoint of the EU institutions might be interpreted by considering other objectives of the Treaty which are not strictly related to competition. It is revealing that the ECJ in the *Pierre Fabre* judgement mentions the freedoms of movement as an objective that explains its position with respect to a prohibition of Internet sales. In this respect, e-commerce is relevant more because it promotes the geographic integration of national markets than for its pro-competitive effect.

A different consideration regards the ability of e-commerce to expand the range of products available to consumers by providing new electronic formats, as in the e-book cases. When this happens, the Internet is not only spurring price competition, but it is also enlarging consumers' choice and the opportunity for new businesses to grow. In these circumstances a more sceptical attitude about the efficiency purposes of restraints that limit the development of both the new distribution channel and the new format seems justified.

6. Conclusions

The Internet is not the first change in the distribution and retail sector, antitrust enforcement has been faced with many commercial upheavals over the years. Well before the advent of e-commerce, antitrust agencies reported market turmoil caused by innovations, such as the introduction of supermarkets chains, shopping malls, discount stores and the use of catalogues, among the others.

Yet, why did e-commerce draw much greater attention compared to the previous changes in distribution systems? The most straightforward reason is that the Internet is ubiquitous, whoever whenever, wherever has the possibility to access the digital world. Secondly, because the introduction of the Internet as a distribution channel affected the majority of products and services already marketed, and also led the emergence of new goods and services as well as the appearance of new consumer demand. Finally, because it is believed to have substantial pro-competitive effects which can enhance consumer and total welfare.

Therefore, there is a list of novelties brought about by the Internet, which should not be underestimated when designing an appropriate competition policy. On the one hand, the Internet created opportunities that strengthen competition: there is general consensus over the fact that the Internet allowed for increased consumer sovereignty, in terms of an enlarged geographical market, increased number of alternatives, easier purchasing choice thanks to intermediaries and an easier way to compare prices and shop around. On the other hand, e-commerce lends itself to practices favouring concentration. One might erroneously believe that the on-line sales lowered barriers to entry, however such a consideration would not account for the fact that entry costs in on-line retailing are mostly sunk and that not all websites are successful, hence other factors should be considered. For instance, in e-commerce very often the first mover enjoys a fairly relevant advantage compared to its rivals; in addition, concentration is easily induced by the 'virtual' network effect as it might lead to a single firm dominance.

Notwithstanding these novelties, what emerges from the analysis presented in this paper is that the approach that competition authorities and courts have developed over the years remains generally valid in this new economic and technological setting. The main economic elements that have to be taken into account in assessing the competitive effects of vertical restraints in e-commerce are those that have been identified in the economic and antitrust literature developed for the off-line world. In a nutshell, competition law enforcers need to consider the risk that some restraints imposed on the parties of a distribution system might reduce competition, either by facilitating some form of price coordination, or by limiting entry, and balance this risk with the pro-competitive effects that the same restraints generate when they are adopted to protect the investments that the supplier or the distributors make to improve the quality of their products or to offer demand enhancing ancillary services. In doing this appraisal, it is important to keep in mind that intra-brand competition is likely to have a second-order impact on consumer welfare when inter-brand competition is lively and manufacturers mainly compete on the qualitative features of their products or on other non-price dimensions. It is also important to remember that the risk of foreclosure is limited when none of the parties to a distribution agreement enjoys a dominant position and the agreement is not part of a network of similar vertical restraints covering a large portion of the market.

The challenge competition law faces is to adapt the established theoretical framework to the new environment. However, to succeed in this challenge there is no need to create new rules and it seems unwise to establish new general presumptions either in favour or against the role that the Internet plays in fostering competition. The Internet indeed might be a powerful means to increase price competition and, in some cases, a source of innovation on its own. But which of these effects will likely occur and which will be more appreciated by firms and consumers depends on the specific characteristics of each industry. The formation of new general presumptions obfuscates these differences and precludes the flexibility that it is needed to adapt the application of competition rules to the specific circumstances of each case.

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AUSTRALIA

1. Introduction

Online sales are becoming an increasingly important way for Australian businesses and consumers to transact with one another. Internet commerce[1] in Australia has grown strongly in the past decade to around $189 billion in 2010-11.[2] In relation to retail sales, the best available estimate is that on-line retailing accounted for 6 per cent of total Australian retail sales in 2010 which equates to around $A12.6 billion. Australian online retailers represented approximately two thirds of total online retail sales with the remainder directed to overseas online retailers.[3]

Online sales in Australia are projected to grow between 10 and 15 per cent per annum over the next three years.[4] New electronic devices including smart phones and tablets are stimulating further growth in online sales. [5] This growth will put continuing competitive pressure on traditional distribution models and 'bricks and mortar' retailers.

In relation to retail, for example, the growth of online sales is altering the role of some traditional retailers and distributors as manufacturers find it easier to sell direct to consumers by establishing an online presence. In response, new retail models are emerging including 'multi-channel' models whereby bricks and mortar retailers also establish an online presence, and online only retailers.

Growth in online commerce is also breaking down the traditional boundaries within which competition occurs and increasingly exposing Australian manufacturers and retailers to competition from overseas online suppliers. In turn, this may disrupt exclusive distribution arrangements which are prevalent in many markets. For competition agencies, the growing importance of import competition results in an increased need to consider the competitive consequences of transactions involving foreign owned entities.

These new innovations and greater competition have the potential to deliver significant benefits to consumers. It is now much easier for consumers to find information about the products and services that they wish to buy, and to compare prices from a far greater range of suppliers than was previously the case.

Despite the potential for online platforms to increase competition, it is evident that Australian consumers still generally pay more for many goods and services than their overseas counterparts. Some of the price differences may be explained by factors such as the size of the Australian economy, transport costs and the higher cost of doing business in Australia. In other instances, trade restrictions and control of intellectual property rights may support suppliers' ability to segment geographic markets and practice

1 Includes business to business and retail transactions.

2 Australian Bureau of Statistics, *Summary of IT use and innovation in Australian business, 2010-11*, Catalogue no. 8166.0.

3 Productivity Commission, 2011, *Economic structure and performance of Australian Retail Industry*, Inquiry report No. 56, 4 November.

4 Ibid.

5 Ibid.

international price discrimination. Where legislative restrictions have been removed, for example the repeal of importation restrictions as they apply to copyright products, there may be a tendency for suppliers to use digital technologies or enter into private arrangements or use technological measures that seek to replicate the effect of the previous restrictions. Such arrangements may undermine the ability of markets to ensure that the benefits of lower cost online platforms are ultimately reflected in lower prices for consumers.

Developments in online markets may also create consumer protection issues, including ensuring that information on websites is accurate, overseas suppliers' compliance with Australian product safety law and standards; and difficulties in obtaining refunds or exchanges and enforcing warranties for goods purchased from overseas websites. Competition concerns may arise if traditional retailers and suppliers seek to use misleading information to protect their existing positions, or to enter into new areas. Entrants may also seek to mislead consumers in order to lower the costs of entry.

In this context, it is noted that in the six months to 30 April 2012, around 30% of complaints and inquiries to the ACCC related to online conduct or businesses[6].

Generally, Australia's competition and consumer protection regulatory regime applies equally to both online and more traditional business models. However, given the growth of ecommerce and its related distribution models, the substantial benefits that developments in the online economy may deliver, and the potential for such benefits to be undermined by anti-competitive arrangements and/or unfair trading arrangements, the online economy has been identified as a key priority for the Australian Competition and Consumer Commission (ACCC) to ensure:

- consumers have the same protection in the digital and online economy as they do elsewhere; and
- vibrant competition in the digital and online economy between new and innovative competitors and incumbents.

While there has been some adjustment in Australia in response to the rise in online markets, the online environment is a large and growing channel for retail and business markets, and it is therefore important to remain vigilant to ensure that competition is not impeded.

2. Australia's competition and consumer framework

The Competition and Consumer Act 2010 (the CCA) is Australia's national competition and consumer law. The ACCC is the independent Australian Government agency responsible for administering and taking enforcement action under the CCA.

The Australian Consumer Law (ACL) was implemented from 1 January 2011 as a schedule to the CCA. It creates a single national law that makes consumer protection consistent across Australia's states and territories. The ACL prohibits specific unfair practices in trade or commerce including: misleading or deceptive conduct, consumer guarantees, product safety, false representations, unsolicited supply of goods and services, pyramid schemes, component pricing and referral selling.

The object of the CCA reflects the notion that competition is generally the best way to enhance welfare by promoting economic efficiency in all its dimensions – allocative, productive and dynamic.[7]

6 *ACCC Update Winter 2012*, page 6.

7 The object of the CCA is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

Thus there are prohibitions in the CCA against misuse of market power (unilateral conduct) and arrangements (horizontal and vertical) that substantially lessen competition (SLC). *Per se* illegality is applied to agreements that are most likely to cause competitive harm, such as vertical and horizontal agreements that fix prices, restrict output, rig bids or share markets.

2.1 Provisions expressly dealing with vertical restraints

Vertical restrictions can potentially be challenged under the CCA under a number of provisions including section 46 (misuse of market power) and the provisions that prevent anti-competitive contracts, arrangements or understandings.

There are, however, two sections of the CCA that deal directly with particular types of anti-competitive vertical arrangements.

Section 47 of the CCA prohibits exclusive dealing, which broadly involves one trader imposing restrictions on another's freedom to choose with whom, in what, or where, it deals. Exclusive dealing is prohibited if it has the purpose, effect or likely effect of SLC. Some forms of exclusive dealing, such as third line forcing, are a *per se* breach of the CCA.[8]

Exclusive distribution agreements between manufacturers and distributors are a common form of exclusive dealing arrangement. In general these agreements do not SLC and thus are not usually of concern under the CCA. Indeed, these arrangements can be pro-competitive by addressing free-rider problems. However, the growth of online trade and in particular the breakdown and expansion of traditional geographic boundaries is making it harder for suppliers and distributors to enforce private exclusive distribution arrangements in a number of industries. This raises the possibility that parties to these arrangements will use potentially anticompetitive means to protect their exclusive territories, by for example, seeking to exclude potential overseas online competitors or fixing the price at which online competitors supply Australian consumers.

Section 48 deems resale price maintenance (RPM), where a supplier requires a third party to on sell its items for no less than a specific price, to be a *per se* breach of the CCA. RPM may be a problem in online markets if, for example, manufacturers seek to protect geographic territories by requiring suppliers from outside a territory to charge no less than the price charged by suppliers in the territory. RPM combined with other restrictions on resupplying goods and services online may also be used to anti-competitively protect traditional bricks and mortar retailers from competition from lower cost online competition, including those located overseas.

2.2 Authorisation and notification regime

Anti-competitive arrangements[9] or mergers between businesses can provide efficiency gains that may offset or outweigh the detrimental effects on competition. Thus the CCA contains provisions that allow parties to these arrangements to apply for protection from legal action where the public benefits (largely efficiencies) outweigh any public detriment (largely anti-competitive effects); thus providing flexibility

8 Third line forcing involves the supply of goods or services on condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition.

9 Including in relation to exclusive dealing, primary and secondary boycotts, resale price maintenance, information exchanges and cartel provisions.

and recognising that, in certain circumstances, arrangements which restrict competition can nonetheless generate net benefits (efficiencies).[10]

The ACCC may grant authorisation if it is satisfied that the relevant statutory test has been met.[11] There are two statutory authorisation tests, with the test to be applied depending on the nature of the proposed conduct for which authorisation is sought.[12]

As an alternative to authorisation, statutory protection for exclusive dealing conduct, certain collective bargaining arrangements and the private disclosure to competitors of price information, can be achieved by lodging a notification with the ACCC. Unlike the authorisation regime, the statutory protection provided by a notification comes into force automatically and parties do not have to wait for a decision from the ACCC to grant the protection.

As with authorisations, the notified conduct is subject to a public benefit test. The nature of this test depends on the type of conduct for which immunity is sought.[13]

3. General competition and consumer issues in online markets

Australia considers that the CCA and ACL are generally a sufficient and flexible way to deal with many of the competition and consumer protection issues associated with online sales, including various forms of anticompetitive vertical restraints.

There are however some areas where it is unclear whether the CCA is sufficient to remedy consumer and competition concerns. In particular, online competition and consumer issues increasingly occur across national borders and thus raise jurisdictional issues. Online sales provide firms based overseas, including very substantial firms, with the capacity to deliver goods or services to a country without establishing a physical presence in that country. Whether the ACCC has jurisdiction to take action against offshore traders depends on the facts in each case. However, even where the CCA and ACL apply, there are difficulties in enforcing the law and obtaining a remedy for contraventions that involve overseas based online traders that do not have a physical presence in Australia.

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10 The ACCC exercises the powers under the CCA to grant immunity to arrangements and other conduct that may otherwise breach the competition provisions of the CCA. The Australian Competition Tribunal is the judicial body responsible for exercising the powers under the CCA to authorise mergers and thus provide immunity from section 50 of the Act CCA.

11 The decision as to whether or not to grant legal protection is an administrative decision and is subject to review by the Australian Competition Tribunal and appeal to the Federal Court of Australia.

12 For authorisation to engage in a contract, arrangement or understanding, including cartels (other than boycotts), exclusive dealing (other than third line forcing) or disclosure of information for the purpose of SLC, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition. For authorisation to engage in a primary or secondary boycott, resale price maintenance, third line forcing or a private disclosure to competitors of information relating to price where the disclosure is not in the ordinary course of business, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct would result or be likely to result in such a benefit to the public that it should be allowed.

13 The ACCC can object to a third line forcing notification if it is satisfied that the likely public benefit will not outweigh the likely public detriment from the conduct. The same test applies when considering whether to revoke a notification for the private disclosure of information to competitors. For other types of exclusive dealing, the ACCC can revoke a notification if it is satisfied that the notified conduct is likely to result in a SLC and the likely benefit from the conduct will not outweigh the likely detriment to the public.

The CCA and the ACL generally apply to online trade in the same way as other trade. Similarly, the ACCC applies the same frameworks and techniques to investigate allegations of breaches of the CCA in the online environment as it applies to other areas of the economy.

Competition in online environments as elsewhere is affected by private, contractual and regulatory restrictions. Online trade interacts with existing bricks and mortar trade (offline trade). For many manufacturers and retailers, both online and offline trade channels are important parts of their business. While this is the case, the strategies they adopt in online sales will not be considered in isolation of the likely effects on their offline sales, and vice-versa.

In this sense, many of the competition issues in online markets raise well know concerns about the potential for collusion, exclusion and abuse of market power. However, the online environment also presents its own particular competition risks.

3.1 Network externalities

Businesses such as Google, eBay and Amazon are 'must have' platforms for many businesses, both big and small. Access to these platforms, either to advertise or sell products is a key requirement for many businesses. Thus there is a high degree of concentration in some areas of the Australian online retail market, particularly in relation to 'enabler' services such as online market places and search engines. This concentration is driven in part by the two-sided nature of the markets and associated network externalities[14] which make it harder for potential competitors to enter and expand and more likely that such markets will 'tip' towards a single provider.

Given these market dynamics it is particularly important that any increase in market concentration is the outcome of competitive processes rather than anti-competitive behaviour.

In this regard, in late 2012 the ACCC announced its intention to oppose a proposed acquisition in an online classifieds market where concentration was high but no particular platform had yet reached 'must have' status. The ACCC considered that the proposed acquisition by Carsales.com of assets associated with Trading Post would be likely to have the effect of substantially lessening competition in relation to online automotive classifieds. The ACCC concluded that the proposed acquisition would increase the already high barriers to entry for the supply of online automotive classified advertising, by, among other things, reinforcing the network effects that Carsales enjoys through having the largest inventory and audience in the market. This would make it even more likely that the market would 'tip' further toward a single provider.

In the presence of network externalities, a company that has already gained a very high market share may be able to use its market power to impose vertical restraints which benefit it in related markets. In 2008 eBay International AG lodged an exclusive dealing notification, notifying the ACCC that it intended to "...amend its User Agreement and alter the functionality of the eBay site such that eBay will supply the services on the eBay site to users [on condition that] all eBay transactions [were] paid for using PayPal..."[15]

The ACCC was concerned that the notified conduct would allow eBay to use its market power in the supply of online marketplaces to substantially lessen competition in the market in which PayPal operated.

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14 For example, the number of sellers on an online classified platform is likely to increase depending on the number of buyers, and vice –versa.

15 ACCC draft notice in respect of notification lodged by eBay International AG. Notification number: N93365, pages 4-5.

The ACCC considered that PayPal competed with a range of other providers to supply online payment services to users of online marketplaces. If the notified conduct was allowed to go ahead, there would have been no competition for the supply of such services to buyers and sellers using eBay.

The ACCC considered that the benefits of the notified conduct did not outweigh the anti-competitive effects of the conduct. Therefore, the ACCC issued a draft notice to revoke the notification. eBay International AG subsequently withdrew the notification.

eBay subsequently proceeded to introduce the condition that its Australian members offer PayPal as one of its payment options. The ACCC was concerned that this conduct still required all active sellers to offer PayPal as a payment method, having similar effects to the authorisation application. The ACCC did not reach a final view on whether this conduct substantially lessened competition in a market for online payment services as eBay removed this requirement in response to the ACCC's investigation and the investigation ceased.

3.2 Interplay between vertical and horizontal components

The ease with which some manufacturers are able to supply direct to consumers means that vertical restraints that potentially harm competition by excluding rivals can be used to achieve similar effects as traditional horizontal agreements.

The institution of proceedings in the Federal Court by the ACCC against Flight Centre, Australia's largest travel agency, demonstrates some of the complex issues surrounding the competitive effects of vertical conduct in the context of changing distribution models.

Flight Centre obtains its revenue from commission from airlines for its travel arrangement services in a vertical relationship. However, airlines are increasingly recognising the benefits and opportunities of direct online sales to consumers which potentially bring the airlines into competition with its traditional distributors. Flight Centre had a 'price beat' policy under which it would beat cheaper airfares (for the same flight, date and class of travel) offered by its competitors. As a result of Flight Centre's 'price beat' policy, Flight Centre was obliged to match cheaper web fares offered by airlines which caused Flight Centre to forego commission.

The Flight Centre case involves alleged attempts by Flight Centre to enter into arrangements with Malaysia Airlines, Singapore Airlines, Etihad Airways and Emirates whereby those airlines would not offer their air fares direct to consumers at less than the prices that Flight Centre offered, which included the airfare itself plus the commission paid to Flight Centre for its booking and distribution services. The ACCC alleged that Flight Centre's conduct constituted horizontal price fixing arrangements in contravention of section 45 of the CCA.

The Flight Centre case also raises issues of agency and its interaction with the CCA. In a properly constituted agency relationship, the 'agent' exists to represent the principal and has duties to the principal. In turn, the principal becomes liable for the actions of the agent. Although they take many forms, agency arrangements can attract exemption from restrictions on vertical restraints in competition law. This recognises that in a properly constituted agency relationship, the agent and principal should be acting in concert at all times.

However, not all vertical arrangements identified as 'agency arrangements' adhere to these principles. In Australia, declaring yourself an agent or entering into an 'agency arrangement' is insufficient to establish a relationship of agency. Whether parties are in an agency relationship is a question of fact and law that goes beyond the terms of written agreements and examines the behaviour of each party.

In the Flight Centre case, Flight Centre argued that as an 'agent' of the airlines it could not be a competitor of the airlines. This issue was a major matter in dispute in the proceedings and attracted broad interest.[16] At the time of preparing this submission the matter is awaiting judgment.

3.3 False or Misleading and Deceptive Conduct

The internet has the potential to facilitate consumers' access to information about the products and services that they wish to purchase thus enhancing their ability to make choices, and to purchase from suppliers, that best meet their needs. However, the information that is provided online, and the way in which that information is presented, can sometimes mislead consumers or induce them to make unwise purchase decisions by tapping into their behavioural biases. In some instances, this can also have competitive effects.

The ACCC's long running proceedings against Google, Australia's most popular search engine, demonstrate some of the enforcement complexities that can arise when seeking to ensure that consumers are not misled by information provided online.

The vast majority of consumers that use Google as a search engine do not click results ranked outside the top 10 or first page of each search result. Achieving a high Google ranking is a key aim for some businesses. Whether this incentivises Google to preference subsidiaries or paying advertisers downstream is the subject of a number of international investigations.

Commencing in 2007, the ACCC alleged that Google had engaged in misleading or deceptive conduct in breach of (then) section 52 of the (then) *Trade Practices Act 1974* (TPA) by publishing eleven third party paid advertisements (sponsored links) on Google's search results page. The headline of each of the advertisements in question comprised a business name, product name or web address of a competitor's business name not sponsored, affiliated or associated with the particular advertiser. When a user clicked the headline of the advertisement, he or she was taken to the advertiser's website. The ACCC alleged that both the traders who paid for the advertisements and Google made implied representations that, in summary, by clicking on the headline users would find information as to the competitor's business. The ACCC took proceedings against Google as it considered Google was so involved in the production of the paid search results by reason of its AdWords technology and the role played by its staff in the preparation of certain advertisements [17] that it made the representations and so contravened the Act.

The primary judge in the Federal Court found that the traders who placed the advertisements with Google had made a number of the misleading representations alleged. However, it held that Google had not made those representations but merely communicated the representations made by the advertiser. The primary judge held that Google had not endorsed or adopted such representations and as such Google had not breached the TPA.

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16 On the first day of the trial, the International Air Transport Association (IATA) sought leave to intervene in the proceedings as amicus curiae in light of its interest in the matter given its impact on the nature of the relationship between airlines and travel agents. The ACCC opposed the application while Flight Centre supported it. Justice Logan dismissed IATA's application on 10 October 2012.

17 Google developed the algorithm by which paid search results were displayed. Google also developed the AdWords program, which allows traders to prepare advertisements and select keywords, including keywords relating to their competitors' businesses, which, if included in a search query, would trigger the display of their advertisements. The AdWords program also allows advertisers to select which keywords will appear in the headline as links to their websites. Google also engaged staff who assisted advertisers in a number of aspects relating to the preparation of advertisements.

However, in relation to four of the eleven advertisements, the primary judge held that if Google had in fact made the representations, it would not have been able to rely on the publisher's defence available under the Act because, in the specific circumstances relating to these advertisements, Google would have been unable to show that it had no reason to suspect that publication of these advertisements was a breach of the Act.

The ACCC appealed the primary judge's decision in relation to the four advertisements in relation to which the primary judge held that the publisher's defence would not apply. The Full Federal Court, in April 2012, unanimously held that Google had engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, by publishing or causing to be published, the four advertisements on the results pages of its Google Australia website. The Full Federal Court held that Google's conduct consisted of the display of the advertisers' sponsored links as a response to a user's search query using selected keywords. This, in the court's view, was critical to a finding that Google made the misleading implied representations.

The High Court of Australia[18] subsequently granted special leave to Google to appeal against the Full Federal Court's decision. In February 2013, the High Court unanimously upheld Google's appeal. At the time of preparing this paper, the ACCC is carefully reviewing the judgment of the High Court to understand whether it has broader ramifications and will consider any consequences for enforcement of the ACL.

3.4 Component pricing

The ACCC also considers that so-called 'drip' or component pricing, whereby the cost of a good or service to consumers is represented in, or as the sum of, multiple component parts that may not be initially disclosed to consumers, or not disclosed at all, has the potential to mislead consumers and undermine the potential benefits associated with growth in online sales. The concern is that the way in which prices are presented, or framed, may influence consumers' purchasing decisions. If this is the case, misleading price frames may cause consumers to pay higher prices and/or make choices that they would not have done in the absence of the price frame. This can have adverse implications for competition.

Section 48 of the ACL sets out the rules for component pricing.[19] These rules are intended to ensure that consumers are not misled by component pricing.[20]

The ACCC has relied on section 48 of the ACL to address online component pricing models in various industries. For example, through correspondence with major domestic and international airlines serving Australian consumers, the ACCC worked to ensure advertised airfares online include all taxes, duties, fees and other mandatory charges.[21] Subsequent to this review, the ACCC noted concerns with the advertised ticket prices in relation to some routes displayed on the Air Asia Berhad website (the entity responsible for operating the website www.airasia.com on which the representations appeared) and in January 2012 instituted legal proceedings in the Federal Court for alleged breaches of section 48 of the ACL. On 14 December 2012, the Federal Court imposed a penalty of $200,000 against Air Asia Berhad for contravening section 48 of the ACL and imposed injunctions preventing repetition of the conduct.

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18 Australia's highest Court and final Court of Appeal.

19 Section 48 of the ACL replaced section 53C of the *Trade Practices Act 1974*.

20 Under section 48, if component pricing is used, consumers must also be provided with a prominent single total price for goods or services

21 The airlines were Jetstar Airways Pty Ltd; Tiger Airways Australia Pty Ltd / Tiger Singapore Pte Ltd; Air Asia X Sdn Bhd; Malaysia Airlines System Berhad; Air New Zealand Limited; LAN Airlines SA; American Airlines Inc; and Etihad Airways PJSC.

3.5 Warranties and refunds

The ACL includes a set of twelve consumer guarantees which apply to all goods and services purchased by consumers.[22] The ACL also sets out the remedies that apply if a business fails to comply with the consumer guarantees. The appropriate remedy varies depending upon whether the failure is major or minor. It can include replacement, refund, repair, resupply of services or compensation for any drop in value below the price paid.

ACL consumer guarantees generally apply to traders selling goods and services to Australian consumers online. While a number of reputable traders recognise the value of providing strong after sales service, should a good or service fail to meet the ACL's standards and a firm based overseas refuses to address the defect in accordance with the ACL, there is currently little prospect of the consumer receiving redress.

4. Online vertical restraints

4.1 Vertical pricing restraints

The vertical pricing constraints of most concern to the ACCC in relation to online sales are RPM arrangements and platform parity agreements.

As noted, RPM is a *per se* breach of the CCA. However, RPM can be authorised if the public benefits arising from the conduct would likely outweigh any anti-competitive detriment. The pro-competitive justification for such conduct is typically the need to address free-riding on retailers' promotional efforts in order to ensure that the right amount of promotional effort is supplied. In the context of online markets, this free-riding can potentially extend to online sellers who have not invested in costly pre-sales support and are thus able to undercut higher cost bricks and mortar retailers who have made such investments.

The competition implications of RPM are a significant issue in relation to online sales. In particular, it may be a way for manufacturers and distributors to shield higher cost retail channels, such as bricks and mortar, from price competition from lower-cost online retailers.

In 2012, the Australian Federal Court found that Eternal Beauty Products Pty Ltd, engaged in RPM by attempting to stop two online retailers discounting its products on their websites. Eternal Beauty is a supplier of women's beauty products and is the sole Australian distributor of Eyesential (eye cream) and The Lift (face cream). Eternal Beauty was ordered to pay penalties and costs of $100,000.[23]

Australia is also concerned about platform parity agreements which seek to ensure that prices are comparable across different distribution platforms. These agreements seem to be particularly prevalent in relation to online travel agencies, both in Australia and overseas. The concern is that these arrangements

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22 Any business that supplies or manufactures goods or services which cost less than $40 000 or cost more than $40 000 but are of a kind normally acquired for domestic or personal use, must comply with consumer guarantees. The consumer guarantees provide that all goods must be of acceptable quality, be fit for any disclosed purpose and match any description, sample or demonstration model shown. Repair facilities and spare parts must be reasonable available for a reasonable time, and any express warranty made by a supplier or manufacturer must be complied with. Goods must come with clear title and without any undisclosed securities or charges attached to them. Services must be delivered with due care and skill, be fit for any disclosed purpose and, if the contract for services does not set a time frame, be completed with a reasonable time.

23 Other recent online RPM cases include *ACCC v Dermalogica Pty Ltd* [2005] FCA 152; (2005) 215 ALR 482; *ACCC v IGC Dorel Pty Ltd* [2010] FCA 1303 (10 December 2010); *ACCC v Jurlique International Pty Ltd* [2007] FCA 79 (8 February 2007); *ACCC v Navman Australia Pty Ltd* [2007] FCA 2061.

may restrict price competition and raise barriers to entry for online suppliers. The ACCC is currently investigating the Most Favoured Nation arrangements of some online traders in the travel industry.

The ACCC has also recently issued a draft determination proposing to deny authorisation to Narta International Pty Ltd for proposed arrangements that would enable it to set a minimum advertising price (MAP) on a wide range of electrical goods.[24] Narta is a buying group of around 30 electrical goods retailers, including bricks and mortar and online suppliers. The proposed conduct would ensure that all of its members advertise the same price for particular new release, premium or BEKO branded products. Narta submits that application of a MAP is necessary for it to be able to obtain exclusive access to these types of products and thus to enable its members to compete more effectively with members of other chains and franchises.

However, the ACCC is concerned that the imposition of a MAP on a broad range of electrical goods could reduce competition between retailers and result in higher prices. This would have a particular impact on online retailers of electrical goods which generally do not negotiate their selling price below advertised prices like bricks and mortar retailers often do. The ACCC will issue a final determination after receiving submissions and additional information in relation to the draft determination.

In Australia, there have been various allegations of manufacturers and retailers entering arrangements in relation to prices at which overseas online retailers sell particular goods to Australian consumers, allegedly in order to protect domestic Australian distributors and retailers from competition from otherwise lower-price overseas suppliers of those goods. These types of arrangements raise particular issues for competition enforcement as it can be difficult to establish that a particular instance of such conduct breaches the CCA. In particular it can be difficult to establish that a particular arrangement substantially lessens competition (because substitutes are available) and/or that participants to the arrangement have the requisite degree of market power. Nevertheless, the ACCC is concerned that the cumulative effect of a number of arrangements that individually do not breach the CCA may be to substantially lessen competition.

Jurisdictional issues impacting both the investigation and enforcement options also arise if a manufacturer or online supplier who is a party to the arrangements is located overseas and does not have a physical presence in Australia.

4.2 Non-price vertical restraints

As noted, exclusive dealing arrangements may breach the CCA if they substantially lessen competition.[25] Such arrangements may be authorised or notified, however, if they deliver a net public benefit.

Broadly, exclusive dealing arrangements may foreclose competition in two main ways. First, the arrangements may seek to restrict retailers' access to a product, thereby reducing competition between retailers. Alternatively, the arrangements may seek to restrict rival manufacturers' access to retail outlets, thus reducing competition at the manufacturing level and ultimately restricting consumer choice at the retail level.

It is possible that the growth in online commerce will undermine the effectiveness of the latter type of anti-competitive exclusive dealing arrangement; at least in those industries where online distribution platforms make it easier for manufacturers to sell direct to consumers.

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24 The conduct for which Narta has sought authorisation is not RPM as the MAP would be determined by Narta, not manufacturers and the MAP is the advertised price, rather than the selling or resale price.

25 In the case of third line forcing, the CCA deems the exclusive dealing to SLC.

However, it also seems likely that exclusive distribution arrangements that seek to anti-competitively restrict retailers' access to product may become more prevalent as a way to restrict competition from lower-priced online retailers and raise barriers to entry.

The ACCC recently considered an exclusive dealing notification submitted by Peter McInnes Ltd (Peter McInnes).[26] Peter McInnes appoints various distributors for KitchenAid products and other kitchen products and appliances in Australia. It proposed to supply distributors on condition that the distributor will not sell the product beyond a particular territory. Peter McInnes also proposed to supply some nominated distributors on condition that they do not sell particular products, such as KitchenAid products, via the internet.

The ACCC invited submissions from interested parties and received a large number of submissions, both in support of and opposing the notified conduct. The submissions opposing the conduct were concerned that the conduct would limit price competition from online suppliers, and more broadly that the public detriments of the conduct would outweigh any relevant public benefits.

During its consideration of the application, the ACCC formed the initial view that the relevant market was a national market for retail services in relation to the sale of kitchenware products inclusive of both online and offline retailers. It also considered that the KitchenAid brand had a certain 'must have' status for kitchenware retailers.

In this context, the ACCC was concerned that the purpose of the proposed conduct appeared to be to limit access to discounted KitchenAid products from internet retailers thereby restricting competition and consumer choice. The applicant claimed that the internet-based side of the market posed a free rider problem where consumers took advantage of presale service for the KitchenAid products in B&M stores yet acquire the product online where they may obtain a greater discount.

The ACCC did not come to a concluded view on these issues as after extensive discussions with the applicant and interested parties, the notification was withdrawn.

The Federal Court's decision in 2010 in relation to Ticketek demonstrates the flexibility of the CCA in dealing with anti-competitive exclusive dealing arrangements. In this matter, Ticketek's conduct was found to be in breach of s.46 of the CCA (misuse of market power) rather than the exclusive dealing provisions.

Ticketek is an online and offline retailer that promotes and sells tickets to concerts, theatrical, sporting and many other events. The ACCC alleged that Ticketek possessed a substantial degree of market power in the national market for ticketing related services.

The Australian ticketing related services market is largely characterised by medium to long term exclusive contracting between major venue operators and two substantial service providers including Ticketek. In contracted venues, venue operators supply a ticketed venue to event promoters and other hirers wishing to hire the venue to stage a ticketed event.

Major venue operators demand sophisticated ticketing services in order to effectively ticket events hosted at their venues. Smaller ticketing service providers also exist and service smaller venues. However, there are significant barriers to entry and expansion which make it difficult for new entrants to enter the market or for existing smaller players to expand and compete. For example, the economies of scale, large

[26] The conduct was notified in May 2012.

'locked in' customer base, network effects and proven track record enjoyed by Ticketek would be difficult for a new or smaller competitor to replicate. At contracted venues, promoters do not have a choice in which ticketing agent is involved in ticketing their event, the ticketing service is supplied as part of the venue hire arrangement.

In 2009 Lasttix was established as a ticket marketing platform, providing a service to promoters who wish to advertise discounted tickets to events 'at the last minute'. On a number of occasions Ticketek prevented promoters, against the promoters' wishes, from using Lasttix to advertise events ticketed by Ticketek for the purpose of substantially damaging Lasttix and/or deterring Lasttix from engaging in competitive conduct.

The court found that Ticketek had on three occasions, refused to implement, in its ticketing system, discounted price types to be published by Lasttix when requested to implement those price types by promoters or venue operators. The court found that on one occasion, Ticketek removed from its ticketing system, discounted price types that were published or to be published by Lasttix. The court found that by doing so Ticketek had misused its market power by engaging in conduct with the anti-competitive purpose of deterring or preventing Lasttix from engaging in competitive conduct in that market. The court imposed a penalty of $2.5 million against Ticketek.

5. Regulatory issues

Although the CCA and ACL are generally able to address competition and consumer protection issues in online markets, there are a number of regulatory issues that also come into play.

5.1 Intellectual property and technological protection measures

Until relatively recently, intellectual property purchases by consumers were most commonly embedded in a physical object, such as a CD or book. Under these types of purchase arrangements, the consumer owns the title to the physical good, but not the intellectual property embedded in the good.

In Australia, restrictions on so-called parallel imports of physical products embodying copyright material have largely been removed. This has helped to unwind the practice of international price discrimination by multi-national copyright holders which often operate to the detriment of Australian consumers. In particular, Australian consumers often pay more for identical products than their overseas counterparts.

Price discrimination, be it domestic or international, is not of itself a breach of Australian competition law. However, where such discrimination is achieved through anti-competitive private arrangements that restrict Australian consumers access to lower-priced overseas suppliers, there may be a role for enforcement under the CCA. Australia notes, however, that section 51(3) of the CCA provides a limited exception for certain intellectual property licence conditions from the competition provisions of the CCA (excluding misuse of market power and resale price maintenance). While the extent of the exception is uncertain, it potentially excludes significant anti-competitive conduct, with substantial detrimental effects on efficiency and welfare, from the application of the CCA.

With the rise of the digital and online environment, copyrighted material including musical or literary works are increasingly being delivered electronically. This has led to the advent of mechanisms which businesses can use to more explicitly segment markets geographically and price discriminate, thus potentially unwinding some of the benefits of loosening parallel import restrictions.

For example, technological protection measures (TPMs) are technical locks copyright owners use to stop their material being copied or accessed without permission. Australia has a TPM regime under the *Digital Millennium Copyright Act 2004* which prohibits the circumvention of TPM devices that are designed to prevent copying.[27] However, the Australian regime specifically excludes TPMs that control geographic market segmentation. This means that consumers can legally bypass region coding measures to play overseas purchased DVDs or computer programs on Australian devices.

Online, firms use internet protocol address lockouts or credit card billing address checks to seek to prevent Australian consumers from accessing content at cheaper prices, or of a wider range, from overseas websites. Amazon, Netflix, Hulu, Steam, and iTunes are just some of the websites which use these measures to identify a consumer's location and prevent them accessing certain goods and services at certain prices, or at all.[28]While market-based measures may evolve which allow consumers to legally circumvent such measures and undermine international price discrimination, many consumers lack the knowledge or ability to avail themselves of these market measures and they can introduce additional risks, costs and delays in transactions.

While parallel imports of most physical products have been fully liberalised, this has not happened in relation to books. Books cannot be parallel imported for sale if they have been published in Australia within 30 days of being first published overseas.

It is possible for retailers to bypass parallel import restrictions by taking advantage of the 'single purchase' rule, which allows those retailers to import single units of titles at the time of demand from the consumer. However, if a retailer is to take advantage of the rule it is unable to hold stock of the book it wishes to import in Australia.

A number of online book retailers take advantage of the single purchase exception to provide books to Australian consumers from overseas warehouses that would otherwise be subject to Australian copyright restrictions. These online retailers substantially undercut bricks and mortar book retailers in Australia.

6. Addressing consumer detriment when it arises

The overall effect of online trade on prices and competition has doubtless been positive. However, as arrangements are put in place that restrict competition and consumer choice and increase prices based on geographical/regional restrictions, Australia considers that there is a growing need for international cooperation and collaboration to deal with competition and consumer issues online.

Where issues can be addressed under competition and consumer laws, such collaboration will take the relatively familiar form of cooperation between competition and consumer agencies, though increasing the need for such cooperation. Online trade highlights the difficulties in obtaining evidence for use in Australia. The ACCC may not be able to compel foreign owned parties to provide evidence and any court judgement about infringing conduct may be difficult to enforce. Further, especially in a mergers context, it

27 The Australian Attorney-General's Department is currently undertaking a review of additional exceptions to the technological protection measure provisions in the *Copyright Act 1968* (Copyright Act) and expects to submit a report to the Attorney General in early 2013.

28 See, for example, CHOICE submission to House of Representatives Standing Committee on Infrastructure and Communications Inquiry into IT Prices, July 2012.

is increasingly important for competition regulators to consider the supply side substitutability of overseas-based online retailers that may be able to readily expand into a domestic market.[29]

Further, some of the issues arising in online trade extend beyond those captured by traditional competition or consumer laws.

As set out above, we are witnessing the growth of trade restrictions online which have been removed (at some effort) offline. A major complaint of Australian consumers is that they are unable to access the substantially lower prices of goods online that are available to consumers in other developed jurisdictions. It is readily apparent to consumers that consumers in other countries such as the United States are paying substantially less[30] for products including products delivered electronically such as computer software.[31]

When IP or technological protection measures enable or facilitate price discrimination, consumers are not able to obtain goods or services at the lowest price at which those goods or services are sold. Consumers are also prevented from acquiring all the benefits of products offered elsewhere.[32] Accordingly they suffer detriment. Sellers are also likely to be able to extract monopoly rents.

Australia considers it is appropriate for competition and consumer policy makers and enforcement agencies to recognise harm to consumer welfare and advocate for consumers in this area.

Domestically, while this conduct may not in most cases contravene the current consumer and competition law, there may be specific educational messages that competition policy makers and agencies could promote to address such conduct. For example, directing consumers to lawful measures or tools which enable them to circumvent IP or technological protection measures and help them to access the lowest prices.

Internationally, Australia considers that there is considerable scope for international action on this issue with a view to limiting such consumer detriment.

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29 For example, in 2011 the ACCC considered the proposed acquisition of online book retailer The Book Depository International Limited (Book Depository), by Amazon.com Incorporated (Amazon). Both Book Depository and Amazon were (and remain) foreign based multinational companies that sell books into Australia. The ACCC considered that in order to assess the impact in Australia it would be necessary to request Australia-specific data. Amazon had previously raised concerns with information requests issued by the ACCC noting that the proposed acquisition took place in the United Kingdom, was under close review by the OFT and was unlikely to raise competition concerns in Australia. However, it did not follow that the competition effects of the acquisition would be the same in Australia as in the United Kingdom. The ACCC did pursue this course as it was content to decide not to oppose the merger based on the information it had.

30 Some popular software products sell in the United States for half or less than half the price at which they are available to Australian consumers online.

31 Australia's House of Representatives Standing Committee on Infrastructure and Communications Inquiry into IT Prices is currently considering this issue.

32 Some of these issues relate to access to new release television or movies being based on Australian release timetables. While the merits of this are arguable, more incongruous examples exist. For example, when purchasing a compact disk from overseas which is offered to US customers with a free electronic version of the CD (to download while waiting for delivery of the physical product), this latter feature is not available to Australian consumers who are geo-blocked from accessing the electronic version (but not the physical CD).

AUSTRIA

The Austrian Federal Competition Authority has recently dealt with a considerable number of cartel cases concerning vertical restraints. While most of the cases concerned offline-sales (food and insulation sector), one case focused on vertical (price) restraints for online-sales of hybrid retailers (electronic sector). Starting point of this case was a study published by Geizhals, i.e. a price comparison platform, together with the Vienna University of Economics and Business revealing that about 47 % of the surveyed online sellers of electronic products felt exposure to pressure from suppliers, in particular concerning pricing behaviour. While the case is still pending, this contribution intends to summarise the main points for discussion that came up from that case.

1. General remarks: Selective distribution and hybrid retailers

Selective distribution has the potential to have foreclosing effects on distribution level, soften competition and facilitate collusion between suppliers and retailers. The aim of selective distribution is inter alia to avoid price war, i.e. secure stable intra-brand market price level throughout all distribution channels (off- and on-line). The main justification of a stable market price level is the fear of free riding, but it can be discussed if this argument is valid for hybrid retailers, which have a brick and mortar shop (offline) as well as an online shop.

The recent investigation of the Austrian Federal Competition Authority resulting in dawn raids brought up the following points for discussion regarding selective distribution and hybrid retailers:

1.1 Separation of authorisation between off- and online sales

The aim of selective distribution is to restrain the off- and online sales area to a specific geographic area thereby restricting intra-brand competition. In order to restrain online sales to local areas, producers separate offline from online authorization:

Producers only permit online sales on a website with the same name as the locally known offline shop. The producers however refuse online authorisation whenever the domain name differs from the offline shop name and uses e.g. a more general name known nationally or Europe-wide, even though the offline retailer has an authorised brick and mortar shop and in most cases the customer would have the possibility to pick up the product ordered online in the brick and mortar shop.

The intention of separate authorisation between off- and online sales is to prevent passive online sales that are offered beyond the local sales area. It is therefore questionable, if a separation of authorisation between off- and online sales for hybrid retailers should be considered to be in line with the Vertical Agreements Block Exemption Regulation (VBER).

The suppliers argue that this separation of authorisation for hybrid retailers is in line with the VBER as the supplier may also impose certain conditions to the use of third party platforms: A supplier can prevent a retailer from selling the contracted products on a third party platform, eg eBay. Producers argue that a domain name not using the name of the offline shop could be interpreted as a third party platform for which the online authorisation can be refused. However, it can be discussed if this argument is also valid to prevent retailers from selling online over their own platform just named differently to their offline shop.

1.2 Stable market price as a prerequisite for online authorisation

Several dawn raids have uncovered that the main criteria for or against authorisation for online sales is the pricing behavior of the retailer for online sales. Online retailers who are known to undercut the market price level do not receive an online authorisation or the online authorisation is withdrawn. Needless to say that these selection criteria are not mentioned in the selective distribution contract, but have been found in internal, confidential emails. This shows how selective distribution can easily be misused to facilitate collusion difficult to discover if communication is exclusively oral.

1.3 Stable market price by discrimination of purchase price between off- and online sales

Dawn raids have also shown that suppliers have found additional ways to guarantee a stable market price by discriminating between off- and online sales: Online retailers, who are known to undercut the market price level, do not receive rebates any more. Therefore the online retailer is not able to undercut the market price level due to an increased purchase price. E.g. in one case, the purchase price was even higher than the offline retail price offered to the end customer (e.g. de facto refusal to supply).

1.4 Conclusion regarding hybrid retailers

The free ride argument is not valid for hybrid retailers who have a brick and mortar shop as well as an online shop. Hybrid retailers offer both customer groups what they demand.

The separation of authorisation has the effect to prevent Europe-wide passive sales leading to stable, different price levels in different countries. It is therefore questionable if a separation of on- and offline authorisation for hybrid retailers can be justified or would have to be considered as prohibited per se. Furthermore, it could be discussed how close the link between the domain name and name of the authorised offline-shop has to be, to make clear that any online sales are to be considered passives sales of the offline shop (e.g. is the mentioning of the name of the offline shop in the legal notice of the online shop a sufficient link?).

CANADA

1. Introduction

Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's 27 February 2013 roundtable on "Vertical Restraints for On-line Sales". The Bureau, headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act") and certain other statutes.[1] In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

The digital economy is a vital sector in Canada, given the country's large size and dispersed population. The development of advanced wireline and wireless communications networks and the services enabled by those networks, including e-commerce, has allowed Canadian consumers to reap the benefits of lower prices, greater choice, and innovation. The digital economy has also introduced new challenges for antitrust authorities: how to strike the appropriate balance between vigorous competition law enforcement and encouraging investment in networks and platforms; how to establish access to networks in the face of gatekeepers such as vertical search providers, electronic payment networks, and broadband infrastructure operators; and, in the case of e-commerce, how to assess the increasing use of vertical restraints.

An increasingly important enforcement priority for the Bureau is ensuring that consumers are able to enjoy the competitive benefits of e-commerce. There is no doubt that the introduction and rapid growth of e-commerce in Canada over the last 15 years has had a pronounced effect on competition. Once the domain of a small niche of early adopters and of little competitive significance to bricks-and-mortar retailers, many online merchants are now fully-fledged competitors to their traditional counterparts in nearly every respect, selling an expected $21.5 billion of goods and services in 2012. The ease with which consumers can now compare prices has in some cases driven margins razor-thin; in other cases, it has motivated retailers to abandon price competition and instead switch to high-quality, high-service business models. Low barriers to entry in online retail have allowed innovative sales models to establish themselves, allowed traditional retailers to extend their brands online to compete directly, and in some cases required suppliers to choose between the two. And important as innovation and entry have been, both online and bricks-and-mortar retailers have experienced widespread consolidation and exit, as vigorous competition makes scale and scope economies more crucial and business more volume-driven.

2. Vertical restraints in e-commerce

It is in the disruptive retail environment created by the introduction and rapid growth of e-commerce that the use of vertical restraints is becoming increasingly prevalent, as retailers and suppliers seek to preserve efficient distribution systems and service incentives, or alternately, to protect their margins

[1] The Act is a federal framework law that applies to most business conduct in Canada. It contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. Among these provisions are sections that enable the Bureau to seek redress in respect of anti-competitive vertical restraints, including in cases of refusal to deal (section 75); price maintenance (section 76); exclusive dealing, tied selling and market restriction (section 77); and abuse of a dominant position (section 79). The Act is available online at: http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html.

against tough, innovative competition. This is exemplified by the Bureau's recent litigation in the Toronto Real Estate Board ("TREB") case, in which the Bureau seeks to ensure that online realtors can use the same electronic databases as their bricks-and-mortar competitors to inform customers online.[2]

The pro- and anti-competitive theories of vertical restraints are well-known, and their application to online sales is now being tested much as they have been with traditional retail. A supplier, faced with highly transparent price competition between a number of retailers, may consider imposing resale price maintenance or minimum advertised price schemes in the face of loss leadering. Another supplier with different distribution networks in different countries may impose territorial restrictions that prevent cross-border sales. A third may impose asymmetries between online and traditional retailers, in terms of product options, marketing support, or pricing restrictions. These practices may be attempts to insulate suppliers from competition or they may be valid online distribution management strategies, which highlights the importance of rule of reason analysis.

The Bureau's view is that these types of vertical restraints in online sales are generally no different in their operation from those that have historically been imposed in traditional retail, in terms of how suppliers distribute to and discriminate between retailers with different cost structures, sales models, and territories. In that respect, assessing the impact of these vertical restraints does not require specific new rules or changes to the law; indeed, the Act's vertical restraint provisions are technologically neutral, in that they can be applied to potentially anti-competitive conduct regardless of the means of sale or distribution. Consequently, the Bureau already possesses the enforcement tools required to address anti-competitive vertical restraints and pricing practices in the online sales channel, and is and will continue to use them. The challenge lies in assessing the rationales and effects of these restraints, when a supplier is faced with distribution decisions between low-cost, high-volume online retailers that may offer little in the way of service or support, and higher-cost traditional retailers that continue to offer consumers hands-on benefits. Suppliers in homogeneous industries may seek to distribute their products as widely as possible, at as low a price as possible, to capture market share; suppliers concerned with product differentiation, reputation, or aftermarkets may not.

There are, however, some distinctions between online sales and traditional retail models, an obvious one being the use of digital communications networks which enable consumers to shop, place orders and pay for goods from a computer, tablet or smartphone. The extensive use of these networks gives rise to some unique economic features which must be taken into account when assessing the use of vertical restraints in online sales. Where network effects are very strong, they may result in supplier monopolies, which may be the most efficient market outcome – network effects can still create efficiencies that drive prices down in online markets, such as streamlined distribution and sales networks, centralized operations, and information gathered from consumer data collection. Care must be taken, however, to ensure that this market power is not maintained by vertical restraints that discipline or eliminate rivals.

Network effects can also exacerbate the effects of vertical restraints that accompany access to platforms and information networks (as in the TREB case) or to electronic payment networks that facilitate online sales. For example, in 2010 the Bureau commenced litigation to strike down restrictive and anti-competitive rules that Visa and MasterCard impose on merchants who accept their credit cards, whether through traditional sales channels or online. The Bureau believes these rules have effectively eliminated

[2] As is discussed below, in *The Commissioner of Competition v. The Toronto Real Estate Board*, CT-2011-003, the Commissioner challenged anti-competitive practices by TREB that deny consumer choice and the ability of real estate agents to introduce innovative real estate brokerage services through the Internet Case documents are available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347.

competition between Visa and MasterCard for merchants' acceptance of their credit cards, resulting in increased costs to businesses and, ultimately, consumers.[3] The outcome of the litigation is pending.

Many electronic networks, including the electronic payment networks that drive online sales in Canada, are two-sided in nature, which can give rise to complex pricing and discrimination issues. Where network firms are vertically integrated, incentives may exist for them to harm non-integrated competitors through leveraging, squeezing or denial of access. One of the Bureau's first e-commerce cases involved the Interac debit network, which allows for shared cash withdrawals at any member financial institution and direct debit payments at any participating merchant.[4] A consent order issued in 1996 prohibits the members of Interac, who include most of the large deposit-taking institutions in Canada, from discriminating against rivals wishing to use the network. More recently, in 2012 the Bureau commenced legal proceedings against Canadian wireless telecommunications carriers and a wireless industry association, alleging that they were making, and permitting others to make, false or misleading representations for the purposes of promoting digital content (such as ring tones) and wireless products.[5] The Bureau's investigation concluded that the companies and their association established and exercised control over the mechanism by which the wireless companies profited from their representations. The outcome of the litigation is pending.

3. Bureau enforcement against anti-competitive vertical restraints in the online sales channel

3.1 Rule of reason analysis

The Bureau will ordinarily review online vertical restraints under the civil provisions in Part VIII of the Act, regardless of whether the restraint is imposed at the initiative of the supplier or at the behest of a retailer, or as a result of any vertical agreement or arrangement.[6] Under Part VIII, vertical restraints are not *per se* illegal, in recognition that they are not always anti-competitive and, in fact, can be pro-competitive in some cases. Because the competitive effects of vertical restraints are case-specific, a common element of the Act's vertical restraint provisions is the requirement that the restraint result in an anti-competitive effect in a market. Depending on the specific provision, the Bureau must establish that a vertical restraint has resulted, is resulting or is likely to result in either an "adverse effect on competition in a market" or a "substantial prevention or lessening of competition in a market".

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3 *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al.*, CT-2010-010. Case documents are available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333.

4 *Director of Investigation and Research v. Bank of Montreal et al.*, CT-1995-002. Case documents are available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=160.

5 Competition Bureau, News Release, "Competition Bureau Sues Bell, Rogers and Telus for Misleading Consumers: Bureau Seeks customer Refunds and $31 Million in Penalties," 14 September 2012, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03498.html.

6 Where, however, the vertical restraint is imposed as a result of an agreement or arrangement between competing suppliers, competing retailers or a supplier that competes with a retailer (*i.e.*, in a dual-distribution context), the Bureau may review such an agreement or arrangement under the Act's civil competitor collaboration provision or criminal cartel provision. The Bureau's approach to the review of dual-distribution agreements or arrangements is discussed in section 2.3.3 of the Bureau's *Competitor Collaboration Guidelines*, available online at: http:// www.competitionbureau.gc.ca/ eic/site/cb-bc.nsf/eng/03177.html.

Case law has established that "adverse" is a somewhat lower threshold than "substantial".[7] However, under either standard, the Bureau must demonstrate that the vertical restraint creates, preserves or enhances market power. Generally, this can occur where the restraint erects or strengthens barriers to entry or expansion, thus inhibiting competitors or potential competitors from challenging the market power of firm(s) imposing the restraint. In examining the effect of a vertical restraint on entry barriers, the Bureau focuses its analysis on determining the likely state of competition in the market in the absence of the restraint. If, for example, it can be demonstrated that but for the vertical restraint, an effective competitor or group of competitors would likely emerge within a reasonable period of time to challenge the market power of the firm(s) imposing the restraint, the Bureau will likely conclude that this conduct creates, preserves or enhances market power.

3.1.1 Market definition

Defining relevant product and geographic markets is important in cases under Part VIII of the Act in order to assess whether the impugned conduct satisfies the requisite competitive effects test.[8] In vertical restraint cases, for example, the Bureau may consider whether the online sale of a particular product is in the same relevant product market as the sale of that product through a bricks-and-mortar retailer. Where there is differentiation between these products, such as with respect to particular product features, warranty, or availability, the Bureau may assess whether, from a consumer demand perspective, the online and bricks-and-mortar sales channels are most accurately viewed as substitutes or as complements. Similarly, an online sales channel may be able to supply a wider geographic market than a locally-based bricks-and-mortar sales channel, and markets that would traditionally be defined around the locations of bricks-and-mortar retailers may need to be viewed more broadly where an online sales channel is considered to compete within the same product market.

No matter how the market is defined, however, generally, a vertical restraint will not raise issues under the Act where it covers products or services that would not constitute a relevant product market; for example, a single brand in a market with several competing brands of similar products. In these circumstances, any restriction of competition at the brand level is generally unlikely to create, preserve or enhance market power in the broader relevant product market, depending on the disciplining effect of inter-brand competition. However, where vertical distribution and pricing practices do have an exclusionary effect in a market, the Bureau will not hesitate to use its enforcement tools under the Act, where appropriate, to preserve and enhance competition. How the relevant market is defined in these cases may impact the Bureau's assessment of these effects, in terms of whether an online vertical restraint has effects only in the online sales channel, or in a market that includes the bricks-and-mortar sales channel as well.

3.2 Vertical non-price restraints

Two types of non-price online vertical restraints are commonly brought to the Bureau's attention: suppliers prohibiting bricks-and-mortar retailers of their products from also selling the products online; and suppliers refusing to distribute their products through retailers that only have an online presence (*i.e.*, that

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7 *B-Filer Inc. et al v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42, available online at: http://www.ct-tc.gc.ca/CMFiles/CT-2005-006_0159_38ODA-1222007-6003.pdf. Case law has also held that "[w]here a firm with a high degree of market power is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with"; *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, Comp. Trib. 204a, p. 361, available online at: http://www.ct-tc.gc.ca/CMFiles/CT-1994-003_0204a_38LFB-472004-7743.pdf.

8 The Bureau's approach to market definition is discussed in its *Merger Enforcement Guidelines* and its *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00168.html.

do not additionally operate bricks-and-mortar stores). While these restraints could serve to preserve exclusive retailer distribution territories, they may also be imposed for pro-competitive reasons, such as to ensure retailers provide an appropriate level and quality of service that the supplier believes cannot be offered through an online sales channel, particularly if the supplier is concerned about free-riding.

In the Bureau's experience, when these types of restraints apply to products in respect of which effective competition remains at the supplier and/or retailer level, it is unlikely a restraint will create, preserve or enhance market power, thus precluding the Bureau from showing an adverse effect on competition in a market or a substantial prevention or lessening of competition in a market. In these cases, non-price restraints, such as exclusive distribution territories, are often used to limit intra-brand competition in order to stimulate inter-brand competition. However, the TREB case reflects a situation where non-price vertical restraints raise serious competition concerns.

3.2.1 The TREB case – Abuse of dominance

In 2011, the Bureau filed an application with the Competition Tribunal (the "Tribunal")[9] against TREB under section 79 of the Act, seeking to prohibit TREB from abusing a dominant market position through its implementation of certain rules and policies that prevent realtors using online business models from using the same electronic databases as their bricks-and-mortar competitors to inform customers online.

Under section 79 of the Act, abuse of dominance occurs when: (i) a dominant firm or a dominant group of firms in a market; (ii) engages in a practice of anti-competitive acts; (iii) with the result that competition has been, is being or is likely to be prevented or lessened substantially. Where the Bureau establishes each of the required three elements, the Tribunal may issue an order: (i) prohibiting the practice of anti-competitive acts; (ii) directing the respondent(s) to take actions that are reasonable and necessary to overcome the anti-competitive effects of the practice, including the divestiture of assets or shares; and/or (iii) requiring the respondent(s) to pay an administrative monetary penalty of up to $10 million on a first order, and up to $15 million for each subsequent order.[10]

TREB is the largest real estate board in Canada, with more than 30,000 members. It owns and operates the Toronto Multiple Listing Service system (the "Toronto MLS System"), an electronic database that contains current property listings and historical information about the purchase and sale of residential real estate in Toronto and the surrounding area. The vast majority of local real estate transactions make use of the Toronto MLS System, which is a key input in the supply of residential real estate brokerage services in the greater Toronto area. Information in the Toronto MLS System is controlled by TREB and is only accessible to those authorized by TREB, primarily its members. By controlling access to this input, TREB is dominant in the market for the provision of residential real estate services in the Toronto area.

The overwhelming majority of TREB's members operate traditional bricks-and-mortar real estate brokerages. TREB's rules permit these members to have full access to the Toronto MLS System, and to provide detailed property listing information from the system to customers by hand, mail, fax or e-mail. However, TREB's rules and policies effectively prohibit real estate agents from providing this same listing

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9 The Tribunal is a specialized federal tribunal that combines expertise in economics and business with expertise in law. Its members comprise judges of the Federal Court and qualified lay members. The Tribunal has jurisdiction to hear and dispose of all applications made under the civil provisions of the Act and any related matters.

10 An overview of the Bureau's approach to section 79 is provided in its *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act).* Additional details are available in Tribunal case law, available online at: http://www.ct-tc.gc.ca/Cases_Affaires/CasesType-eng.asp#Abuse.

information to customers in innovative new ways, such as through password-protected websites (also called virtual office websites, or "VOWs"[11]). As such, real estate agents who would prefer to operate through an online model, rather than a bricks-and-mortar model, are effectively precluded from carrying on business due to their inability to provide information from the Toronto MLS System to their customers in an online environment. TREB's restrictive rules and policies therefore constitute a practice of anti-competitive acts.

The Bureau submitted in its section 79 application that TREB's Toronto MLS System access restrictions result in a substantial prevention and lessening of competition in the market for residential real estate brokerage services in the greater Toronto area. TREB's access restrictions protect and perpetuate the traditional bricks-and-mortar business model used by a majority of its member brokers. But for TREB's restrictions, the Bureau believes that innovative and lower-cost brokerage models, such as VOWs, would enter and expand in the relevant market, allowing consumers to access new and higher quality services at lower prices.

A hearing on the Bureau's section 79 application against TREB was held in the fall of 2012. The Tribunal's decision is pending.

3.2.2 Other non-price vertical restraint provisions of the Act

In addition to the Act's abuse of dominance provisions, the Bureau can also address online vertical restraints under other civil provisions of the Act, including the refusal to deal (section 75) and exclusive dealing, tied selling and market restriction (section 77) provisions. Under these provisions, the Bureau generally takes the same analytical and enforcement approach to restraints in the online sales channel as it does to restraints in the bricks-and-mortar channel. That is, the Bureau will follow a rule of reason analysis to evaluate whether, as a result of the imposition of the restraint, the supplier is likely to obtain, preserve or enhance its market power in the relevant product and geographic market.

Under section 75 of the Act, the Tribunal may order one or more suppliers of a product to accept a person as a customer within a specified time period and on usual trade terms, provided each of the following five elements is established:

- a person is substantially affected in his/her business or is precluded from carrying on business due to his/her inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- the person is unable to obtain adequate supplies of a product because of insufficient competition in the market among suppliers of the product;
- the person is willing and able to meet the supplier's usual trade terms;
- the product is in ample supply; and
- the refusal to deal is having or is likely to have an adverse effect on competition in a market.[12]

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11 A VOW is a secure, password-protected website that enables residential real estate customers to themselves conduct online searches of a database containing property listing information. VOWs provide the same services as traditional brokers in a bricks-and-mortar setting, but more efficiently. For example, the use of a VOW allows the task of searching for information on the listing system to be transferred from the broker to the customer, reducing or eliminating the time and expense incurred by brokers. The efficiencies realized by VOW brokerages may be passed on to consumers in the form of price competition, through such means as commission rebates.

12 A brief overview of each of these elements is provided in the Bureau's "Refusal to Supply" pamphlet, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng_/01244.html. Additional details are available in Tribunal case law, available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesType-eng.asp#Refusal.

For purposes of the application of this section, the Act provides that a product is not to be considered a separate product in a market only because it is differentiated by its brand name, trade-mark or the like, unless the product, so differentiated, occupies such a significant position in the market as to substantially affect the ability of a person to carry on business in that class of products unless that person has access to the product. Consequently, the refusal to supply a particular brand of product to a retailer will not ordinarily satisfy the required elements of section 75 where the retailer may obtain other brands within the market.

Section 77 of the Act permits the Tribunal to issue a remedial order in respect of exclusive dealing, tied selling or geographic market restriction that occurs between non-affiliated entities. Where the Tribunal finds that the conduct is engaged in by a major supplier of a product or is widespread in a market, is likely to have an exclusionary effect in a market (in the case of exclusive dealing or tied selling) and is likely to substantially lessen competition, the Tribunal may prohibit the conduct and order any other action necessary to overcome the anti-competitive effects of the practice or to restore or stimulate competition in the market.[13]

The effectiveness of exclusive dealing and market restriction as potentially exclusionary practices in the bricks-and-mortar sales channel can be enhanced by the use of other vertical restraints, such as price maintenance or refusal to deal, in the online sales channel. For example, a supplier's refusal to permit retailers to engage in online sales, or the supplier's requirement that retailers engaging in online sales price the supplier's products at manufacturer suggested retail prices ("MSRP"), can be used to preserve the exclusive distribution franchises of bricks-and-mortar retailers. However, in recognition that exclusive dealing and market restriction may also sometimes have pro-competitive effects, no order may be issued under the Act in respect of the practices if they are engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market. Moreover, where these restraints are used online to reinforce restraints in the traditional retail channel, it is unlikely the restraint will create, preserve or enhance market power where it applies to a product or service that is not itself a relevant product market.

3.3 Vertical price restraints

Price maintenance has been the most common vertical price restraint brought to the Bureau's attention. In most price maintenance cases, a manufacturer requires a retailer of its products to price them at MSRP in the online sales channel (and sometimes in the bricks-and-mortar sales channel as well). Less frequently, manufacturers induce retailers to price at MSRP in the online sales channel (and again, sometimes also in the bricks-and-mortar sales channel) by threatening to increase wholesale prices. As discussed previously, price maintenance policies may be implemented for both pro-competitive and anti-competitive reasons. However, similar to non-price vertical restraints, and for the same reasons, vertical price restraints will satisfy the requisite competitive effects test under the Act only in certain circumstances.

In some cases, vertical price restraints may be a manifestation of an underlying competitor collaboration. For example, a group of retailers may agree to induce a manufacturer to impose a price maintenance policy or to assign exclusive sales territories so that the retailers need not compete on price or service. At the supplier level, a group of suppliers may agree to implement a price maintenance policy as a mechanism to monitor enforcement of a collusive wholesale pricing arrangement.

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13 A brief overview of section 77 is provided in the Bureau's "Restricting the Supply and Use of Products" pamphlet, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01246.html. Additional details are available in Tribunal case law, available online at: http://www.ct-tc.gc.ca/CasesAffaires/CasesType-eng.asp.

Where a vertical restraint is imposed as a result of an agreement or arrangement between competing suppliers, competing retailers or a supplier that competes with a retailer (*i.e.*, in a dual-distribution context), the Bureau may review such an agreement or arrangement under the Act's civil competitor collaboration provision or criminal cartel provision. Agreements between competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture) will be examined under section 45, the *per se* criminal cartel provision, unless a defence applies.[14] Where an agreement or arrangement is not in respect of conduct prohibited by section 45, or a defence under that section applies, the Bureau may examine the collaboration under section 90.1 of the Act, the civil competitor collaboration provision, which requires the Bureau to show that the collaboration is likely to substantially prevent or lessen competition in a market.

3.3.1 Price maintenance

In 1951, Canada became the first country to impose a statutory ban on price maintenance.[15] As a result of amendments to the Act in 2009, the *per se* criminal price maintenance prohibition (in the former section 61) was repealed and replaced with a new civil provision, in section 76, which includes a competitive effects test.[16] Under section 76, the Tribunal may prohibit price maintenance or require a person to do business with a customer or supplier on usual trade terms, where the Tribunal finds that the conduct adversely affects competition in a market and no statutory exceptions apply.[17] The intent of section 76 is to circumscribe the ability of one market participant to exercise control over, or dictate, the pricing practices of another, to the extent this conduct is harmful to competition. In the Bureau's view, market power is likely a prerequisite for a person's price maintenance to result in anti-competitive effects. That said, section 76 does not prohibit the mere exercise of market power, such as may occur when a supplier increases wholesale prices.[18]

In some circumstances, vertical price restraints in the online sales channel are likely to result in an adverse effect on competition in a market or a substantial prevention or lessening of competition in a market. In one such case, the Bureau is currently investigating certain e-commerce vertical price restraints imposed by a critical mass of suppliers. Because the restraints in this case are imposed against all major retailers in the relevant market, the Bureau believes these restraints may substantially prevent and lessen retail price competition in the online sales channel. The Bureau's investigation in this case is ongoing.

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14 Among the statutory defences available under section 45 is the ancillary restraints defence. A person cannot be prosecuted under section 45 where the restraint is ancillary to a broader or separate agreement or arrangement between the same parties which would not contravene section 45, and the restraint is directly related to and reasonably necessary for giving effect to the objective of that broader or separate agreement or arrangement.

15 Mathewson, Frank and Ralph Winter, "The Law and Economics of Resale Price Maintenance," *Review of Industrial Organization* 13: 57-84, 1998.

16 A brief overview of section 76 is provided in the Bureau's "Setting Your Own Price" pamphlet, available online at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03213.html. The Bureau has announced its intention to develop more detailed enforcement guidelines on the Act's price maintenance provision.

17 No order may issue where the supplier and customer are principal and agent, or are affiliated corporations, partnerships or sole proprietorships.

18 In a dual-distribution situation, where a vertically integrated manufacturer's increase in the wholesale price squeezes the margin available to a retail competitor, to deter or prevent entry or expansion into the downstream market, the Bureau may review the practice under section 79 of the Act, the abuse of dominance provision.

Section 76 encompasses three forms of price maintenance. First, subparagraph 76(1)(a)(i) prohibits a person from using an agreement, threat, promise or any like means to directly or indirectly influence upward or discourage the reduction of the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada. For purposes of this provision, prices are deemed to be influenced upward by the use of manufacturer suggested resale prices or minimum resale prices, unless the manufacturer makes it clear to the retailer that the retailer is under no obligation to accept the suggested price and would in no way suffer in its business relations with the manufacturer if it failed to follow the suggested price. Similarly, prices are deemed to be influenced upward by a manufacturer's advertisement that mentions a resale price, unless the price is expressed in a way that makes it clear that the product may be sold at a lower price (such as, for example, by accompaniment with the phrase "dealer may sell for less").

The Bureau may analyze platform parity agreements as an example of this first form of price maintenance. A supplier's requirement that an online retailer price at a level that is not less than that charged in a bricks-and-mortar store could influence upward prices in the online sales channel, as well as the overall price across sales channels. At the same time, however, there could be legitimate reasons for the agreements, including preventing online retailers from free-riding on the investments in retail experience and service quality of bricks-and-mortar retailers. Regardless, absent market power by the supplier, the use of a platform parity agreement is not likely to meet the requisite anti-competitive effects test under section 76 of the Act.

Subparagraph 76(1)(a)(ii) of the Act prohibits the second form of price maintenance, namely directly or indirectly refusing to supply a product to a person or otherwise discriminating against a person engaged in business in Canada because of that person's low pricing policy.[19] However, in recognition that there can be legitimate reasons why a manufacturer may not wish to supply a discounting retailer, various statutory exceptions provide that the Tribunal cannot issue an order under this provision where the retailer was: using the relevant product(s) as a loss-leader; using the relevant product(s) for bait-and-switch marketing; engaging in misleading advertising; or not providing the level of service that purchasers of the product(s) might reasonably expect.

Finally, subsection 76(8) prohibits a person from using an agreement, threat, promise or any like means to induce a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a particular person because of that person's low pricing policy. Thus, for example, the Bureau would examine under this provision a retailer's threats to boycott a manufacturer unless the manufacturer discontinued supplying a competitor of the retailer. As with price maintenance engaged in by suppliers, some degree of monopsony power on the part of the retailer(s) would likely be necessary to adversely affect competition.

4. Conclusion

This submission has provided an overview of Canada's competition law framework for addressing potentially anti-competitive vertical restraints. In the Bureau's experience, the Act provides the Bureau with the tools to examine online vertical restraints in the same manner as those in the bricks-and-mortar sales channel, and the enforcement issues with respect to both are generally the same. That said, where an online vertical restraint does create, preserve or enhance market power, the Bureau will not hesitate to use its enforcement tools under the Act, where appropriate, to preserve and enhance competition.

[19] Although section 75 of the Act also encompasses refusals to deal, the Bureau will generally examine such a refusal under section 76 where the refusal can reasonably be linked to the retailer's low pricing policy.

CZECH REPUBLIC

1. Introduction

For several years, enforcement activities of the Czech Competition Authority (hereinafter referred to as "CCA") were focused on vertical restraints, in particular on RPM, which was prevalent in distribution agreements. Since 2011, the attention of the CCA has shifted to horizontal agreements, in particular *bid rigging*, and the CCA has opened only a single RPM investigation, currently about to be closed by a prohibitive decision.

The cases the CCA has dealt with were often concerned with internet sales. No special conclusions have been drawn from this specific method of sales, the restrictive practices (mostly resale price maintenance, hereinafter referred to as "RPM") were assessed in the same way as in non-internet cases.

The experience of the CCA in the on-line sales area is therefore very limited and the CCA can thus provide only a brief observation.

2. On-line sales in general

The importance of e-commerce has recently been growing in the Czech Republic. For a long time, the volume of sales was rather small, but in 2012, there was more than 20 000 active e-shops whose volume of sales exceeded 1.5 billion EUR. Mostly cloths (17 %), household and garden equipment (12 %), sport equipment (10 %) and electronics (7 %) were sold on-line. More than two-thirds of population currently has direct experience with e-shops. Further development of on-line sales is however hindered by fear of credit card abuse (81 %), inability to try the goods out before making the purchase (67 %) and unavailability of advice from shop assistants (53 %).[1]

The CCA appreciates the positive effects e-commerce generally has on the overall quality of competition in the Czech Republic. As the significance of e-commerce has increased only recently, the CCA has not developed any specific analytical approach or issued any specific guidelines.[2]

As already mentioned above, in all the CCA's cases concerned with on-line sales, the infringement consisted primarily in RPM. The question whether the RPM clauses restricted competition was tackled in the same way as would have been in case of other methods of sale. In the CCA's opinion, it is not necessary to formulate any specific rules concerning the on-line sales, in particular concerning the RPM.

Arguably, the method of on-line sales might create extra room for efficiency claims. In the Czech Republic, it is an obligation of the undertakings concerned to put forward the efficiencies connected with their agreements and bring evidence to support their claims. So far, no such argument has been raised in the Czech Republic. In this regard, it also ought to be mentioned that the jurisprudence concerning

1 All the statistical data come from the 2012 E-commerce Report, available at: http://www.shoptet.cz/stav-e-commerce-v-cr/ [18 February 2013].

2 The guidelines issued by the European Commission are however used in the Czech Republic for the purposes of interpretation of both the Czech and the EU competition law.

efficiencies of RPM is extremely strict in the Czech Republic. In a seminal 2009 judgement, the court declared that RPM can never bring benefits to consumers.[3]

As far as non-price constraints connected with on-line sales are concerned, the CCA has not yet issued any relevant decision.

3. Enforcement activities in the on-line sales area

The CCA has so far issued two decisions prohibiting RPM in on-line sales of outdoor equipment and is currently drafting a final decision in a similar case concerning pet food products. These cases will be briefly discussed below.

3.1 Outdoor equipment company – Husky CZ

In 2011 the CCA imposed a fine in the amount of CZK 2.316 million on the Czech company HUSKY CZ for entering into prohibited agreements on resale price maintenance in the outdoor equipment market. According to the evidence obtained when conducting a dawn-raid the HUSKY CZ had repeatedly breached the competition rules in its business relations with purchasers from internet shops. The company had based its pricing policy on oral agreements on obligatory compliance with recommended prices, which it further specified in a price list sent out by e-mails. The relevant price lists had contained a wholesale price excluding VAT and a retail price which had been always marked as recommended. HUSKY CZ operated both e-shops and stores thus the undertaking protected both its on and off-line sales.

Generally, pursuant to the Act on the Protection of Competition, recommended prices are not considered anticompetitive provided that the seller is not directly or indirectly restricted in setting resale prices and has the option of setting a final price that may even be less than the amount of the recommended sales price. Pricing policies that include instructions or penalties binding or motivating contractual parties to comply with the set (recommended) prices are prohibited. According to the collected evidence the Office concluded that the HUSKY CZ had actually monitored the performance of agreements on recommended resale prices on the part of its customers and had also enforced compliance with the same under the threat of suspension of supplies of goods or other penalties. The sanction was confirmed by the Regional Court in 2012.

3.2 Outdoor equipment company - Pinguin

In 2011 the Office imposed a fine in the total amount of CZK 425,000 on the entrepreneur Zdeněk Král (Registered owner of the "Pinguin" brand) for entering into prohibited agreements on resale price maintenance in the outdoor equipment market. The undertaking had sent his customers an e-mail containing a written draft of an agreement on setting resale prices, which was accepted by them. Prohibited agreements had been thus concluded and subsequently performed. The Office was able to collect the necessary evidence (mainly the e-mail correspondence) to prove that the undertaking had monitored the prices charged by its retailers and enforced the maintenance of the prices under the threat of terminating relevant business cooperation. The undertaking terminated the anticompetitive agreements during the investigation of the Office which was taken into account when drafting the decision and related sanction.

3.3 Pet food products

This still on-going case is concerned with an exclusive importer of certain brands of pet food products (hereinafter referred to as the "Supplier"), which distributes it via (i) its own e-shop;[4] (ii) a network of registered wholesalers; and (iii) other retailers, including those running only e-shops.

3 The judgment of Regional Court in Brno, ref. No. 62 Ca 4/2007 (*Tupperware*), of 23 October 2009.

The registered wholesalers were obliged to keep the resale prices set by the Supplier or request its authorization for price reductions. The retailers were repeatedly informed that they are under obligation to increase their e-shop prices to a level suggested by the Supplier;[5] in most of the cases, the prices were indeed increased.

Since the retail prices for final consumers have actually increased without any efficiencies being claimed to offset it, the CCA decided to initiate the proceedings and is about to prohibit the conduct of the Supplier and impose upon it a fine.

4. Conclusions

Despite its very limited experience, the CCA takes the view that the fact that certain products are distributed on-line does not on itself necessitate any deviation from standard rules concerning assessment of vertical restraints. Arguably, the on-line sales might leave additional room for efficiency claims, but the CCA has not dealt with any such argument so far.

Since on-line distribution does exhibit particularities distinguishing it significantly from other forms of distribution, the competition authorities might consider adopting specific guidelines concerning interpretation of antitrust rules in the on-line context.

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4 The consumers can also purchase the products directly from the Supplier's warehouse.

5 The supplier even informed the retailers that they are under an antitrust obligation to maintain the Supplier's prices and that in case they deviate from them, a fine might be imposed on the retailers by the CCA.

EUROPEAN UNION

1. The application of Article 101 to vertical restraints and on-line sales: Introduction

This Roundtable is dedicated to "Vertical Restraints for On-line Sales". In order to address some of the issues that this topic raises, this note will describe the EU competition rules applicable to vertical restraints. This is not just useful as general background for analysing the issues, but is also necessary for understanding the Commission's perspective on the issues to be discussed, as the EU competition rules applicable to vertical restraints are the same for and are generally applied in the same way to off-line and on-line vertical restraints. In the course of this general description, a number of the specific online issues will be addressed.

2. The EU competition rules applicable to vertical restraints

The goal of the European Union's competition policy is to protect and develop effective competition in the common market for the benefit of consumers. The legislative framework of European competition policy is provided by the Treaty on the Functioning of the European Union (TFEU), in particular in Articles 101–109. Article 101 of the TFEU applies to agreements that may affect trade between Member States and which prevent, restrict or distort competition. If an agreement appreciably restricts competition, this agreement is automatically null and void according to Article 101(2). However, Article 101(3) renders this prohibition inapplicable for those agreements which create sufficient benefits to outweigh the anti-competitive effects. Such agreements are said to be exempted under Article 101(3).

Article 101 applies amongst others to vertical agreements. Vertical agreements are agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain. Distribution agreements between manufacturers and wholesalers or retailers are typical examples of vertical agreements. However, an industrial supply agreement between a manufacturer of a component and a producer of a product using that component is also a vertical agreement.

Vertical agreements which simply determine the price and quantity for a specific sale and purchase transaction do not normally restrict competition. However, a restriction of competition may occur if the agreement contains restraints on the supplier or the buyer (hereinafter referred to as 'vertical restraints'). Examples of such vertical restraints are an obligation on the buyer not to purchase competing brands (i.e. non-compete obligation) or an obligation on the supplier to only supply a particular buyer (i.e. exclusive supply).

Vertical restraints may have not only negative effects but also positive effects. They may for instance help a manufacturer to enter a new market, or avoid the situation whereby one distributor 'free rides' on the promotional efforts of another distributor, or allow a supplier to depreciate an investment made for a particular client.

Whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will often depend on the market structure. In principle, this requires an individual assessment under Article 101. However, the Commission has adopted Regulation (EU) No

330/2010, 'the Block Exemption Regulation' (the BER), which entered into force on 1 June 2010 and which provides a safe harbour for most vertical agreements.[1]

The BER contains certain requirements that have to be fulfilled before it renders the prohibition of Article 101(1) inapplicable for a particular vertical agreement. The first requirement is that the agreement does not contain any of the hardcore restrictions set out in Article 4 of the BER. If the agreement contains one or more hardcore restrictions, this leads to the exclusion of the whole agreement from the benefit of the BER. Hardcore restrictions are considered to be severe restrictions of competition because of the likely harm they cause to consumers and it is considered unlikely that vertical agreements containing such hardcore restrictions fulfil the conditions of Article 101(3). The second requirement concerns a market share cap of 30 % for both supplier and buyer. Thirdly, Article 5 of the BER contains conditions relating to three specific restrictions.

Above the market share threshold of 30 %, the BER does not apply. However, exceeding the market share threshold of 30 % does not create a presumption of illegality. This threshold serves only to distinguish those agreements which benefit from a presumption of legality from those which require individual examination. To assist firms in carrying out such an examination, the Commission also published 'Guidelines on Vertical Restraints' (the Guidelines).[2]

The Guidelines set out general rules for the assessment of vertical restraints and provide criteria for the assessment of the most common types of vertical restraints: single branding (non-compete obligations), exclusive distribution, customer allocation, selective distribution, franchising, exclusive supply, upfront access payments, category management agreements, tying and resale price restrictions. This should enable firms to carry out their own assessment of their vertical agreements under Article 101(1) and (3).

3. The EU competition rules and the internet – the general approach

The BER and the Guidelines apply both to off-line sales restrictions and to on-line sales restrictions. The policy for both types of sales restrictions is fundamentally the same. This does not mean that specificities are ignored, as they are also not ignored if rooted in the type of product sold, the level of trade in question or the market or sector under investigation. However, the policy is fundamentally the same because both the possible anti-competitive effects such as foreclosure and collusion and the possible efficiencies are fundamentally the same for off-line and on-line sales.

In addition, in reality there are not two neatly divided sales channels of off-line and on-line sales resulting in clearly distinct off-line and on-line purchases. Many distributors use both brick & mortar shops and the internet to sell their products, so-called multi channel distributors. Similarly also consumers search cross channel. *The research behaviour of online consumers is not limited to using online tools. Nearly one in two (47%) used at least one offline research method before making their last online purchase….. At the same time, offline shoppers are using online tools for their research. For their last purchase, nearly one in two offline shoppers (49%) used at least one online research method.*[3] It would thus be very difficult in practice to apply different rules to on-line and off-line sales. It would only lead to unproductive definitional and demarcation questions and increased possibilities for forum shopping.

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1 Official Journal of the European Union, L 102, 23.4.2010, p. 1-7. You can also find the text on DG Competition's web site at http://ec.europa.eu/competition/antitrust/legislation/vertical.html

2 Official Journal of the European Union, C 130, 19.5.2010, p.1. You can also find the text on DG Competition's web site at http://ec.europa.eu/competition/antitrust/legislation/vertical.html

3 *Commission staff working paper – Bringing e-commerce benefits to consumers*, Brussels, 2011. The figures are based on *Consumer market study on the functioning of e-commerce*, Civic Consulting, 2011.

4. The EU competition rules and the internet – some specific issues

4.1 Exclusive distribution and active versus passive sales

The hardcore restriction in Article 4(b) of the BER concerns restrictions concerning the territory into which or the customers to whom the buyer may sell. This hardcore restriction relates to market partitioning by territory or by customer. Distributors must remain free to decide where and to whom they sell. The BER contains exceptions to this rule, which, for instance, enable companies to operate an exclusive distribution system or a selective distribution system. If a manufacturer wants to operate a selective distribution system, an exception to this hardcore restriction allows it to prohibit its selected distributors to sell, both actively and passively, to non-authorised distributors. If a manufacturer wants to operate an exclusive distribution system, the exclusive distributors can be protected against each others' active sales, i.e. they can be required not to actively approach, for instance by direct mail or visits, customers in each others' exclusive territories and not to specifically target by advertising, in whatever media, customers in each others' exclusive territories. However, passive sales, i.e. sales in response to unsolicited orders including delivery, must always remain free.

It is thus for exclusive distribution that a distinction between active and passive sales is made. This distinction applies both to off-line and on-line sales, as is clear from the definition in the Guidelines:

- 'Active' sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory.
- 'Passive' sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.[4]

There are a priori no reasons why this distinction would be less relevant for on-line sales. One argument that was sometimes heard during the public consultation before the adoption of the BER and the Guidelines, was that the internet would make it much easier to achieve passive sales and would thus reduce the protection of exclusive distributors if only active selling into their territories could be prohibited. Aside from the question why it would in general be good for consumers to be barred from a better offer they have found themselves, the argument seems to be based on a conviction, dating back to the beginning of the internet era, that having a website would be sufficient to be found by many consumers. The reality is different. It is very easy not to be found or not to be attractive in the abundance of offers on the internet and firms spend large sums to have qualitatively good websites and to improve the chance to be found and selected by consumers, for instance by acquiring a sponsored place on search engines or by online advertising in the form of pop-ups on other relevant websites.

There are also a priori no reasons why the distinction between active and passive sales would be more difficult to make for on-line sales. The principle of the definition above is that *advertisement or promotion*

4 Guidelines, point 51.

that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory. This may often be more easily applied to the on-line world than the off-line world. For instance, the price of a sponsored place on a search engine or online advertising in the form of pop-ups on another website is generally dependent on the country/region or even city that is targeted. Usually, the wider the area is where consumers will see the sponsored link or pop-up, the higher the price. This leads to a clear cut distinction between active and passive sales, possibly clearer than with more traditional advertising in paper copies of newspapers or magazines, where it may be less possible to target only a particular region or city.

4.2 Selective distribution and the internet

Because internet commerce is a relatively new phenomenon, there were of course a number of new questions to be answered concerning online sales restrictions, in particular what is and what is not a restriction of passive online sales, when the rules were reviewed recently. Given that restrictions of the possibilities of distributors to sell passively to consumers are treated as hardcore restrictions, these questions are relevant in principle for all types of distribution. However, in practice they are mainly relevant for selective distribution systems.

As explained in the previous section, if a manufacturer wants to operate a selective distribution system, an exception to the resale hardcore restriction allows it to prohibit its selected authorised distributors to sell, both actively and passively, to non-authorised distributors. The BER thus covers setting up a closed distribution system, where selling by the authorised distributors to non-authorised third party traders is prohibited. In such a system it becomes extra important to ensure that the authorised distributors themselves are not restricted in their (active and passive) sales to consumers.

As explained by point 52 of the Guidelines: The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. The remainder of the same point then continues to provide examples of what are considered a restriction of passive online sales. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. …If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling. The same holds if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. Offering different language options on the website does not, of itself, change the passive character of such selling. The Commission thus regards the following as examples of hardcore restrictions of passive selling given the capability of these restrictions to limit the distributor’s access to a greater number and variety of customers:

- an agreement that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall automatically re-rout its customers to the manufacturer's or other (exclusive) distributors' websites. This does not exclude an agreement that the distributor’s website shall also offer a number of links to websites of other distributors and/or the supplier;
- an agreement that the (exclusive) distributor shall terminate consumers' transactions over the internet once their credit card data reveal an address that is not within the distributor's (exclusive) territory;
- an agreement that the distributor shall limit its proportion of overall sales made over the internet. This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products off-line

to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model…;

- 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 off-line. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter's offline or online sales efforts.

Again as clarification on the same issue of what is considered a restriction of passive online sales, the Guidelines clarify in point 56 that *the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes.*

Undoubtedly other questions about what is or what is not a restriction of passive online sales will be raised over time in view of new internet developments. One such question is referred to in the list of suggested ideas and questions attached to the invitation for written submissions for this Roundtable, where it is asked how to deal with restrictions on the distributor to use search engine optimisation. Should such a restriction be considered a restriction of passive sales? While the answer will be provided by future case law, at first glance it seems a restriction that will hinder the distributor to use the internet effectively, both for active and passive sales, which would thus amount to a hardcore restriction. It is as if a distributor is allowed to use the telephone but is not allowed to be listed in the telephone directory, or is allowed to use a car to deliver its goods but only with petrol from one nearby petrol station, thus limiting effectively the number and variety of consumers it can reach.

While thus, for a distribution agreement to be covered by the BER, the distributor must be allowed to use the internet, this does not imply that a supplier necessarily will have to supply to on-line only distributors. As explained in the Guidelines (point 54), under the BER *the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system.*

This is in line with the general approach to selective distribution in the BER and the Guidelines. As explained in point 176 of the Guidelines, *the Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria.* It is considered that below the market share threshold qualitative and quantitative selective distribution systems will in general benefit consumers, for instance by increasing the quality of distribution. Nonetheless, this sentence is immediately followed by the warning that *where the characteristics of the product do not require selective distribution or do not require the applied criteria, such as for instance the requirement for distributors to have one or more brick and mortar shops or to provide specific services, such a distribution system does not generally bring about sufficient efficiency enhancing effects to counterbalance a significant reduction in intra-brand competition. Where appreciable anti-competitive effects occur, the benefit of the Block Exemption Regulation is likely to be withdrawn.*

4.3 Resale price maintenance and the internet

In the invitation for written submissions for this Roundtable, it is asked whether the distinction between price and non-price restraints is useful for competition analysis in the context of online sales? It could be argued that this is not the right question. In most jurisdictions, including the EU, there is a difference in treatment of agreements where the distributor is required to apply a fixed or minimum resale price and agreements on a maximum resale price. The relevant question is not price versus non-price restraints, but restraints where experience has shown that they lead in general to negative effects for consumers and restraints where experience does not support such a conclusion.

Resale price maintenance, that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated in the EU as hardcore restrictions.[5] However, the practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price are not considered hardcore restrictions, provided that such maximum or recommended prices do not amount to a fixed or minimum price as a result of pressure from, or incentives offered by, any of the parties.[6]

This continued hardcore treatment of resale price maintenance is not just the result of past case law which consistently has dealt with resale price maintenance as a restriction by object, it also resulted from the Commission services together with the National Competition Authorities taking stock of enforcement as part of the review process which led to the adoption of the BER and Guidelines. The discussion within the European Competition Network on the many resale price maintenance cases dealt with since 2000, mainly handled by the National Competition Authorities, pointed to the pertinence of a cautious approach towards RPM. In general, companies have been unsuccessful in their attempts to show efficiencies and justify RPM. It is considered that extensive recourse to RPM across the EU Member States, many of which have small and concentrated markets, would result in more harm than benefit for the European consumers as a whole.[7]

There seems a priori no reason to change this policy where it concerns online resale price maintenance. In the list of suggested ideas and questions attached to the invitation for written submissions for this Roundtable, it is mentioned that there may be a need to off-set the risk of free riding by online distributors on off-line distributors' investments. At the same time, also the risk of inverse free riding, by off-line retailers free riding on online retailers' investments in technical product information and users reviews provision, is mentioned.

As already indicated in section 3 above, the reality is that consumers search cross channel. Nearly one in two (47%) used at least one offline research method before making their last online purchase. 18% of online shoppers visited a shop in person before making an online purchase. At the same time, offline shoppers are using online tools for their research. For their last purchase, nearly one in two offline shoppers (49%) used at least one online research method. Some of the most commonly used online research methods by offline shoppers are: visits to sellers' websites (15%), search engines (15%), online consumer reviews (14%), price comparison websites (13%) and visits to manufacturers'/brand websites (13%).[8] This indicates that possible free riding is certainly not going in one direction and that off-line and

5 See Article 4(a) of the BER and points 48 and 49 of the Guidelines.

6 See Article 4(a) of the BER.

7 For more background on the current treatment of resale price maintenance in the EU, see Luc Peeperkorn, *Revised EU Competition Rules for Supply and Distribution Agreements*, published in Finnish Competition Law Yearbook 2010.

8 *Commission staff working paper – Bringing e-commerce benefits to consumers*, Brussels, 2011. The figures are based on *Consumer market study on the functioning of e-commerce*, Civic Consulting, 2011.

on-line sales efforts are complementary. It may thus be most efficient for manufacturers to support their distributors to use both sales modes (brick & click).

5. Conclusion

To paraphrase Commissioner Almunia, the principles of competition-law enforcement do not change when we leave the realm of brick-and-mortar, but we have to adjust our methods to the specific features of on-line sales and the internet.[9] EU competition policy is fundamentally the same for off-line and on-line sales. This does not mean that specificities are ignored, but the possible anti-competitive effects and the possible efficiencies are fundamentally the same for off-line and on-line sales. The rules, in this case the BER and the Guidelines, are regularly updated and are flexible enough to take such specificities into account.

[9] When speaking on high tech sectors, Commissioner Almunia remarked recently "[t]he principles of competition-law enforcement do not change when we leave the realm of brick-and-mortar, but we have to adjust our methods to the specific features of these new sectors." Commissioner Almunia, *Competition enforcement in the knowledge economy*, Fordham University/ New York City 20 September 2012, http://europa.eu/rapid/press-release_SPEECH-12-629_en.htm..

FRANCE

(Version française)

1. Introduction: Le commerce en ligne facteur d'animation de la concurrence

L'Autorité de la concurrence dispose d'une expérience relativement étendue dans l'analyse des relations entre fournisseurs et distributeurs en matière de vente en ligne.

Elle a adopté une trentaine de décisions et avis en matière de restrictions verticales, dont un certain nombre spécifique à la vente en ligne[1], et apporté une contribution à la consultation publique de la Commission européenne dans le cadre de la révision du règlement d'exemption (CE) n°2790/99[2], qui a abouti à l'adoption du règlement n°(UE)330/2010.

L'Autorité a, en outre, consacré une enquête sectorielle au fonctionnement concurrentiel du commerce électronique[3], recueilli des données lui permettant d'appréhender le développement du commerce électronique qui a connu une croissance particulièrement rapide en France au cours des dernières années. Entre 2008 et 2012, le volume d'affaires du commerce électronique a plus que doublé. Il représente aujourd'hui un peu plus de 7 % du commerce de détail (hors alimentaire et services).

Cette enquête précise que le développement du commerce électronique provient de plusieurs facteurs. Tout d'abord, le nombre de consommateurs achetant par le biais d'Internet augmente régulièrement. Entre 2009 et 2011, il a ainsi augmenté de 20%, passant de 25 à 30 millions de personnes. Ensuite, la gamme des secteurs concernés par le commerce électronique s'est étendue. Au-delà des activités sur lesquelles le commerce électronique s'est développé initialement (tourisme, informatique grand public, produits culturels), l'habillement et le textile (11% des ventes en ligne), l'équipement de la maison (6% des ventes en ligne) ou encore l'alimentaire (3% des ventes en ligne) ont connu récemment un important développement de leurs ventes par le canal Internet. Enfin, l'offre de produits par Internet se développe fortement comme en témoigne le nombre de sites Internet marchands qui a quasiment triplé entre 2007 et 2011 pour dépasser en 2011 le nombre de 100 000 sites (117 500 en 2012).

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1 Le Conseil puis l'Autorité de la concurrence ont été amenés à connaître des pratiques de restrictions verticales mises en œuvre sur le canal Internet à l'occasion des décisions n° 06-D-24 du 24 juillet 2006 relative à la distribution des montres commercialisées par Festina France, n° 06-D-28 du 5 octobre 2006 relative à des pratiques mises en œuvre dans le secteur de la distribution sélective de matériels Hi-Fi et Home-cinéma, n° 07-D-07 du 8 mars 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle, n° 08-D-25 du 29 octobre 2008 relative à des pratiques de la société Pierre Fabre dans le même secteur que celui de la décision précitée et n°12-D-23 du 12 décembre 2012 relative à des pratiques mises en œuvre par la société Bang& Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinéma.

2 Avis du 28 septembre 2009 sur la révision du règlement (CE) n° 2790/99 et des lignes directrices concernant les restrictions verticales.

3 Avis n°12-A-20 du 18 septembre 2012 sur le fonctionnement concurrentiel du commerce électronique.

L'enquête note que le commerce électronique ne connaît cependant pas le même dynamisme dans l'ensemble des secteurs. L'Autorité de la concurrence avait décidé de mener une analyse plus approfondie des secteurs des produits électrodomestiques, des produits cosmétiques vendus sur conseil pharmaceutique ainsi que de parfumerie et avait constaté que les produits électrodomestiques rencontraient une forte demande sur Internet tandis que, pour les deux autres secteurs, la part des ventes en ligne était particulièrement réduite (moins de 2%). Le développement des ventes en ligne dans un secteur donné pourrait être lié à plusieurs facteurs, en particulier l'existence de *pure players* ou bien d'acteurs de dimension nationale ayant le potentiel et la volonté d'investir dans le développement de sites marchands.

L'Autorité de la concurrence a procédé à une comparaison des prix en ligne et hors ligne dans chacun des secteurs évoqués ci-dessus. Il en est ressorti que les prix sur Internet étaient globalement plus faibles que les prix hors ligne. Ce constat peut être attribué à l'intensité concurrentielle sur Internet (renforcée par l'existence d'outils de comparaisons de prix, la facilité d'accès à des vendeurs différents, l'existence d'éventuels nouveaux acteurs apparus avec Internet, etc.), ainsi qu'au fait que les vendeurs Internet font face à des coûts de distribution relativement réduits par rapport aux distributeurs physiques. Ce dernier facteur ne doit cependant pas être considéré comme un fait immuable : en effet, l'avis a constaté que certains frais spécifiques aux sites Internet, tels les coûts de référencement (référencement payant et/ou optimisation du référencement naturel), pouvaient connaître des augmentations importantes.

S'agissant des produits électrodomestiques, la comparaison a porté sur plusieurs produits : télévision, caméscope, appareil photo numérique, lecteur DVD, baladeur numérique, lave-vaisselle, four micro ondes, lave-linge, réfrigérateur, imprimante multifonctions et ordinateur portable. Pour chacun de ces produits, l'Autorité a recueilli des données de prix moyens par canal de distribution (en ligne / hors ligne) pour un échantillon des références les mieux vendues. L'étude de l'Autorité a conclu qu'en moyenne, les prix sur Internet étaient inférieurs aux prix moyens hors ligne pour l'ensemble des produits étudiés. L'ampleur de ces différences varie entre les produits. L'avantage prix du canal Internet a pu être estimé à environ 10 % pour les produits bruns comme les télévisions ou les appareils photo numériques. Pour les produits blancs comme les produits gris, les écarts de prix sont apparus différenciés : moins de 5 % pour les lave-linges, les réfrigérateurs ou les ordinateurs portables, et 10 %, voire plus, pour les lave-vaisselles, fours micro-ondes et autres imprimantes multifonctions.

En ce qui concerne les produits de parapharmacie ou les parfums et cosmétiques de luxe, les comparaisons ont porté sur 128 références de parapharmacie et 114 parfums ou cosmétiques de luxe. Pour la grande majorité des références de produits en parapharmacie étudiées, le prix moyen en ligne est inférieur au prix moyen hors ligne, la différence s'élevant le plus souvent de 5 à 15%. En moyenne sur l'ensemble des références étudiées, le prix moyen en ligne s'est trouvé être 8 à 10% inférieur au prix moyen hors ligne. Dans les parfums et cosmétiques de luxe, les prix sur Internet et hors ligne sont apparus très proches, notamment du fait que les principaux sites Internet sont exploités par les grandes chaînes nationales actives dans ce secteur (Sephora, Marionnaud, etc.), qui pratiquent le plus souvent des prix similaires dans leurs magasins et sur leurs sites.

Ces résultats figurant dans l'avis de l'Autorité portent sur des comparaisons de prix n'incluant pas les éventuels frais de livraison facturés par les sites marchands. La question de la prise en compte de ces frais de livraison, qui peut au demeurant être débattue, ne remet pas en cause l'existence d'un avantage tarifaire du canal Internet, même si elle peut en limiter l'ampleur en fonction des modalités de livraison prises pour référence (cf. §§61-78 de l'avis). En effet, dans cet avis, l'Autorité conclut que si les frais de livraison sont pris en compte dans cette comparaison, l'avantage tarifaire du canal Internet est relativement plus réduit. En premier lieu, il est plus réduit lors d'une livraison à domicile qu'en point de retrait. En second lieu, il est très limité dans le cas des produits encombrants tel le lave-linge, mais l'avantage reste très significatif pour des produits de grande consommation, comme les télévisions, les appareils photo numériques, les caméscopes ou les baladeurs, et dans une fourchette de 0 à 5 % pour les four micro-ondes, les imprimantes,

les ordinateurs portables ou les lecteurs DVD. Enfin, l'étude montre que plus le montant du panier d'achat est élevé, moins grande est l'incidence des frais de livraison, qui peut même, au-delà d'un certain montant, être nulle et dès lors permettre à l'acheteur de profiter pleinement de l'avantage tarifaire du canal Internet.

Cet avis souligne que le commerce électronique a également pour avantage d'offrir une gamme plus étendue de produits. Pour les produits électrodomestiques par exemple, plusieurs distributeurs *click&mortar*, c'est-à-dire disposant de point(s)s de vente physique(s) et d'un site marchand, ont expliqué proposer sur Internet une offre complémentaire à celle déjà présentée en magasin. De façon générale, les commerçants ont relevé la plus grande facilité qu'il y a à proposer une référence supplémentaire sur Internet plutôt qu'en magasin. En effet, seuls les magasins physiques font face à l'importante contrainte, en termes de limitation physique et de coût, de la surface d'exposition. En outre, l'existence sur Internet des places de marché, tels Amazon, Pixmania, Cdiscount, Rueducommerce, etc., favorise la variété du choix offert aux acheteurs.

Enfin, l'avis salue les multiples outils de comparaisons offerts aux consommateurs par le commerce électronique. Ces outils peuvent être utiles et appréciés de ces derniers et favorisent l'animation concurrentielle du marché. Il existe des comparateurs de prix dans de nombreux secteurs, qui sont utilisés par plus de la moitié des consommateurs achetant sur Internet. En outre, la comparaison de différents modèles d'un type de produit donné est rendue possible sur certains sites spécialisés ou marchands. Certains sites proposent ainsi de comparer les caractéristiques de références différentes, d'autres recueillent et publient des avis de consommateurs sur les biens proposés à la vente.

L'Autorité souligne que certains acteurs du marché perçoivent dans le développement du commerce électronique des menaces, portant en particulier sur le développement des magasins physiques ou sur le parasitisme d'acteurs Internet.

Certains acteurs semblent ainsi s'inquiéter du fait que les canaux de vente traditionnels hors ligne perdent du terrain relativement au commerce électronique ou que la croissance dans certains secteurs se fasse majoritairement, voire exclusivement, sur Internet. Pour l'Autorité, si cet état de fait est réel, il n'est pas pour autant négatif du point de vue collectif, puisqu'il illustre avant tout la meilleure adéquation de l'offre Internet à certains besoins de consommation par rapport à l'offre « traditionnelle ». Par ailleurs, si le commerce électronique a effectivement connu, et connaît toujours aujourd'hui, une croissance forte, il est nécessaire de relativiser la part des ventes qu'il représente : il ne contribue ainsi que pour moins d'un douzième du commerce de détail en 2012. Dans la plus grande partie des secteurs, l'émergence et la croissance du commerce électronique ne remet donc pas en cause la viabilité des magasins physiques, d'autant plus qu'il est loisible à ces derniers d'étendre leur activité à Internet afin de profiter de ce relais de croissance. En outre, le risque de disparition des commerces physiques est d'autant plus limité qu'ils disposent de certains avantages structurels, comme la disponibilité immédiate des produits (pas de délais de livraison), la possibilité de faire toucher et/ou d'essayer les produits aux consommateurs.

L'Autorité précise que certains acteurs s'inquiètent également d'un potentiel parasitisme des sites marchands, et notamment des *pure players*, c'est-à-dire des acteurs qui ne disposent pas de réseau de distribution physique. Selon ces acteurs, les *pure players* profiteraient indirectement des investissements en termes de conseil et de services réalisés par les magasins physiques et ne contribueraient que faiblement à la mise en valeur des produits et au conseil des clients, ce qui leur permettrait de bénéficier de coûts réduits et de proposer ainsi des prix de vente particulièrement attractifs pour les consommateurs. Les éléments recueillis par l'Autorité invitent à être prudent sur la réalité de cette menace en l'absence de données quantitatives précises communiquées par les parties prenantes permettant d'en vérifier la réalité sur un réseau donné de distribution. Les données globales recueillies montrent que si certains consommateurs prennent conseil dans des magasins physiques avant d'acheter en ligne, le phénomène inverse existe, dans lequel les consommateurs s'informent sur Internet avant d'acheter dans un magasin physique. Plus

précisément, selon le baromètre *FEVAD – Médiamétrie/NetRatings* sur les comportements d'achats des internautes, publié en mai 2010, 53 % des internautes ont préparé leur achat sur Internet avant d'acheter en magasin, et inversement 31 % des internautes ont préparé leur achat en magasin avant d'aller acheter sur Internet. En outre, les sites marchands ont progressivement développé de nombreux outils de conseil avant l'achat (mise en relation avec un conseiller via des *hotlines* ou un *chat*, mise à disposition de documentations sur les produits proposés à la vente, etc.) ou contribuant à la mise en valeur des produits. Il convient donc d'être particulièrement prudent sur la réalité du phénomène de parasitisme dénoncé par certains acteurs du marché.

Au final, l'Autorité est d'avis de conclure que le commerce électronique apparaît comme un facteur d'animation de la concurrence, en particulier en termes de prix et de diversité de choix pour les consommateurs. Les menaces créées par le commerce électronique selon certains acteurs du marché, en particulier le parasitisme des vendeurs *pure players*, doivent être relativisées. L'émergence du commerce en ligne nécessite surtout des adaptations des acteurs du marché : ces derniers peuvent investir eux-mêmes sur ce nouveau canal de distribution et/ou innover afin de se différencier et de créer de la valeur ajoutée pour les consommateurs.

2. Le cadre juridique applicable aux restrictions mises en œuvre vis-à-vis de la vente en ligne

2.1 Un cadre juridique commun à l'ensemble des relations entre fournisseurs et distributeurs…

Il n'existe pas, à l'heure actuelle, de cadre juridique spécifique à l'analyse des restrictions verticales portant sur la vente en ligne. Les restrictions verticales susceptibles d'affecter le commerce européen, qu'elles portent sur la distribution sur Internet ou sur la distribution en points de vente physique, sont soumises au règlement (UE) d'exemption n°330/2010, entré en vigueur au 1er juin 2010. Le droit national de la concurrence, pour l'application duquel le règlement d'exemption européen constitue un « guide d'analyse utile », ne prévoit pas non plus de dispositions spécifiques aux restrictions verticales appliquées à la distribution sur Internet.

Il est vrai que chaque canal de distribution présente effectivement des spécificités. La vente en magasin permet un contact physique entre le client et le vendeur et un certain mode de présentation des produits aux consommateurs (essais en magasins par exemple). La vente en ligne, quant à elle, permet aux acheteurs potentiels d'accéder au site du vendeur 24h sur 24h pour y faire leurs achats ou d'économiser des coûts de déplacement, notamment pour comparer les prix des produits. Elle permet également d'accéder à des conseils spécifiques qui ne sont pas toujours fournis en magasin, comme, par exemple, les avis des personnes ayant déjà acheté le produit étudié, ou selon le type de produit et de distributeurs, de disposer d'une variété de choix plus étendue qu'en magasin.

Néanmoins, l'élaboration d'un cadre juridique spécifique aux restrictions verticales portant sur la vente en ligne ne paraît pas souhaitable. En premier lieu, sauf à demeurer très général, un tel cadre juridique risquerait d'empêcher la pratique décisionnelle de s'adapter aux spécificités que peut présenter chaque cas d'espèce en matière de restriction verticale sur Internet, compte tenu, notamment, des évolutions rapides que connaît la vente en ligne.

En second lieu, les similitudes et les recoupements existant entre, d'une part, la vente en points de vente physiques, d'autre part, la vente en ligne, sont nombreux. Ainsi, qu'il s'agisse du canal de distribution traditionnel ou d'Internet, le processus de distribution connaît des étapes (fabrication, approvisionnement de gros, vente au détail) et des acteurs (fabricants, grossistes, distributeurs, détaillants, clients) identiques. De plus, dans la plupart des secteurs d'activité, la majorité des opérateurs sont désormais présents sur les deux canaux et définissent des stratégies de distribution (distribution sélective, exclusive etc.) et des politiques commerciales (politiques tarifaires, promotionnelles, de communication

etc.) prenant en compte ces deux canaux. Des restrictions verticales peuvent donc être mises en œuvre simultanément sur les deux canaux sans distinction. Enfin, si des restrictions verticales peuvent être spécifiques à certains canaux (comme les restrictions visant la vente des produits sur les places de marché ou celles visant l'achat de mot-clé), elles obéissent cependant à des objectifs communs aux différents canaux utilisés par le fabricant pour la revente de ses produits, licites ou non.

Ainsi, l'élaboration d'un cadre juridique spécifique aux restrictions verticales à la distribution en ligne ne paraît pas souhaitable. Elle l'est d'ailleurs d'autant moins que la pratique décisionnelle de la Commission européenne et la jurisprudence de la Cour de Justice de l'Union européenne (CJUE), les textes de « soft law » établis par la Commission[4] et la pratique décisionnelle de l'Autorité de la concurrence[5] d'autre part, viennent utilement préciser les modalités d'application de ces règles générales à la distribution sur Internet.

Ainsi, l'Autorité de la concurrence considère que le règlement d'exemption n°330/2010 complété par la jurisprudence de la CJUE et les lignes directrices de la Commission européenne, en phase avec les grands équilibres de la pratique décisionnelle et la jurisprudence françaises, tendent à apporter la sécurité juridique nécessaire aux opérateurs.

2.2 Un équilibre entre la liberté d'organisation de la distribution et le respect de la libre concurrence

Tout fabricant est libre d'organiser la distribution de ses produits comme il l'entend, sous réserve, néanmoins, que le mode de distribution choisi n'ait pas pour objet ou pour effet de porter atteinte à la concurrence.

A cet égard, l'avis 12-A-20 de l'Autorité de la concurrence relatif au fonctionnement concurrentiel du commerce électronique a permis de constater un développement de la distribution sélective à des produits auparavant distribués de façon classique. Ce mode de distribution garantit en effet aux fabricants que leurs produits ne seront revendus que par des distributeurs sélectionnés par eux, leur permettant ainsi de mieux contrôler le réseau de revente de leurs produits. S'agissant en particulier de la vente sur Internet, l'avis a relevé différents critères utilisés par les fabricants pour garantir que la distribution Internet soit conforme à la politique générale de vente de leurs produits. Ces critères peuvent notamment consister à exiger des distributeurs la détention d'un ou de plusieurs points de vente physiques, parfois pendant au moins une certaine durée avant la mise en vente des produits, le respect de certaines caractéristiques techniques et graphiques pour le site Internet et de certaines limitations relatives à la publicité (autorisation préalable de la publicité du site, contrôle ou interdiction des achats des mots clé pour le référencement sur les moteurs de recherche) ou encore, à interdire la présence du site Internet sur les places de marché.

Pour analyser ces comportements, le droit de la concurrence doit définir un point d'équilibre entre le droit pour le fabricant d'organiser la vente de ses produits sur Internet comme il l'entend et l'interdiction de restrictions qui limiteraient de façon excessive la possibilité de vente sur Internet les produits achetés auprès d'un fabricant. A cet égard, dans le cadre de l'avis de l'Autorité de la concurrence rendu le 28 septembre 2009 sur la révision du règlement (CE) n°2790/99 et des lignes directrices concernant les restrictions verticales, l'Autorité a tenu à « *saluer l'architecture retenue par la Commission dans son projet de lignes directrices, qui tire enseignement des questions rencontrées par les ANC dans leur pratique décisionnelle, et qui vise à permettre un déploiement cohérent des différentes stratégies de distribution susceptibles d'être mises en œuvre au sein du marché unique, à commencer par la distribution sélective* (…) ».

4 Les lignes directrices sur les restrictions verticales (2010/C 130/01).

5 Avis n°12-A-20 relatif au fonctionnement concurrentiel du commerce électronique.

Cette architecture repose sur trois axes fondamentaux. En premier lieu, en l'absence de restriction dites caractérisées (cf. infra), les accords de distribution comprenant des restrictions couramment rencontrées dans la distribution traditionnelle, comme la distribution ou la fourniture exclusive et les exclusivités de clientèle ou d'approvisionnement, bénéficient d'une exemption par catégorie lorsque les opérateurs détiennent une part de marché inférieure à celle(s) fixée(s) sous l'article 3 du règlement 330/2010, qu'il s'agisse de distribution en magasin ou en ligne, soit 30% sur chacun des marchés définis par le règlement. Dans le cas contraire, l'exemption individuelle de ces accords doit être fondée sur leurs effets potentiels ou avérés sur le jeu de la concurrence.

En second lieu, les lignes directrices définissent différentes exigences des fabricants quant aux qualités requises pour vendre en ligne qui ne constituent pas des restrictions de concurrence, et d'autres, correspondant à une interdiction ou à une limitation des ventes passives ou à une limitation des ventes actives et passives dans le cadre d'un réseau de distribution sélective, qui sont qualifiées de restriction caractérisée de la concurrence. Ainsi, selon ces lignes directrices, il est loisible à des fournisseurs d'imposer aux détaillants qui souhaiteraient intégrer leur réseau de distribution sélective l'exploitation d'un lieu de vente physique[6] (« magasin traditionnel ») et la réalisation d'un certain montant (en valeur absolue) de vente en magasin, tenant compte de l'éventuelle nécessité de services spécifiques propres à la vente en magasin[7]. De même, les fabricants peuvent adopter, pour autoriser la vente en ligne, des critères spécifiques, distincts de ceux régissant la vente « en dur »[8], dès lors qu'ils poursuivent le même objectif que ces derniers et qu'ils permettent d'atteindre des résultats comparables[9]. A l'inverse, l'interdiction faite à un revendeur agréé de vendre ses produits en ligne[10], l'interdiction faite à des clients d'un autre territoire de consulter le site en ligne ou de leur vendre des produits, la limitation de la part des ventes réalisées en ligne plutôt qu'en magasin, la fixation d'un prix plus élevé pour les produits destinés à être vendus en ligne plutôt qu'en magasin constituent des interdictions ou limitations des ventes passives et, de ce fait, des restrictions caractérisées de la concurrence au regard du règlement n°330/2010 de la Commission du 20 avril 2010 concernant l'application de l'article 101, paragraphe 3 du TFUE à des catégories d'accords verticaux et de pratiques concertées. De même, exiger du revendeur en ligne qu'il respecte des conditions qui ne poursuivraient pas les mêmes objectifs que celles exigées pour la vente en magasin ou qui n'aboutiraient pas à des résultats comparables constitue, pour la même raison, une restriction caractérisée.

Ce faisant, le point d'équilibre préconisé par la Commission européenne s'articule donc autour d'un « mix » entre la vente en dur et la vente en ligne, que l'on pourrait appeler le « *brick and click* » ou encore le « *click and mortar* ».

En troisième lieu, les autorités de concurrence conservent une faculté d'appréciation au cas par cas de chaque situation spécifique. D'une part, les restrictions considérées comme anticoncurrentielles du point de vue de leur objet peuvent faire l'objet d'une demande d'exemption individuelle, appuyée sur des gains

6 Cf. également la décision n° 06-D-24 précitée de l'Autorité de la concurrence.

7 D'autres restrictions autorisées sont, notamment, la présentation sur le site de liens vers d'autres sites ou vers le fabricant, le paiement d'une redevance fixe, l'interdiction de publicité ciblées vers les clientèles d'un territoire particulier octroyé en exclusivité à un autre distributeur.

8 Voir les décisions n° 06-D-28 et n°07-D-07.

9 D'autres restrictions autorisées sont, notamment, la présentation sur le site de liens vers d'autres sites ou vers le fabricant, le paiement d'une redevance fixe, l'interdiction de publicité ciblées vers les clientèles d'un territoire particulier octroyé en exclusivité à un autre distributeur.

10 Voir en ce sens, les décisions n° 07-D-07 du 8 mars 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle et°12-D-23 du 12 décembre 2012 relative à des pratiques mises en œuvre par la société Bang&Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinéma.

d'efficience issus de l'interdiction de la vente en ligne ou de sa limitation. D'autre part, les lignes directrices précisent que « lorsque les caractéristiques du produit ne nécessitent pas une distribution sélective ni l'application de critères, tels que, par exemple, l'obligation faite aux distributeurs de disposer d'un ou de plusieurs points de vente physiques (…) un tel système n'apporte généralement pas de gains d'efficience suffisants pour compenser une réduction significative de la concurrence intramarque. en cas d'effets préjudiciables sensibles sur la concurrence, le bénéfice de l'exemption par catégorie sera probablement retiré » (§176 des lignes directrices).

En définitive, le régime d'exemption défini par la Commission, en accord avec les autorités nationales de concurrence, établit des zones de sécurité permettant aux opérateurs, sous respect de certaines conditions qui peuvent s'ajouter à celles des seuils de parts de marché fixés à l'article 3 du règlement 330/2010, d'organiser leur réseau de distribution, et la vente en ligne en particulier, sans nuire à l'efficience économique et aux opportunités que recèlent le commerce électronique pour les entreprises, les consommateurs et l'emploi.

3. L'analyse des restrictions liées à la vente en ligne

3.1 Principes généraux d'analyse

Les restrictions verticales, qu'elles concernent la vente en ligne ou en magasin, sont analysées du point de vue de leurs effets sur la concurrence**.** Pour la plupart des restrictions verticales, comme les différents accords d'exclusivité, cet examen des effets nécessite une analyse concrète des restrictions considérées et de la position des acteurs et des produits considérés, prenant en compte la durée de l'accord et, le cas échéant, la période de l'année à laquelle il est mis en œuvre, le caractère exclusif ou non de la pratique visée, le type de produits couvert (existence ou non d'une image de marque particulière), les parts de marché et le pouvoir de négociation des opérateurs concernés (etc.), l'objectif étant notamment d'apprécier dans quelle mesure la réduction de la concurrence intra-marque est rendue moins probable du fait du maintien d'une forte concurrence inter-marques. Il est présumé qu'en l'absence de restriction caractérisée, les accords conclus par des opérateurs disposant d'une part de marché inférieure à 30% sur chacun des marchés définis par le règlement remplissent les conditions prévues à l'article 101, paragraphe 3, du traité.

D'autres restrictions verticales, notamment celles équivalant à une interdiction ou à une limitation des ventes passives ou des ventes actives et passives aux consommateurs au sein d'un réseau de distribution sélective, sont considérées comme des restrictions caractérisées par le règlement européen d'exemption par catégories relatif aux restrictions verticales. Ainsi, conditionner les ventes en ligne au respect de critères qui ne sont pas globalement équivalents à ceux mis en place pour la vente en magasins, c'est-à-dire ceux qui ne poursuivent pas les mêmes objectifs que ceux imposés pour la vente en magasin et/ou qui ne conduisent pas aux mêmes résultats, revient à limiter le développement des ventes en ligne et ce faisant, le développement des ventes passives[11]. Les lignes directrices précisent qu'il est fortement probable que de telles restrictions soient contraires aux dispositions de l'article 101§1 du TFUE.

Saisie d'une question préjudicielle sur la question de savoir si la restriction caractérisée d'interdiction générale et absolue édictée par un fabricant à l'encontre de son distributeur agréé constituait également une restriction par objet, la CJUE a dit pour droit, dans son arrêt du 13 octobre 2011[12], que « l'article 101, paragraphe 1, TFUE doit être interprété en ce sens qu'une clause contractuelle, dans le cadre d'un système

11 Voir en ce sens, les décisions n° 07-D-07 du 8 mars 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle et°12-D-23 du 12 décembre 2012 relative à des pratiques mises en œuvre par la société Bang&Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinéma.

12 Arrêts Pierre Fabre de la CJUE du 13 octobre 2011.

de distribution sélective, exigeant que les ventes de produits cosmétiques et d'hygiène corporelle soient effectuées dans un espace physique en présence obligatoire d'un pharmacien diplômé, ayant pour conséquence l'interdiction de l'utilisation d'Internet pour ces ventes, constitue une restriction par objet au sens de cette disposition si, à la suite d'un examen individuel et concret de la teneur et de l'objectif de cette clause contractuelle et du contexte juridique et économique dans lequel elle s'inscrit, il apparaît que, eu égard aux propriétés des produits en cause, cette clause n'est pas objectivement justifiée » . La fixation des prix de revente par le fabricant constitue également une restriction par objet, selon une jurisprudence constante et ancienne[13].

Enfin, qu'il leur soit reproché la mise en œuvre d'une restriction par objet ou d'une restriction par effet, les parties mises en cause conservent la faculté d'alléguer des gains d'efficience, notamment au titre de l'article 101§3 TFUE et/ou L.420-4 du code de commerce. Ces gains d'efficience, dans le cas de la vente en ligne, peuvent notamment se référer à un risque « réel »[14] de parasitisme des offres de conseils et d'autres services « additionnels » des vendeurs en magasins, notamment dans le cas de produits nouveaux ou complexes, onéreux et pour lesquels une obligation de promotion et de service, qui se substituerait à la restriction verticale en cause, est en pratique impossible. Dans ses lignes directrices, la Commission évoque également « le parasitisme de certification » et la recherche, par le fabricant, d'une « uniformité » et de « normes de qualité », justifiant la distribution sélective et la franchise.

Par ailleurs, comme cela a été exposé supra, les lignes directrices autorisent les fabricants à conditionner la vente sur Internet de leurs produits à l'exploitation d'un (ou de plusieurs) point(s) de vente physique(s) d'une part, et au respect de certains critères de sélection qui constituent l'adaptation de ceux prévus pour la vente en dur, d'autre part. Pour autant, les lignes directrices indiquent également que « *lorsque les caractéristiques du produit ne nécessitent pas une distribution sélective ni l'application de critères, tels que, par exemple, l'obligation faite aux distributeurs de disposer d'un ou de plusieurs points de vente physiques* (…) *un tel système n'apporte généralement pas de gains d'efficience suffisants pour compenser une réduction significative de la concurrence intramarque. En cas d'effets préjudiciables sensibles sur la concurrence, le bénéfice de l'exemption par catégorie sera probablement retiré* » (§ 176). A titre d'illustration, dans son avis 12-A-20 précité, l'Autorité de la concurrence avait ainsi tenu à rappeler que la conformité aux règles de concurrence de la condition de détention d'un point de vente physique n'est pas absolue. En effet, si, compte tenu des circonstances particulières de l'espèce, cette condition produit des effets sensibles sur la concurrence en limitant l'émergence de la vente en ligne, par exemple si l'installation de nouveaux points de vente est difficile à mettre en œuvre et si les produits concernés présentent, soit individuellement, soit de façon cumulative, une attractivité ou une part de marché rendant leur référencement déterminant pour la viabilité d'un site Internet, elle ne sera alors valable que si elle est à la fois nécessaire et proportionnée eu égard aux caractéristiques du produit concerné (Avis 12-A-20, § 330 et suivants).

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13 CJCE, 3 juillet 1985, SA Binon & Cie contre SA Agence et messageries de la presse, affaire 243/83, *Rec p. 2015* (restriction par objet donnant lieu en l'espèce à l'octroi d'une exemption individuelle)*;* CJCE, 17 janvier 1984, Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB), aff. 43/82 et 63/82, *Rec. p. 19* ; CJCE, 25 octobre 1983,AEG, aff. 107/82, Rec. p. 3151 ; TPICE, 13 janvier 2004, JCB Service c/ Commission CE, aff. T-67/01, points 119 à 133 *Rec. p. II-49* (le TPICE retient que des accords verticaux ou des pratiques concertées visant à fixer directement ou indirectement des prix d'achat ou de vente ou d'autres conditions de transaction sont prohibés par l'article 81, paragraphe 1, sous a), mais juge qu'en l'espèce l'infraction n'est pas établie à suffisance de droit en l'absence d'éléments probants et non ambigus démontrant une fixation ou un encadrement strict des prix de vente au détail et des remises; le pourvoi n'est pas revenu sur la question des prix imposés, CJCE, 21 septembre 2006, JCB service, C-167/04 P, *Rec. p. I-8935*).

14 §107 des lignes directrices.

3.2 La distinction entre ventes actives et ventes passives

La distribution exclusive autorise le fournisseur d'un point de vente à limiter les ventes actives de ce dernier sur des territoires qu'il a concédés en exclusivité à d'autres opérateurs, mais toute restriction des ventes passives mise en œuvre par ce même fournisseur constitue une restriction caractérisée de concurrence. S'il était alors considéré arbitrairement – d'un point de vue technique – qu'un site Internet constitue en toute hypothèse le support de ventes, soit actives, soit passives, une telle solution bouleverserait en profondeur l'activité des opérateurs ayant choisi la distribution exclusive comme stratégie concurrentielle : soit les sites Internet seraient en mesure de concurrencer librement et sans limitation les distributeurs détenant une exclusivité de la part du fournisseur, soit leurs ventes seraient en pratique considérablement restreintes alors même que leur clientèle potentielle, du fait de l'accessibilité des sites Internet à l'ensemble des consommateurs, s'étendrait au-delà du territoire concédé.

A rebours de l'une ou l'autre de ces solutions extrêmes, la Commission européenne considère que constituent des ventes actives par Internet le fait pour les distributeurs de mettre en place sur leur site des actions de promotion ciblées sur une clientèle déterminée, quelles qu'en soient les modalités techniques, la notion de vente passive s'appliquant, pour sa part, aux actions de promotion générale sans lesquelles le détaillant ne pourrait s'adresser à sa clientèle réservée et à la clientèle non réservée à d'autres détaillants, ni effectuer des ventes sur demande spontanée du client (lignes directrices, § 51). L'Autorité de la concurrence a d'ores et déjà eu l'occasion de se prononcer sur la pertinence du maintien de la distinction entre vente active et vente passive dans le cadre de l'avis rendu le 28 septembre 2009 sur la révision du règlement (CE) n°2790/99 et des lignes directrices concernant les restrictions verticales. Une telle définition est en effet cohérente avec la position de l'Autorité de la concurrence et de la Cour de cassation. L'Autorité a ainsi eu l'occasion de préciser « *qu'un site Internet n'est pas un lieu de commercialisation mais un moyen de vente alternatif utilisé, comme la vente directe en magasin ou la vente par correspondance, par les distributeurs d'un réseau disposant de points de vente physiques »*[15]. La Cour de cassation française a retenu la même approche en jugeant que l'ouverture d'un site Internet par un franchiseur n'est pas de nature à violer la garantie contractuelle d'exclusivité territoriale qu'il avait concédée à son franchisé[16].

Surtout, une telle position forge un équilibre adéquat en permettant aux opérateurs de bénéficier des opportunités offertes par le commerce en ligne tout en assurant aux fabricants la possibilité d'adapter les conditions de vente sur Internet de leurs produits aux spécificités de ces derniers. D'une part, les autorités de concurrence permettent ainsi aux sites Internet de concurrencer pleinement les magasins, sous réserve de ne pas enfreindre, par des actions promotionnelles ciblées, les exclusivités octroyées par le fabricant. D'autre part, afin de s'assurer que cette concurrence ne s'exerce pas au détriment du consommateur en remettant en cause la fourniture de certains services en magasin, les fabricants ont la possibilité d'encadrer l'exercice de cette concurrence, en exigeant des distributeurs qu'ils vendent au moins une certaine quantité absolue (en valeur ou en volume) des produits hors ligne (lignes directrices, § 52, c), en convenant avec les distributeurs du paiement d'une redevance fixe pour soutenir leurs efforts de vente hors ligne ou en ligne (§ 52, d), en imposant des normes de qualité pour l'utilisation du site Internet aux fins de la vente de ses produits (§ 54), etc.

15 Voir la décision n° 08-D-25du Conseil de la concurrence du 29 octobre 2008 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle vendus sur conseils pharmaceutiques (paragraphe 63).

16 Arrêt de Cour de cassation du 14 mars 2006 Sté Flora Partner c/ Sté Laurent Portal Rouvelet.

4. L'analyse concurrentielle de l'interdiction de la vente en ligne

Le fabricant qui souhaiterait se réserver à lui-même ou à un autre opérateur qu'il aurait désigné la vente en ligne de ses produits peut soit refuser de vendre le produit à des distributeurs, soit conclure expressément avec un distributeur en ligne une exclusivité de fourniture grâce à laquelle ce dernier sera le seul à vendre le produit. L'examen de ces deux pratiques s'effectue alors sous l'angle des dispositions relatives au refus de vente et/ou clauses d'exclusivité, sur la base de leurs effets sur la concurrence et au terme d'une analyse in concreto. Un fournisseur est ainsi en droit, pour une ou plusieurs références de produits, de refuser d'approvisionner un distributeur, qu'il soit *pure player*, *click&mortar* ou *brick&mortar*, ou de conclure un accord avec un distributeur par lequel il lui accorde une exclusivité de fourniture, pour autant que ce refus de fourniture ou cette exclusivité, par sa durée, la période de l'année à laquelle il se produit, les produits qu'il couvre et la position des opérateurs concernés, ne fausse pas la concurrence.

L'analyse est différente lorsqu'un opérateur souhaite recourir à des distributeurs indépendants pour la vente en magasin mais interdire à ces derniers de vendre en ligne. Comme rappelé supra, l'interdiction à un revendeur agréé membre d'un réseau de distribution sélective, de proposer ses produits sur Internet constitue une restriction par objet si à la suite d'un examen individuel et concret de la teneur et de l'objectif de cette interdiction et du contexte juridique et économique dans lequel elle apparaît, eu égard aux propriétés des produits en cause, cette interdiction n'est pas objectivement justifiée[17]. Cette restriction est d'autant plus grave et dommageable que l'avis de l'Autorité relatif au fonctionnement concurrentiel du commerce électronique montre qu'Internet est un vecteur permettant d'atteindre un nombre élevé de consommateurs, de leur proposer des services spécifiques, le cas échéant à un coût inférieur à celui de la vente en magasin.

Dans certains cas, cependant, une interdiction absolue de vendre en ligne peut apparaître objectivement nécessaire et échapper, sans plus ample examen, à l'interdiction prévue par l'article 101, paragraphe 1, TFUE et ou L.420-1 du code de commerce. Elle peut relever d'une disposition légale prévoyant au travers d'un commandement légitime extérieur aux parties le respect d'une interdiction générale de vendre des substances dangereuses par Internet pour des raisons de sécurité ou de santé publiques. A contrario, au titre de la justification des clauses d'interdiction de vente sur Internet de médicaments qui ne sont pas soumis à prescription médicale et de lentilles de contact, la Cour de Justice n'a pas retenu, au regard des libertés de circulation, les arguments relatifs à la nécessité de fournir un conseil personnalisé au client et d'assurer la protection de celui-ci contre une utilisation incorrecte de produits pour justifier une interdiction de vente par Internet (voir, en ce sens, arrêts du 11 décembre 2003, Deutscher Apothekerverband, C/322/01, points 106, 107 et 112, ainsi que du 2 décembre 2010, Ker-Optika, C-108/09, point 76). Elle n'a pas non plus retenu l'argument relatif à la nécessité de préserver l'image de prestige des produits en cause : « *L'objectif de préserver l'image de prestige ne saurait constituer un objectif légitime pour restreindre la concurrence et ne peut ainsi pas justifier qu'une clause contractuelle poursuivant un tel objectif ne relève pas de l'article 101, paragraphe 1, TFUE* »[18].

Enfin, et plus généralement, les restrictions caractérisées sont admises au bénéfice d'une exemption individuelle au titre de l'article 101, paragraphe 3, TFUE et/ou L.420-4 du code de commerce, si elles sont nécessaires à l'obtention de gains d'efficacité dont une partie équitable est retransmise aux consommateurs. Dans ce cadre, lorsqu'une entreprise mise en cause allègue qu'une pratique donnée

17 Voir en ce sens, les décisions n° 07-D-07 du 8 mars 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle et°12-D-23 du 12 décembre 2012 relative à des pratiques mises en œuvre par la société Bang&Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinéma.

18 CJUE, Affaire C-439/09 du 13 octobre 2011 Pierre Fabre, §46.

engendre des gains d'efficacité actuels ou potentiels, il revient aux autorités de concurrence d'examiner si les arguments et les éléments de preuve invoqués démontrent effectivement l'existence de tels gains d'efficacité et la nécessité de la restriction pour leur obtention, puis de faire le « bilan » concurrentiel de la pratique en cause, entre les effets anticoncurrentiels (eux aussi actuels ou potentiels) qui n'étaient que présumés dans le cadre de l'examen mené au titre de l'article 101, paragraphe 1, TFUE, et les effets pro-concurrentiels démontrés par l'entreprise concernée.

Les nouvelles lignes directrices de la Commission sur les restrictions verticales invitent à approfondir ce type d'analyse en présence d'une demande d'exemption individuelle étayée. Le texte énonce clairement que la présomption d'illégalité est réfragable et qu'une exemption individuelle est possible (§47), contient des développements relatifs aux éventuels effets pro-concurrentiels de telles pratiques, tels que la suppression de la double marge et la lutte contre le parasitisme (§§221, 225 et 226), et invite la Commission à évaluer à suffisance de droit les allégations des entreprises avant de statuer sur une demande (§47).

A ce jour, l'Autorité n'a pas été amenée à consentir une exemption individuelle à un opérateur mettant en œuvre ce type d'interdiction, en l'absence de demande démontrant le progrès économique découlant de cette pratique et le caractère indispensable de la restriction de concurrence pour obtenir cette exemption[19].

5. Le cas de la distribution sélective

Comme indiqué supra, la jurisprudence de la CJUE et la pratique décisionnelle de l'Autorité de la concurrence[20] posent le principe selon lequel les détaillants autorisés à intégrer un réseau de distribution sélective ne peuvent se voir refuser d'avoir une activité de vente en ligne – sous réserve de la disposition d'ordre public déjà mentionnée et de la possibilité donnée aux fabricants de justifier, au cas par cas, l'existence d'une telle interdiction au moyens de gains d'efficacité de nature à promouvoir le progrès technique ou économique tout en réservant aux utilisateurs une partie équitable du profit qui en résulte.

En revanche, les accords de distribution sélective conditionnant l'accès au réseau à l'exploitation d'un point de vente physique et/ou au respect par le distributeur agréé d'un certains nombre de critères sélectifs n'entrent pas dans le champ de l'article 101§1 TFUE ou 420-1 du code de commerce dès lors que ce mode de distribution et les critères sur lesquels il se fonde sont nécessaires eu égard à la nature du produit en cause et que lesdits critères sont objectifs et appliqués de façon non discriminatoire[21]. En tout état de cause, la distribution sélective qualitative bénéficie du régime d'exemption par catégorie si les parts de marché des opérateurs sont inférieures au seuil de 30% défini par le règlement d'exemption et si l'accord en cause ne contient pas de restriction caractérisée. Pour autant, si le fabricant ne respecte pas ces conditions et si les

19 A titre d'illustration, dans le cadre de la décision n°08-D-25 précitée, le Conseil a rejeté l'argument de Pierre Fabre selon lequel cette clause d'interdiction des ventes sur Internet visait à garantir le bien-être du consommateur grâce à la présence physique d'un pharmacien lors de la délivrance du produit. Le Conseil a rappelé à cet égard que les produits cosmétiques ne sont pas des médicaments, que le pharmacien n'est pas habilité à établir un diagnostic et enfin, a considéré que Pierre Fabre ne démontrait pas en quoi la pratique litigieuse était nécessaire pour permettre le système de surveillance intitulé « cosmétovigilance ».

20 Voir en ce sens, les décisions n° 07-D-07 du 8 mars 2007 relative à des pratiques mises en œuvre dans le secteur de la distribution des produits cosmétiques et d'hygiène corporelle et°12-D-23 du 12 décembre 2012 relative à des pratiques mises en œuvre par la société Bang&Olufsen dans le secteur de la distribution sélective de matériels hi-fi et home cinéma.

21 A titre d'illustration, dans la décision n°06-D-28 du 5 octobre 2006 précitée, le Conseil a accepté qu'un des fabricants mis en cause soumette la vente sur Internet de certaines gammes de matériels Hi-fi et Home cinéma hautement techniques à l'attestation par les clients d'une écoute préalable de ces produits chez un distributeur agréé et au bénéfice de conseils personnalisés pour leur installation (décision n°06-D-28, §35).

accords en cause avec les distributeurs entraînent un effet sensible sur la concurrence[22], alors le bénéfice de l'exemption sera retiré (lignes directrices sur les restrictions verticales, §176).

Par ailleurs, s'agissant des critères susceptibles de conditionner la vente en magasin et la vente en ligne, les lignes directrices indiquent que *« la Commission considère comme une restriction caractérisée toute obligation visant à dissuader les distributeurs désignés d'utiliser Internet pour atteindre un plus grand nombre et une plus grande variété de clients en leur imposant des conditions pour la vente en ligne qui ne sont pas globalement équivalentes à celles qui sont imposées dans un point de vente physique* » (§ 56). Les conditions de vente en ligne et hors ligne n'ont pas à être obligatoirement identiques mais elles doivent poursuivre les mêmes objectifs et aboutir à des résultats comparables. Enfin, la différence entre elles doit être justifiée par la nature différente de ces deux modes de distribution.

Les lignes directrices donnent à cet égard différents exemples : « Par exemple, pour empêcher les ventes à des distributeurs non agréés, un fournisseur peut exiger de ses distributeurs désignés qu'ils ne vendent pas plus d'une certaine quantité de produits contractuels à un utilisateur final individuel. Une telle exigence peut devoir être plus stricte pour les ventes en ligne s'il est plus aisé pour un distributeur non agréé d'obtenir les produits par Internet. De même, elle peut devoir être plus stricte pour les ventes hors ligne s'il est plus aisé d'obtenir les produits dans un point de vente physique. Pour garantir la livraison des produits contractuels en temps voulu, un fournisseur peut exiger que les produits soient livrés immédiatement, dans le cas de ventes hors ligne. Étant donné qu'une exigence identique n'est pas possible dans le cas de ventes en ligne, le fournisseur peut imposer certains délais de livraison réalistes pour de telles ventes. Des exigences spécifiques peuvent devoir être formulées concernant un service d'aide après-vente en ligne, afin de couvrir les frais de renvoi exposés par les clients et pour l'application de systèmes de paiement sécurisés » (§ 56).

La pratique décisionnelle du Conseil et de l'Autorité de la concurrence et la jurisprudence française sont cohérentes avec l'analyse au cas par cas préconisée par ces dispositions.

A titre d'exemple, s'agissant des clauses visant à limiter le nombre d'articles achetés lors d'une commande sur Internet mises en place par certains fabricants de produits pharmaceutiques. Le Conseil a relevé que de telles clauses ont pour but d'éviter que ne se développe un commerce parallèle des produits en cause mais que cette exigence n'existe par pour la vente dans les points de vente physiques. Le Conseil a néanmoins accepté les clauses par lesquelles le distributeur s'engage à refuser toute commande de produits qui serait anormale (en périodicité ou quantité) pour un consommateur final et/ou à informer le fabricant lorsqu'un acheteur effectue un nombre de commandes ne correspondant pas à une demande normale pour un consommateur final ou à refuser toute commande supérieure à 5 unités identiques[23].

Un deuxième exemple concerne la clause par laquelle certains fabricants de produits cosmétiques exigeaient de leurs distributeurs la mise en place d'un site exclusivement réservé à la vente de produits vendus sur conseil pharmaceutique. Constatant que, par cette exigence, les fabricants auraient obligé les distributeurs qui ne vendent pas exclusivement des produits dermo-cosmétiques sur conseil pharmaceutique, à créer un site dédié à ces seuls produits, ce qui aurait multiplié leurs coûts de création de sites, alors même que certains produits d'hygiène courante, telles que des brosses à dents, sont également vendus en officine et en parapharmacie, le Conseil a exprimé des préoccupations de concurrence

22 Selon la jurisprudence de la Cour, de tels accords « *influencent nécessairement la concurrence dans le marché commun »* (CJCE 25 octobre 1983, *AEG-Telefunken/Commission, 107/82, Rec. p. 3151, point 33*). Dans l'affaire C-439/09 du 13 octobre 2011 *Pierre Fabre Dermo-Cosmétique*, la Cour de Justice a ajouté que de *« tels accords sont à considérer, à défaut de justification objective, en tant que «restrictions par objet »* (§ 39).

23 Cons.conc. n°07-D-07, §112 et suivants.

concernant cette dernière. Par conséquent, les fabricants mis en cause ont proposé d'exiger non plus un site mais un espace dédié dans le site, soit des « pages dédiées » dans le cadre d'une boutique virtuelle consacrée aux produits dermo-cosmétiques vendus sur conseil pharmaceutique[24].

Un troisième exemple concerne le conseil d'un diplômé en pharmacie. La Cour d'appel de Paris, dans son arrêt du 31 janvier 2013, a jugé que ce conseil au moment de la vente des produits ne pouvait être justifié par la sécurité des consommateurs et qu' « aucun élément n'établit qu'une information et un conseil personnalisé de qualité lors de l'achat des produits ne puissent être organisée en ligne », un site internet étant notamment « susceptible d'être organisé comme une vitrine de présentation et d'information sur les produits, voire avec utilisation de films, et permet une interaction entre le fabricant et le consommateur, au travers par exemple d'une hot line destinée à assurer des conseils personnalisés par une personne diplômée en pharmacie ». Elle a également relevé que d'autres sociétés concurrentes assuraient le respect de la qualité des produits et un conseil personnalisé au client via internet, conciliant ainsi « la préservation de la qualité et de l'usage des produits et » « la vente en ligne desdits produits par les distributeurs agréés ».

En définitive, le cadre juridique constitué par le règlement d'exemption sur les restrictions verticales, les lignes directrices afférentes et la pratique décisionnelle offrent aux fabricants de biens de luxe, d'expérience ou de confiance, la flexibilité nécessaire pour mettre en place un mode de distribution approprié aux spécificités de leurs produits. Il n'apparait pas nécessaire de définir, pour la vente de ces produits, des règles de concurrence spécifiques ou d'aller au-delà d'une application au cas par cas.

6. Les restrictions relatives à la publicité et au référencement sur les places de marché

Il convient d'examiner la faculté qu'ont les fabricants d'encadrer la publicité effectuée sur Internet par leurs distributeurs d'une part (a) et le référencement sur les places de marché des sites de leurs distributeurs, d'autre part (b).

6.1 Sur la possibilité pour les fabricants de contrôler la publicité sur Internet de leurs distributeurs

6.1.1 La faculté offerte aux fabricants de contrôler la publicité non tarifaire ainsi que l'établissement de liens publicitaires mis en place par leurs distributeurs sur Internet

Dans la décision n°06-D-24 précitée (§88 à 90), le Conseil de la concurrence a estimé que le fait pour un fabricant de soumettre la publicité non tarifaire des détaillants à son autorisation préalable n'apparaît pas contraire aux règles de concurrence, dès lors que ce contrôle repose sur le souci légitime de protéger la renommée de la marque et du réseau de distribution. Le Conseil avait d'ores et déjà admis une règle similaire, dans l'affaire dite de la porcelaine de Limoges (décision 99-D-78 du 15 décembre 1999), « *dès lors qu'elle visait la protection de la marque et qu'il n'était pas démontré que sous couvert de la protection, elle aurait eu pour but de permettre aux fournisseurs d'empêcher les campagnes publicitaires portant sur les prix* ». Dans cette décision, le Conseil s'était référé à la décision de la Commission européenne 92/428/CEE, du 24 juillet 1992, relative à une procédure d'application de l'article 85 du traité CEE au système de distribution sélective des parfums Givenchy (JOCE L236, p.11). De même, le Conseil a considéré que dès lors qu'un contrôle de l'usage publicitaire de la marque est admis, sous réserve qu'il soit effectué dans le souci de protéger la renommée de la marque et du réseau de distribution. Dans la même mesure, un contrôle de l'établissement de liens publicitaires sur Internet vers ou depuis des sites marchands ou non marchands doit être admis (Décision n°06-D-24, §§ 91 et 92)[25].

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24 Cons.conc. n°07-D-07, §100 et suivants.

25 Une solution identique a également été adoptée dans le cadre de la décision n°07-D-07 précitée (§124 et suivants).

6.1.2 L'absence de faculté pour les fabricants de contrôler le référencement naturel des sites Internet de leurs distributeurs sur des moteurs de recherche

En revanche, le Conseil a considéré que la faculté offerte aux fabricants de contrôler la publicité non tarifaire ainsi que l'établissement de liens publicitaires mis en place par leurs distributeurs ne s'appliquait pas au simple référencement par des moteurs de recherche dits « naturels », opéré de manière automatique par des robots qui sillonnent et analysent en permanence les contenus disponibles sur Internet, sans qu'aucune démarche particulière ne soit entreprise par les distributeurs eux-mêmes. Ces référencements et les liens qui en découlent ne font en effet que renvoyer vers les sites des distributeurs agréés du fabricant dont ce dernier peut vérifier le contenu. Dès lors, exercer un tel contrôle sur les référencements « naturels » excède ce qui est nécessaire pour assurer la protection de la marque et du réseau et porterait atteinte de manière excessive à la liberté commerciale du détaillant en freinant de manière injustifiée ses possibilités de ventes passives (Décision n°06-D-24, §§ 93 à 96).

6.2 Le référencement sur les places de marché

Certains fabricants refusent que les sites de leurs distributeurs agréés soient présents sur des sites de « *place de marché* ». À cet égard, dans la décision n° 07-D-07 précitée, le Conseil a indiqué qu'un fabricant pouvait valablement refuser d'agréer les sites de mise en relation car ces plateformes n'apportaient pas, en l'espèce, de garanties suffisantes concernant la qualité et l'identité des vendeurs, ce qui pouvait faciliter des reventes illicites hors réseau ou la vente de produits contrefaits et nuire ainsi à l'image du réseau concerné. Cependant, le Conseil a également reconnu « *avec satisfaction* » que les plateformes avaient la « *capacité […] de satisfaire aux critères qualitatifs des produits* », par exemple par la création de boutiques virtuelles réservées aux vendeurs agréés, et qu'à cet égard au moins deux fabricants avaient accepté le principe d'une vente de leurs produits sur ce type de sites dès lors que les critères qualitatifs conditionnant la vente sur Internet de leurs produits étaient respectés[26].

Au sujet de ces plateformes tierces, les lignes directrices indiquent que « le fournisseur peut exiger que ses distributeurs ne recourent à des plateformes tierces pour distribuer les produits contractuels que dans le respect des normes et conditions qu'il a convenues avec eux pour l'utilisation d'Internet par les distributeurs. Par exemple, si le site Internet du distributeur est hébergé par une plateforme tierce, le fournisseur peut exiger que les clients n'accèdent pas au site du distributeur via un site qui porte le nom ou le logo de la plateforme tierce » (§ 54). Comme précisé supra, au § 56, les lignes directrices précisent cependant que « [les conditions imposées à la vente en ligne] doivent poursuivre les mêmes objectifs et aboutir à des résultats comparables [à la vente hors ligne] et que la différence entre elles doit être justifiée par la nature différente de ces deux modes de distribution ». Enfin, une telle interdiction, si elle venait à restreindre la concurrence sur les marchés concernés, devrait être nécessaire et proportionnée à l'objectif poursuivi, qu'il s'agisse du respect de l'image de marque ou de la prévention de la vente de produits contrefaits ou vendus hors-réseau.

En définitive, les fournisseurs peuvent donc licitement contrôler ou limiter les efforts effectués par leurs détaillants pour faire la publicité de leur produit sous trois conditions. La première est que ce contrôle ne doit pas limiter la concurrence, deuxièmement il doit poursuivre un objectif légitime et enfin il doit être équivalent aux contrôles opérés en magasin physique. Seule une approche in concreto de ces dispositifs pour en apprécier la conformité vis-à-vis de ces règles apparaît alors légitime.

[26] Cons. Conc. n° 07-D-07, § 104 et suivants.

FRANCE

(English version)

1. Introduction: E-commerce as a factor in encouraging competition

The Autorité de la concurrence has fairly extensive experience in analysing the relationship between e-commerce suppliers and distributors.

It has adopted thirty or so decisions and opinions covering vertical restraints, some of which specific to e-commerce (selling online)[1], and contributed to the European Commission's public consultation concerning the revision to exemption regulation (EC) no. 2790/99[2], resulting in the adoption of regulation no. (EU) 330/2010.

The Autorité also devoted a sector inquiry into the way competition works in e-commerce[3], collected from data which enabled it to understand how online trading has developed. E-commerce has experienced a particularly swift growth in France in recent years. Between 2008 and 2012, the volume of e-commerce business more than doubled. It currently represents slightly more than 7% of retail trade (outside the food and services sectors).

This sector inquiry explains that the development of e-commerce is the result of several factors. Firstly, the number of consumers who make purchases via the internet is increasing regularly. Between 2009 and 2011, it increased by 20%, from 25 million to 30 million people. The range of sectors involved in e-commerce subsequently expanded. Apart from the activities initially developed via e-commerce (tourism, home computing, cultural products), clothing and textiles (11% of online sales), home appliances (6% of online sales) or even food (3% of online sales) internet sales recently experienced a significant growth. Finally, the range of products offered via the internet is increasing exponentially as witnessed by the number of e-commerce sites which virtually tripled between 2007 and 2011, so that in 2011 they exceeded 100,000 sites (117 500 in 2012).

The sector inquiry says however that e-commerce does not have the same dynamic in every sector. The Autorité de la concurrence decided to perform a more thorough analysis of the home electrical appliances sector and cosmetics sold on pharmaceutical and perfumery advice and it had noticed that home

1 The Conseil and subsequently the Autorité de la concurrence analyzed vertical restraints in internet trading in decision no. 06-D-24 of 24 July 2006 concerning the distribution of watches marketed by Festina France, as well as decision no. 06-D-28 of 5 October 2006 concerning the practices implemented in the selective distribution sector for hi-fi and home cinema equipment, decision no. 07-D-07 of 8 March 2007 concerning the practices implemented in the cosmetics and personal care products sector, no. 08-D-25 of 29 October 2008 concerning the practices of the company Pierre Fabre in the same sector as that of the above-mentioned decision and no. 12-D-23 of 12 December 2012 concerning the practices implemented by the company Bang & Olufsen in the selective distribution sector for hi-fi and home cinema equipment.

2 Notice of 28 September 2009 concerning the review of regulation (CE) no. 2790/99 and guidelines covering vertical restrictions.

3 Notice no. 12-A-20 of 18 September 2012 concerning how competition operates in the e-commerce sector.

electrical appliances were heavily in demand over the internet whereas, in the case of the other two sectors, the online market share was particularly small (less than 2%). The development of online sales in a specific sector could be connected with several factors, especially the existence of "pure players" or of those active on a national scale with the potential and desire to develop e-commerce sites.

The Autorité de la concurrence proceeded to compare online prices and shop prices in each of the sectors mentioned above. It emerged that the internet prices were much lower overall than the shop prices. This finding can be attributed to the intense competition on the internet (reinforced by the existence of price comparison tools, the ease of access to different sellers, the existence of possible new competitors arriving on the internet, etc.), as well as the fact that e-commerce sellers have relatively low distribution costs compared to physical distributors. This last factor must not be considered an immutable given, however. In fact, the opinion determined that certain costs that are specific to internet sites, such as the cost of listing the items (paid listings and/or optimisation of natural listings), could be subject to considerable increases.

With respect to electrical home appliances, the comparison covered a number of products: televisions, camcorders, digital cameras, DVD players, digital mp3 players, dishwashers, microwave ovens, washing machines, refrigerators, multifunction printers and laptop computers. The Autorité collected the average price data per distribution channel for each of these products (online/in the shop) for a sample of the best-selling items. The Autorité's study concluded that on average, the internet prices were lower than average shop prices for all of the products surveyed. The extent of the differences varied between products. The internet price advantage could be estimated at 10% for items such as televisions or digital cameras. For white goods and grey goods, the price differentials varied. They were less than 5% for washing machines, refrigerators or laptop computers, and 10%, or even more, for dishwashers, microwave ovens and multifunction printers.

As for alternative healthcare products or luxury perfumes and cosmetics, the comparisons made covered 128 alternative healthcare products and 114 perfumes or luxury cosmetics. In most of the cases studied of alternative healthcare products, , the average online price was lower than the average price in the shop, with the difference most often being of 5 to 15%. On average, for all of the product lines studied, the average online price was 8% to 10% lower than the average price in the shop. As for luxury perfumes and cosmetics, the internet price was very similar to the shop price, in particular because of the fact that the main internet sites are operated by the large national chain stores that are active in this sector (Sephora, Marionnaud, etc.) and these often employ similar pricing in their shops as on their sites.

These results, in the Autorité's sector inquiry, cover price comparisons that do not include possible delivery charges invoiced by e-commerce sellers. The question of taking these delivery costs into account, even though it is debatable whether they should be included, does not affect the price advantage via the internet, even though it could restrict the extent of this advantage, depending on the delivery method used as the standard (see §§61-78 of the opinion). Indeed, the Autorité concluded in this sector inquiry that if delivery costs are taken into account in this comparison, the price advantage of internet is relatively smaller. First, it is smaller for home deliveries than for collection points. Second, it is very limited for bulky items such as washing machines but the advantage remains significant for general consumption products such as televisions, digital cameras, camcorders and music players, in a bracket from 0 to 5% for microwaves, printers, laptops and DVD players. Finally, the study shows that the higher the amount of the shopping bag is, the lesser impact delivery costs have, which even can, above a certain amount, be insignificant, and, therefore, allow the buyer to fully benefit from the price advantage of internet.

This sector inquiry underlines that e-commerce also has the advantage of offering a wider range of products. For home electrical appliances, for instance, several "click & mortar" distributors, i.e. those with physical point(s) of sale and an e-commerce site, explained that their internet offers were complementary

to those already offered in their shops. In general, traders mentioned the greater ease with which they could offer a new product on the internet rather than in-store. In fact, only physical shops have to deal with the important constraint of space restrictions and the cost of a display area. Furthermore, the existence of such internet marketplaces as Amazon, Pixmania, Cdiscount, Rueducommerce, etc. favours the variety of choice offered to purchasers.

Finally, the sector inquiry hails the multiple comparison tools offered to consumers by the e-commerce. These tools can be useful to and appreciated by them, as well as promoting competition in the marketplace. There are price comparison sites in numerous sectors, and these are used by more than half of the consumers who buy goods over the internet. Furthermore, comparisons between different models of a specific type of product are made possible on certain sites, whether specialized or trading. Some sites offer to compare the characteristics of different products, others collect and publish consumer opinions on goods offered for sale.

The Autorité notices that some sellers perceive the development of e-commerce as a threat, especially with respect to the development of physical shops or through free riding by internet sellers.

Some sellers are therefore worried by the fact that the traditional non-internet sales channels are losing ground in favour of e-commerce or that the growth of certain sectors will occur mainly, or even exclusively, over the internet. According to the Autorité, if this really is the case, it still may not be negative from the collective point of view, since it illustrates, above all, that the internet offer is better adapted to certain consumer needs compared with the “traditional” offer. Furthermore, even though e-commerce has experienced strong growth and continues to do so, the share of sales that it represents must be put into perspective. It only represented less than one-twelfth of retail trade in 2012. In the majority of sectors, the emergence and growth of e-commerce does not affect the viability of physical shops, just as it is perfectly lawful for the latter to extend their activity to the internet in order to benefit from this expanding channel. Furthermore, the risk that physical businesses will disappear is all the more limited since they have certain structural advantages, such as the immediate availability of products (no waiting for delivery) and the opportunity for consumers to touch and/or try on or test the products.

The Autorité mentions that some of those involved are also worried about potential free riding by e-commerce sites, and this is the case notably with the “pure players”, i.e. those who have no physical distribution network. According to these traders, pure players benefit indirectly from investment in terms of advice and services provided by the physical shops and make little contribution to enhancing the value of the products and providing customer advice, thus enabling them to benefit from reduced costs and offer particularly attractive selling prices to consumers. The information collected by the Autorité is an invitation to remain cautious as to the reality of this threat in the absence of specific quantitative data communicated by those involved that would make it possible to check the actual situation in a specific distribution network. The comprehensive information gathered showed that even though some consumers take advice in physical shops before purchasing online, the opposite phenomenon also exists, whereby consumers get their information from the internet before purchasing in an actual shop. More specifically, according to the *FEVAD – Médiamétrie/NetRatings* barometer on French net-surfers’ purchasing behaviour, published in May 2010, 53% of net-surfers prepared for their purchase on the internet before buying in-store, and conversely 31% of net-surfers prepared for their purchase in-store before buying it on the internet. Furthermore, trading sites have progressively developed numerous advisory tools before purchasing (putting people in touch with an advisor via hotlines or a chat room, providing documentation about the products offered for sale, etc.) or adding value to the products. It is thus advisable to be particularly cautious with respect to the reality of the free riding phenomenon denounced by some of those active in the market.

Finally, the Autorité concludes that e-commerce appears to be a factor that encourages competition, especially in terms of price and diversity of choice for consumers. The threats created by e-commerce according to some of those involved in trading, especially free riding by pure player sellers, must be put into perspective. The advent of e-commerce especially requires traders to be more adaptable. They can themselves invest in this new distribution channel and/or innovate so as to differentiate themselves and create added value for consumers.

2. The legal framework applicable to restrictions in online sales

2.1 A legal framework common to the entire relationship between suppliers and distributors

There is currently no legal framework specific to the analysis of vertical restraints relating to online sales. The vertical restraints liable to affect European trade, whether in respect of distribution via the internet or distribution at actual points of sale, are subject to (EU) exemption regulation no. 330/2010 which came into force on 1 June 2010. The national competition law, for the application of which the European exemption regulation constitutes a "useful analytical guide", also does not make specific provision for vertical restraints applied to internet distribution.

It is true that each distribution channel has its own specific characteristics. Selling in a shop enables physical contact between customer and seller and a certain way of presenting products to consumers (trying items on/out in the shop, for instance). Online selling, on the other hand, enables potential purchasers to access the seller's site 24 hours a day to make their purchases or to save travel costs, especially for comparing prices. It also makes it possible to get specific advice that is not always provided in a shop, such as, for example, the opinions of those who have already purchased the product in question or – depending on the type de product and the distributors – offering a wider variety of choice than is available in-store.

Nevertheless, the creation of a legal framework specific to the vertical restraints applicable to online selling does not appear to be desirable. Firstly, unless it remains very general, such a legal framework would risk preventing decision-making practice from adapting to the specific features which each individual case might present with respect to vertical restraints applied to the internet, especially when taking account of the swift changes that are happening to online selling.

Secondly, the existing similarities and overlaps between, on the one hand, sales at physical points of sale and, on the other, online sales, are numerous. Thus, whether it is a traditional or an internet distribution channel, the distribution process has identical stages (manufacturing, wholesaling, retailing) and those involved (manufacturers, wholesalers, distributors, retailers, customers) are also identical. Furthermore, in most business sectors, the majority of operators are already present in both channels and define the distribution strategies (selective distribution, exclusive distribution, etc.) and sales policies (pricing policies, promotions, communications, etc.) taking both channels into account. Vertical restraints can therefore be implemented simultaneously in both channels, without distinction. Finally, although vertical restraints may be specific to certain channels (such as the restrictions covering the sale of products in the marketplace or those covering the purchase of a keyword), they are nevertheless based on shared objectives in the various channels used by the manufacturer for the resale of his/her/its products, whether legal or otherwise.

Thus the creation of a legal framework specific to vertical restraints for online distribution does not appear to be desirable. It is even less so since the decision-making practice of the European Commission and the case law of the Court of Justice of the European Union (CJUE), the "soft law" issued by the

Commission[4], as well as the decision-making practice of the Autorité de la concurrence[5] are useful in specifying the methods for applying these general rules to internet distribution.

Thus, the Autorité de la concurrence considers that exemption regulation no. 330/2010 supplemented by the CJUE case law and the Commission's guidelines, in line with the major balancing factors of French decision-making practice and case law, tend to provide the legal security that the operators need.

2.2 A balance between freedom of organisation of distribution and respect for free competition

All manufacturers are free to arrange for the distribution of their products in whatever way they see fit, subject, however, to the distribution method chosen not having the purpose or effect of harming the competition.

In this respect, the Autorité de la concurrence's opinion 12-A-20 concerning the operation of competition in selling-commerce has made it possible to observe a development in the selective distribution of products formerly distributed in the traditional way. This method of distribution guarantees to manufacturers that their products will only be resold by distributors that they have chosen, thus allowing them better control over the sales network for their products. With respect, in particular, to internet selling, the opinion provides several different criteria used by manufacturers to guarantee that the internet distribution of their products complies with their general selling policy. These criteria may consist, for instance, in requiring distributors to own one or more physical points of sale, sometimes for a minimum period of time before the products are made available for sale, compliance with certain technical features and graphics specifications for the internet site and certain restrictions on advertising (prior consent for the site advertisements, checking or banning the purchase of keywords for listing on search engines), or even banning the presence of the internet site in marketplaces.

To analyse this behaviour, competition law needs to define a balancing point between the manufacturer's right to arrange the sale of its products on the internet in the way that it wishes and a ban on restrictions that would place excessive limitations on the possibility of internet selling of products purchased from a manufacturer. In this respect, under the opinion issued by the Autorité de la concurrence on 28 September 2009 concerning the revision of regulation (EC) no. 2790/99 and guidelines for vertical restraints, the Autorité made a point of "*welcoming the architecture adopted by the Commission in its draft guidelines, which has learned from the issues encountered by the NCAs in their decision-making practice, and which is designed to enable a consistent deployment of the various distribution strategies liable to be implemented within the single market, starting with selective distribution* (…)" .

This architecture is based on three fundamental principles. Firstly, in the absence of so-called hardcore restrictions (see below), distribution agreements containing the restrictions frequently encountered in traditional distribution, such as exclusive distribution or supply and exclusivity of the customer base or supply, benefit from an exemption by category when operators' market share is less than that fixed under article 3 of regulation 330/2010, whether with respect to in-store or online distribution, i.e. 30% of each of the markets defined by the regulation. If this is not the case, the individual exemption of such agreements must be based on their potential or proven effects on competition.

Secondly, the guidelines define different requirements of manufacturers with respect to the qualities required for online selling which do not constitute restrictions on competition and others corresponding to a ban or a restriction on passive sales or a restriction on active and passive sales in the context of a selective distribution network, which are described as hardcore restrictions on competition. Thus,

4 Guidelines on vertical restraints (2010/C 130/01).

5 See opinion no. 12-A-20 concerning the operation of competition in e-commerce.

according to these guidelines, it is permissible for suppliers to require retailers who wish to incorporate into their selective distribution network the operation of a physical point of sale[6] ("traditional shop") and the achievement of a certain amount of sales (as an absolute value) in-store, taking into account the possible need for specific services that are exclusive to selling in shops[7]. Similarly, to permit online sales, manufacturers can adopt specific criteria that are different from those governing selling "in-store"[8], since they are pursuing the same objective as those of the in-store sales and allow comparable results to be achieved[9]. Conversely, the ban imposed on an approved dealer for selling its products online[10], the ban imposed on customers of a different territory to consult the online site or sell them products, restricting the share of sales carried out online as opposed to in-store, fixing prices that are higher for products intended for online selling rather than in the shop constitute bans or restrictions on passive sales and, consequently, hardcore restrictions on competition in light of regulation no. (EU) 330/2010 of the Commission of 20 April 2010 on the application of article 101, paragraph 3 of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices. Similarly, requiring an online dealer to comply with conditions which do not have the same objectives as those required for in-store selling or which would not produce comparable results constitutes a hardcore restriction, for the same reason.

The balance point recommended by the European Commission is thus based around a "mix" between shop sales and online sales, which could be called "*bricks and clicks"* or "*clicks and mortar*".

Thirdly, the competition authorities retain an assessment option on a case-by-case basis for each specific situation. On the one hand, restrictions considered to be anti-competitive with respect to their purpose could be the subject of a requirement for individual exemption, applied to efficiency gains resulting from the ban on online selling or the limitation thereof. On the other hand, the guidelines specify that "*when the product's characteristics do not require selective distribution or the application of criteria, such as, for example, the obligation for distributors to have one or more physical points of sale (…) such a system does not generally produce sufficient efficiency gains to compensate for a significant reduction in competition between brands. In the case of significantly damaging effects on competition, the benefit of the exemption by category will probably be withdrawn"* (§176 of the guidelines).

In the end, the exemption regime defined by the Commission, in accordance with the practices of the national competition authorities, establish safety areas that enable operators, as long as they comply with certain conditions that can be added to the market share thresholds determined under article 3 of regulation 330/2010, to organise their distribution network, and especially online selling, without adversely affecting economic efficiency and the opportunities offered by e-commerce for businesses, consumers and jobs.

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6 See also above-mentioned decision no. 06-D-24 of the Autorité de la concurrence.

7 Other permitted restrictions include the presentation on the site of links to other sites or to the manufacturer, the payment of a fixed fee and banning advertising targeted at customers in a particular territory exclusively assigned to another distributor.

8 See decisions no. 06-D-28 and no. 07-D-07.

9 Other permitted restrictions include the presentation on the site of links to other sites or to the manufacturer, the payment of a fixed fee and banning advertising targeted at customers in a particular territory exclusively assigned to another distributor.

10 See, in this respect, decisions no. 07-D-07 of 8 March 2007 concerning practices implemented in the cosmetics and personal care products distribution sector and decision no. 12-D-23 of 12 December 2012 concerning practices implemented by the company Bang & Olufsen in the sector for the selective distribution of hi-fi and home cinema equipment.

3. Analysis of restrictions in online sales

3.1 General principles of analysis

Vertical restraints, whether relating to online or in-store selling, are analysed from the point of view of their effects on competition. In the case of most vertical restraints, such as the various exclusivity agreements, this examination of the effects requires a concrete analysis of the restrictions under consideration and the position of those involved as well as the relevant products, taking into account the period covered by the agreement and, where applicable, the time of year when it is implemented, the exclusive nature or otherwise of the practice under review, the type of products covered (the existence or otherwise of a particular brand image), the market shares and the negotiating power of the operators in question (etc.), with the aim being mainly to assess to what extent a reduction in intra-brand competition is made less probable due to strong, inter-brand competition being maintained. It is assumed that in the absence of a hardcore restriction, the agreements entered into by operators having less than a 30% market share in each of the markets defined by the regulation fulfil the conditions laid down in article 101, paragraph 3 of the Treaty.

Other vertical restraints, especially those that are the equivalent of a ban or restriction on passive sales or active and passive sales to consumers within a selective distribution network, are considered hardcore restrictions by the European regulation on the exemption of categories of vertical agreements. Therefore, making online sales subject to compliance with criteria which are not generally equivalent to those introduced for in-store sales, i.e. those which do not pursue the same objectives as those introduced for in-store sales and/or which do not lead to the same results, is equivalent to restricting the development of online sales and thus the development of passive sales[11].

The guidelines specify that it is highly likely that such restrictions violate article 101§3 TFEU.

Following a preliminary question on whether or not a hardcore restriction such as a general and absolute ban by a manufacturer against its authorized distributor also constitute a restriction by object, the CJUE held in its decision of 13 October 2011[12] that "article 101, paragraph 1, TFUE must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified." Fixing resale prices by the manufacturer also amounts to a restriction by object, according to established and longstanding caselaw[13].

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11 See decisions 07-D-07 of 8 March 2007on the sector of the distribution of cosmetics and personal care products and 12-D-23 of 12 December 2012 on the sector of the selective distribution of hi fi and home cinema equipment.

12 CJUE, Pierre Fabre, 13 October 2011.

13 CJCE, 3 July 1985, SA Binon & Cie vs. SA Agence et messageries de la presse, case 243/83, *Rec p. 2015* (individual exemption of restriction by object)*;* CJCE, 17 January 1984, Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB), case 43/82 and 63/82, *Rec. p. 19* ; CJCE, 25 October 1983,AEG, case 107/82, Rec. p. 3151 ; TPICE, 13 January 2004, JCB Service vs. Commission CE, case T-67/01, paragraphs 119 to 133 *Rec. p. II-49* (the TPICE said that vertical agreements or concerted practices directly or indirectly fixing purchase or resale prices are prohibited by article 81, paragraphe 1, a), but held that there was no violation in the absence of supporting evidence that the fixing of or the strict set of rules

Finally, whether they are accused of implementing a restriction by object or a restriction by effect whose effects are to restrict competition, the parties involved retain the option of alleging efficiency gains, especially under article 101§3 TFEU and/or L.420-4 of the French Code of Commerce. These efficiency gains, in the case of online sales, can, inter alia, refer to a "genuine" [14] risk of free riding on offers of advice and other "add-on" services offered by sales staff in shops, especially in the case of new or complex products that are difficult to use and for which an obligation of promotion and service, which would take the place of the vertical restraint in question, is impossible in practice. In its guidelines, the Commission also mentions "the certification free riding" and the search by the manufacturer, for a "uniformity" and "quality standards" that justify selective distribution and a franchise.

Furthermore, as stated above, the guidelines permit manufacturers to make the internet sales of their products subject to the operation of one (or more) physical point(s) of sale on the one hand, and compliance with certain selection criteria which constitute an adaptation of those planned for in-store selling, on the other. The guidelines also indicate that "*where the product characteristics do not require selective distribution or the application of criteria, such as, for example, the obligation for distributors to have one or more physical points of sale* (…) *such a system does not generally contribute sufficient efficiency gains to compensate for a significant reduction in intra-brand competition. Where there might be significantly damaging effects on competition, the benefit of the exemption by category will probably be withdrawn*" (§ 176). As an illustration, in its above-mentioned opinion 12-A-20, the Autorité de la concurrence had thus insisted on a reminder that compliance with the rules of competition with respect to the condition of owning a physical point of sale is not absolute. In fact, if, in view of special circumstances applicable to a case, this condition had tangible effects on competition by restricting the emergence of online sales, for example if the installation of new points of sale were to be difficult to implement and if the products in question had, either individually or cumulatively, an attractiveness or a market share making their listing critical for the viability of an internet site, this would only be valid if it was both necessary and proportionate with respect to the features of the product in question (opinion 12-A-20, § 330 ff.).

3.2 The distinction between active sales and passive sales

Exclusive distribution authorises the supplier of a point of sale to restrict active sales from that point of sale on territories that it has assigned exclusively to other operators, but any restriction on passive sales implemented by the same supplier constitutes a hardcore restriction on competition. If it were then to be considered arbitrarily – from a technical point of view – that an internet site internet constitutes a hypothetical sales medium, whether active or passive, such a solution would totally upset the activity of operators who had chosen exclusive distribution as a competition strategy. Either the internet sites would be able to compete freely and unrestrictedly with the distributors being granted exclusivity by the supplier, or their sales would, in practice, be considerably restricted even though their potential customer base would extend beyond the territory granted, due to the accessibility of internet sites to all consumers.

Notwithstanding these two extreme solutions, the European Commission considers that distributors placing promotions on their site aimed at a particular customer base constitute active internet sales, regardless of the technicalities, with the concept of passive sales, for its part, applying to general promotions without which a retailer could not communicate with its customer base reserved or not reserved for other retailers, nor could it make sales in response to a spontaneous customer request (guidelines, § 51). The Autorité de la concurrence recently had the opportunity of issuing a decision concerning the relevance of maintaining the distinction between an active sale and a passive sale under the opinion issued on 28 September 2009 concerning the revision of regulation (CE) no. 2790/99 and the guidelines concerning

regarding retail prices and discounts; the judicial review didn't touch on the question of fixed prices, CJCE, 21 September 2006, JCB service, C-167/04 P, *Rec. p. I-8935*).

14 §107 of the guidelines.

vertical restraints. Such a definition is, in fact, consistent with the position adopted by the Autorité de la concurrence and the French Cour de cassation. The Autorité took the opportunity to specify "*that an internet site is not a marketing place but an alternative selling resource used, like direct in-store sales or mail order selling, by the distributors of a network that has physical points of sale" [15]*. The French Cour de cassation took the same approach when it judged that the opening of an internet site by a franchisor is not of such a nature as to breach the contractual warranty of territorial exclusivity that it had granted to its franchisee[16].

Above all, such a position forges an adequate balance by enabling operators to benefit from the opportunities offered by e-commerce while offering manufacturers the option of adapting the conditions of sale for their products via the internet to the specific requirements thereof. On the one hand, the competition authorities thus enable internet sites to compete fully with the shops, subject to not infringing, through targeted promotions, any exclusivity granted by the manufacturer. On the other hand, in order to ensure that such competition is not exercised to the detriment of the consumer by challenging the provision of certain in-store services, manufacturers have the opportunity of restricting the exercising of this competition, by requiring distributors to sell at least a certain absolute quantity (in terms of value or volume) of products in their retail outlets (guidelines, § 52c), by agreeing with the distributors on the payment of a fixed fee to support their shop-based or online sales drives (§ 52, d), by imposing quality standards for the use of the internet site for the sale of its products (§ 54), etc.

4. Competition analysis of online sales ban

A manufacturer that wishes to reserve online sales for itself or another designated operator can either refuse to sell the product to distributors or enter into an exclusive supply contract with an online distributor as a result of which that distributor becomes the only one selling the product. An examination of these two practices can then take place in the light of the provisions concerning a refusal to sell and/or exclusivity clauses, based on their effects on competition and once a case-by-case analysis has been carried out. A supplier is thus entitled, for one or more product lines, to refuse to supply a distributor, whether the latter is a *pure player*, *clicks & bricks* or *bricks & mortar* or to enter into an agreement with a distributor whereby it grants the latter exclusive distribution, as long as the refusal to supply or the exclusivity, with respect to its duration, the time of year during which it applies, the products covered and the position of the operators involved, does not distort the competition position.

The analysis is different where an operator wants to use independent distributors for in-store selling but prohibits these distributors from selling online. As mentioned above, banning an approved reseller member of a selective distribution network from offering its products over the internet constitutes a restriction by object if after an individual and concrete examination of the ban, and of the legal and economic context in which it takes place, considering the products' properties, this ban isn't objectively justified[17]. This restriction is all the more serious and damaging that the Autorité's opinion on competition in the e-commerce sector showed that the internet is a vector that makes it possible to reach a large number of consumers, offering them specific services, where applicable at a lower cost than that of in-store sales.

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15 See decision no. 08-D-25 of the Conseil de la concurrence of 29 October 2008 concerning the practices implemented in the distribution sector for cosmetics and personal care products sold on pharmaceutical advice (paragraph 63).

16 Decision of the Cour de cassation of 14 March 2006 Scté Flora Partner vs. Scté Laurent Portal Rouvelet.

17 In this respect, see decision no. 07-D-07 of 8 March 2007 concerning the practices implemented in the cosmetics and personal care products sector and decision no. 12-D-23 of 12 December 2012 concerning the practices implemented by the company Bang & Olufsen in the selective distribution sector for hi-fi and home cinema products.

In certain cases, however, an absolute ban on online selling may objectively appear necessary and escape, without more detailed examination, the ban provided under article 101, paragraph 1, TFEU and/or L.420-1 of the French Code of Commerce. This ban can be based on a legal disposition ensuring, through a legitimate commandment, compliance with a general ban on the sale of dangerous substances via the internet for reasons of public health or safety. In the opposite case, so as to justify the clauses banning the internet sale of non-prescription medicines and contact lenses, the Court of Justice did not accept arguments, with respect to freedom of circulation, concerning the need to provide individual advice to a customer and ensure the customer's protection against the incorrect use of products to justify a ban on internet sales (see, in this respect, the orders of 11 December 2003, Deutscher Apothekerverband, C/322/01, points 106, 107 and 112, as well as 2 December 2010, Ker-Optika, C-108/09, point 76). Nor did it accept the argument for the need to preserve the prestigious image of the products in question: "*The aim of preserving a prestigious image cannot constitute a legitimate reason for restricting competition and cannot thus justify that a contractual clause that pursues such an aim does not come under article 101, paragraph 1, TFEU*"[18].

Finally, and more generally, the hardcore restrictions are allowed to the benefit of an individual exemption under article 101, paragraph 3, TFEU and/or L.420-4 of the French Code of Commerce, if they are needed for achieving efficiency gains of which a fair share is passed on to consumers. In this context, when a company that is challenged alleges that a specific practice will produce actual or potential improvements in efficiency, it is up to the competition authorities to examine whether the arguments and elements of proof invoked effectively show the existence of such efficiency gains and the need for the restriction in obtaining them, and then to weight up the competition pros and cons of the practice in question, between the anti-competitive effects (again, those that are actual or potential) that were only presumed in respect of the examination conducted under article 101, paragraph 1, TFEU, and the pro-competitive effects demonstrated by the company in question.

The Commission's new guidelines on vertical restraints are an invitation to conduct a more in-depth analysis of this type when faced with a supported application for individual exemption. The text states clearly that the presumption of illegality can be refuted and an individual exemption is possible (§47) and it contains developments concerning possible effects that developments concerning the possible effects of such practices in promoting competition, such as the abolition of the double profit margin and the fight against free riding (§§221, 225 and 226), and invites the Commission to assess the sufficiency in law of the allegations of companies before issuing a ruling on an application (§47).

To date, the Autorité has not been required to consent to an individual exemption for an operator by implementing this type of ban, in the absence of an application supporting economic progress ensuing from the practice and the necessity of the restriction to get this exemption[19].

5. The case of selective distribution

As indicated above, the CJUE caselaw and the Autorité de la concurrence's decision-making practice[20] lay down the principle whereby retailers authorised to join a selective distribution network

18 CJEC, Case C-439/09 of 13 October 2011 Pierre Fabre Dermo-Cosmétique v.s President of the Autorité de la concurrence, §46.

19 As an illustration, in the above-mentioned decision no. 06-D-28 of 5 October 2006, the Conseil rejected the claim of Pierre Fabre according to which the clause banning internet sales was aimed at guaranteeing the consumer's well-being thanks to the physical presence of a pharmacist when the product was delivered. The Conseil recalled in this respect that cosmetics are not medicines, that a pharmacist is not qualified to issue a diagnosis and, finally, considered that Pierre Fabre had not shown in what way the practice in dispute was necessary for the supervision system entitled "cosmétovigilance".

cannot be prevented from having an online sales activity – subject to the public order disposition already mentioned and the possibility offered to manufacturers, on a case-by-case basis, to justify the existence of such a ban due to the efficiency gains that are of such a nature as to promote technical and economic progress while maintaining a fair share of the profit to users.

On the other hand, selective distribution agreements that make access to the network subject to the operation of a physical point of sale and/or compliance by the approved distributor with a certain number of selective criteria that do not fall within the provisions of article 101§1 TFUE or 420-1 of the French Code of Commerce, as long as said distribution method and the criteria on which it is based are necessary due to the nature of the product in question and that the said criteria are objective and applied in a non-discriminatory manner[21]. In any event, qualitative selective distribution benefits from the arrangement covering exemption by category if the operators' market shares are below the 30% threshold defined in the exemption regulation and if the agreement in question does not contain a hardcore restriction. Yet if the manufacturer does not comply with these conditions and if the relevant agreements with the distributors result in a tangible effect on competition[22], the benefit of the exemption will be withdrawn (guidelines on vertical restraints, §176).

Furthermore, with regard to the criteria liable to affect the conditions of in-store sales and on-line sales, the guidelines indicate that *"the Commission considers a hardcore restriction to be any obligation designed to dissuade the designated distributors from using the internet to achieve a higher number and greater variety of customers by imposing conditions on them for online sales which are not the general equivalent of those imposed at a physical point of sale"* (§ 56). The conditions of sale online and in-store are not required to be identical but they must pursue the same objectives and lead to comparable results. Finally, the difference between them must be justified by the different nature of these two methods of distribution.

In this respect, the guidelines provide different examples: "For example, to prevent sales to unauthorised distributors, a supplier may require its designated distributors not to sell more than a certain quantity of contractual products to an individual end user. Such a requirement may have to be stricter for online sales if it is easier for an unauthorised distributor to obtain the products via the internet. Similarly, it may have to be stricter for in-store sales if it is easier to obtain the products at a physical point of sale. To guarantee the delivery of the contractual products within the required time, a supplier can require the products to be delivered immediately, in the case of products sold in-store. Given that an identical requirement is not possible in the case of online sales, the supplier can impose certain realistic delivery deadlines for such sales. Specific requirements may have to be formulated concerning the after-sales service assistance for online sales, in order to cover the costs of returns incurred by customers and for the application of secure payment systems" (§ 56).

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20 See in this sense, decision no. 07-D-07 of 8 March 2007 concerning practices implemented in the cosmetics and personal care products sector and decision no. 12-D-23 of 12 December 2012 concerning practices implemented by the company Bang & Olufsen in the selective distribution sector for hi-fi and home cinema products.

21 As an illustration, in the above-mentioned decision no. 06-D-28 of 5 October 2006, the Conseil accepted that one of the challenged manufacturers could make internet sales of certain ranges of hi-tech hi-fi and home cinema equipment subject to customer testimonials after first listening to the products at an approved distributor and with the benefit of individual advice on how to install them (decision no. 06-D-28, §35).

22 According to Court's case law, such agreements "*necessarily affect competition within the Common Market"* (CJEC 25 October 1983, *AEG-Telefunken/Commission, 107/82, Rec. p. 3151, point 33*). In case C-439/09 of 13 October 2011 *Pierre Fabre Dermo-Cosmétique*, the Court of Justice added that "*such agreements should, in the absence of objective justification, be considered as "restrictions by object"* (§ 39).

The decision-making practice of the Conseil and the Autorité de la concurrence and French caselaw are consistent with the case-by-case analysis recommended by these provisions. As an example, with respect to the clauses designed to restrict the number of items bought through an internet order introduced by certain manufacturers of pharmaceuticals, the Conseil noted that such clauses are designed to avoid the development of a parallel trade in the products in question but that this requirement does not exist for sales at physical points of sale. The Conseil nevertheless accepted the clauses whereby the distributor undertakes to reject any order for products which would be unusual (with respect to frequency or quantity) for an end consumer and/or to inform the manufacturer when a purchaser places a number of orders that do not correspond to a normal request for an end consumer or to reject any order greater than 5 identical units[23].

A second example concerns the clause whereby certain manufacturers of cosmetics require their distributors to set up a site exclusively reserved for the sale of products sold on pharmaceutical advice. Noting that, due to this requirement, manufacturers would have forced distributors who do not exclusively sell skincare products and cosmetics on pharmaceutical advice to create a dedicated site for those products only, which would have increased their site creation costs, whereas certain common care products such as toothbrushes, are also sold in pharmacies and alternative healthcare pharmacies, the Conseil expressed its concerns about competition in relation to the latter. Consequently, the challenged manufacturers proposed that they no longer required a site but a dedicated space on the site, i.e. "dedicated pages" as part of a virtual shop devoted to skincare products and cosmetics sold on pharmaceutical advice[24].

A third example concerns the advice provided by a qualified pharmacist. The Paris Court of Appeals, in its decision of 31 January 2013, held that such advice given at the time of selling the products couldn't be justified by the safety of consumers and that "no element supported that an information and personalized advice provided when buying the products couldn't be set online", a website being "susceptible of being organized as a window shop presenting and giving information on products, including with videos, and allowing an interaction between the manufacturer and the consumer, for example through the use of a hotline with personalized advice by a qualified pharmacist". The Court also said that other competing companies ensured compliance with products' quality and personalized advice to customers via the internet, thus combining "quality maintenance and products' use and" "online selling of products by authorized distributors". In the end, the legal framework created by the exemption regulation on vertical restraints, the guidelines relating thereto and the decisions in practice offer manufacturers of luxury goods, those difficult to use or those requiring trust, the necessary flexibility to introduce an appropriate method of distribution for the specific nature of their products. It doesn't seem necessary, for the sale of such products, to define specific competition rules or to go beyond a case-by-case application.

6. Restrictions on advertising and listing on marketplaces

The option that manufacturers have to oversee the internet advertising used by their distributors, on the one hand (a), and marketplace listings on their distributors' sites, on the other hand (b), should be examined.

6.1 Concerning the possibility for manufacturers to check the internet advertising of their distributors

6.1.1 The option offered to manufacturers to check advertising that does not include pricing as well as the creation of advertising links set up by their distributors on the internet

In the above-mentioned decision no. 06-D-24 (§88 to §90), the Conseil de la concurrence considered that the fact that a manufacturer required non-pricing advertising by its retailers to be submitted for its

23 Conseil de la concurrence decision no. 07-D-07, §112 ff.

24 Conseil de la concurrence decision no. 07-D-07, §100 ff.

prior permission did not appear to contravene competition rules, since this check was based on a legitimate concern to protect the reputation of the brand and the distribution network. The Conseil had previously accepted a similar rule in the so called Limoges porcelain case (decision 99-D-78 of 15 December 1999), "*since it involved protection of the brand and it had only been shown as being for protection purposes, its purpose was to permit suppliers to prevent advertising campaigns that were price-related*". In this decision, the Conseil referred to the European Commission's decision 92/428/EEC of 24 July 1992, concerning proceedings under article 85 of the EEC Treaty concerning the selective distribution system for Givenchy perfumes (OJEC L236, p.11). Also, the Conseil considered that as soon as a check on the publicity usage of the brand is accepted, as long as this check is carried out to protect the reputation of the brand and the distribution network. A check by the company of the advertising links on the internet to or from merchant or non-merchant sites must be accepted to the same extent (Decision no. 06-D-24, §§ 91 and 92)[25].

6.1.2 Absence of an option for manufacturers to check the natural listing of the internet sites of their distributors on search engines

On the other hand, the Conseil considered that the option offered to manufacturers to check the non-pricing advertising as well as the creation of advertising links set up by their distributors did not apply to the merely so-called "natural" listing on search engines, performed automatically by bots that permanently trawl and analyse the internet for available content, without the distributors themselves taking any particular action. These listings and the resulting links merely direct a user to the sites of distributors approved by the manufacturer, with the latter being able to check their content. Consequently, performing such a check of the "natural" listing exceeds what is necessary to ensure the protection of the brand and the network and would do excessive damage to the retailer's commercial freedom by unjustifiably interfering with its possibilities of passive sales (Decision no. 06-D-24, §§ 93 to 96).

6.2 Listing on marketplaces

Some manufacturers refuse to allow the sites of their approved distributors to have a presence on "*marketplace*" sites. In this respect, in the above-mentioned decision no. 07-D-07, the Conseil indicated that a manufacturer was entitled to refuse to approve the contact sites because, in this case, the platforms did not provide sufficient guarantees as to the quality and identity of the sellers, which could facilitate illegal sales outside of the network or the sale of counterfeit goods and thus damage the image of the network in question. The Conseil also recognised "*with satisfaction*" however that the platforms had the "*ability […] to satisfy the qualitative criteria for the products*", for example through the creation of virtual shops reserved for approved sellers, and that in this respect at least two manufacturers had accepted the principle of a sale of their products on this type of site if the qualitative criteria on which the internet sale of their products depended were complied with[26].

With respect to these third party platforms, the guidelines indicate that "the supplier may require its distributors only to use third party platforms for the distribution of the contractual products if the standards and conditions which it has agreed with them for internet usage by the distributors are complied with. For example, if the distributor's internet site is hosted by a third party platform, the supplier may require customers not to access the distributor's site via a site bearing the name or logo of the third party platform" (§ 54). As specified above, in § 56, the guidelines nevertheless specify that "[the conditions imposed on online sales] must pursue the same objectives and lead to comparable results [to those of in-store sales] and that the difference between them must be justified by the different nature of these two distribution methods". Finally, such a ban, if it were to restrict competition on the markets in question, ought to be

[25] An identical solution was also adopted under the abovementioned decision no. 07-D-07 (§124 ff.).

[26] Conseil de la concurrence decision no. 07-D-07, § 104 ff.

necessary and proportionate to the objective pursued, whether it involves respect for the brand image or the prevention of the sale of counterfeit goods or those sold outside the network.

Finally, the suppliers can thus legally check or restrict their retailers' initiatives to advertise their product under three conditions: first the check carried out should not be of such a nature as to restrict competition, second it must pursue a legitimate objective, and third it must be equivalent to those used for in-store distribution. Only a case-by-case approach to these arrangements to assess their compliance with the rules thus appears to be legitimate.

GERMANY

1. Introduction

The emergence and development of the internet has transformed consumer conduct and the business world considerably. Changes sometimes happen very fast and accurate predictions about these developments can be very difficult to make. Online sales have become important channels for the distribution of goods and services and exert a significant competitive pressure on traditional distribution and business models of producers as well as retailers. While some retailers use the new channels as complement to the traditional brick-and-mortar business, other players have begun to focus purely on online sales. Other business models include providing online platforms that act as an intermediary between sellers and buyers. In addition, completely new internet-based products and services have emerged and continue to be developed that may compete with existing ones, for example cloud computing (e.g. use of office software on a rental basis), e-books or social networks. All these developments have already considerably increased and have the potential to further improve the efficiency of the distribution of goods and services and thus to deploy significant welfare-enhancing effects, in particular to the benefit of final consumers. Beyond lower prices, reduced transaction costs as well as new or additional services (like convenient "business hours" or home delivery) consumers can benefit from - and increasingly make use of - the enhanced availability of information on different prices and quality (like test reports, the experiences of other consumers or the exchange of information on social networks). The increased availability of information (e.g. collection and evaluation of customer data in online shops) also allows businesses to better adapt product features, services and marketing efforts to customers' preferences and competitors strategies.

Despite the challenges associated with such a highly dynamic and sometimes complex market environment, competition authorities regularly have to assess whether specific business practices may unreasonably restrict the increasing competitive pressure imposed by the emergence and growth of online sales. In this context, certain types of vertical restraints of competition (especially those associated with selective distribution systems, price-maintenance or best-price clauses) seem to be gaining importance in the daily routine of a competition authority where online sales are concerned. In particular, some brand producers try to adapt to the digital economy by restricting by various means the most dynamic new online distribution channels. Apart from restrictions by object that unambiguously infringe competition in a serious way, competition authorities and courts have to evaluate not only the effects of restraints of competition in these often dynamic and two-sided[1] (or: platform) online markets, but also the potential efficiency justifications for such restrictions. While the relevance of specific points of the analysis may be different in respect of online markets compared to more traditional markets, it seems, nonetheless, that the competition laws in their current form (at least in Germany) are well equipped and sufficiently flexible to also deal with the newly emerged markets and market forms. The challenge is rather to apply the competition laws in a new context.

In the next section (2.), this contribution will provide an overview over issues that seem to be becoming more important and frequent concerning competition in online markets and its assessment, starting with selective distribution systems (under emphasis of resale-price-maintenance) and then turning towards the effects of two-sided markets and highly dynamic markets on competition on the market and its

[1] The term "two-sided markets" also encompasses platform markets or multi-sided markets.

assessment. After that, an overview of ongoing cases as well as past decisions will be given (3.) before some concluding remarks (4.).

2. Vertical restraints in online sales

Compared to conventional sales markets, the importance and magnitude of specific methods of competitive restraint as well as pro- and anti-competitive effects of firms' conduct may be different in online markets.

2.1 Selective distribution

Selective distribution systems seem to play a particularly important role in online sales. In order to promote non-price competition or improved quality of services offered by traditional brick-and-mortar stores, producers and distributors may seek to control the distribution channels, for example by (indirectly) prohibiting or severely restricting internet sales.[2] Frequently raised concerns by producers and retailers about online sales are that brick-and-mortar stores will no longer be able to offer valuable (pre-sale) services or specific product features to consumers for three reasons: Firstly, online sellers (allegedly) have a cost advantage and may be able to offer the same products for lower prices.[3] Secondly, consumers (allegedly) still make use of the valuable pre-sales services that brick-and-mortar retailers provide, only to buy the products cheaper later online from retailers offering only a low level of services (free-riding). The same concerns regarding the negative effects of free-riding are also voiced with regard to other investments made by producers and retailers, for example investments made in costly quality signalling (e.g. elaborate shop fittings), the ability to enter a new market (which could require extra margins for financing the launch of stationary shops) or any other potentially efficient and welfare enhancing but costly service or marketing measure. The third claim often raised is that a prohibition or restriction of internet sales and particularly the use of specific platforms is necessary to protect a ("high end") brand image or the investments required to establish such an image. This is sometimes linked to the claim that high prices are needed to signal the quality of the products or that a high-price brand image generates additional value for consumers (for example, by offering exclusivity), which would be jeopardised through online sales.

Courts and agencies need to assess carefully the merits of such claims in those proceedings where welfare enhancing arguments can be or have to be taken into consideration. Firstly, in a case of existing cost advantages of online sellers, a competition authority's focus should be on keeping markets open for these price efficient competitors. Secondly, free-riding may also function in both directions. Research in Germany suggests that more consumers inform themselves online before making a purchase in an offline store than the other way round. Moreover, researchers found that the impetus generated by information gathered on the internet to purchase goods in offline stores is six to ten times the (turnover) value of the impetus generated by information gathered offline to purchase on the internet.[4] Thirdly, another issue could be whether the additional consumer welfare generated by being able to buy a high end brand (as far as such arguments can be considered as justifications) or receive pre-sale services is likely to outweigh the welfare losses from restraints of competition and/or higher retail prices in a specific case. In cases where the relevant claims are made, it can also be discussed whether high prices are really needed or even effective as signalling devices when consumers are already familiar with the brand and the quality it stands

2 The described aims of producers and distributors are also classical justifications for resale price maintenance (RPM) offline or online.

3 Such cost advantages may not always materialise. Online stores may have lower costs or advantages stemming from economies of scale. On the other hand, they may also have larger costs due to high levels of returns of online purchases, which are generally free for the consumer (for example, clothing or shoe sellers).

4 See http://www.dbresearch.de/PROD/DBR_INTERNET_DE-PROD/PROD0000000000277459.pdf and http://krefeld.ihk.de/media/upload/ihk/imap/20100526/Praesentation_25052010.pdf

for or can easily find that information. Brand image may also be linked to high quality by other means that are less restrictive to competition.

Apart from restrictions by object unambiguously infringing competition in a serious way, competition authorities will have to assess and weigh the pro- and anti-competitive effects of encountered vertical restraints of competition, which can sometimes be a complex task. Such selective distribution systems and the debate about their (potential) positive or negative effects on (intra-brand and inter-brand) competition have, however, already been subject to competition law analysis in offline markets as well.[5]

2.2 Two-sided markets and dynamics of markets

The analysis of potentially anti-competitive conduct can be more complex in online markets due to the specifics of the analysed markets. Online services like online sales, but also search engines, social networks or price comparison websites, are relatively new developments, which make markets highly dynamic. Constant innovation and new business models can allow newcomers to leapfrog formerly very successful and seemingly powerful companies. Innovation and growth can enable swift market entries or quick shifts in market share. Imbalances between the market participants inevitably occur in such dynamic markets, even if they may only be of a passing nature. This is a feature of entrepreneurial freedom, with all its opportunities and risks, and it is the nature of competition. While this may make the assessment of competitive concerns more complex in specific cases, competition authorities have already dealt with competition issues in dynamic markets in the past. It is well established that one element of the market conditions that are assessed in any antitrust or merger procedure is the market phase, which indicates the market's stage of development. While high market shares may be one indicator for market power in saturated and mature markets, they are of less significance in expanding or dynamic markets. [6]

Many online services are also offered on two-sided markets where they are (almost) free to the end-user on the one market side and financed through advertising or prices on the other.[7] On two-sided markets a supplier acts as an intermediary between different customer groups. Indirect network effects are characteristic for such markets, one of the best-known examples being the market position of a newspaper on the advertising market; which is influenced by its position on the reader market. Similarly, the service provided by issuers of credit cards or debit cards is the more attractive for end customers the more retailers accept these cards as a method for payment. In such cases, prices and quantities on both markets are interdependent. The competitive constraints for platform operators or intermediaries (e.g. high barriers to market entry) are influenced by the market conditions and the interrelation between the markets concerned. Direct and indirect network effects as well as economies of scale can benefit incumbent firms and may form significant barriers to entry for newcomers in some cases, so that oligopolistic or even monopolistic market structures may result that are no longer subject to sufficient competitive pressure.[8] In cases

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5 See, for example, BKartA case B5-100/10, a case concerning selective distribution in the area of high quality sanitary fittings.

6 See i.a. BKartA, decision of 5.10.2006, B7-84/06 – KLATencor/ADE, para. 47-51, where the current market share of a supplier only minimally mirrored its future market opportunities.

7 While consumers on the one market side may not always pay a monetary price for using the platform, they may contribute in other ways, for example with "eyeballs" (e.g. reading the advertisements and banners) or information revealed about their consumption patterns or preferences.

8 On the other hand, the same effects can, in a more dynamic perspective, also be one important factor helping newcomers with new or better products/services to successfully leapfrog former seemingly uncontestable companies (one example may be the development and consequent concentration of the telegraph market in the United States of America. The dominant market leader was challenged by a newcomer introducing an improvement on the telegraph: the telephone).

concerning two-sided markets it is thus not sufficient to assess the market conditions on only one of the markets.[9] However, as the cited examples show, competition analysis by competition authorities in two-sided offline markets can offer fruitful experience.

3. Cases of vertical restraints in online sales

Due to the new business models and the rapid development of online markets, producers and distributors try to exert control over the distribution channels, also to find the most profitable way to incorporate these new business models into their distribution systems. The most frequent vertical restraints relating to online sales which the Bundeskartellamt encountered so far were per se bans on internet sales, the ban of sales through specific online platforms and the ban of online sales with lower prices (resale price maintenance). Also best price clauses and prohibited price communication through the internet have been an issue.

3.1 Ongoing Cases

Due to several complaints of dealers about the implementation or tightening of selective distribution systems, the Bundeskartellamt is currently investigating major sporting equipment suppliers. One important point in these cases is whether a restriction of competition like the ban on the use of third-party platforms for the sales business of authorized dealers could be justified by the wish to protect a certain brand image. Here an analysis is needed of the competitive role of brand image, which seemed to be one main argument put forward for the constraints. In parallel, the loss of intra-brand competition due to the ban of highly price transparent sales environments has to be taken into consideration. Some small dealers may even quit e-commerce, deterred by the higher fixed costs and efforts (e.g. for logistics and payment processing) of an own internet shop as well as by the loss of traffic and range compared to ready-to-use offers by platform operators. Whereas consumers have to increase their searching effort, the suppliers seem to improve their market insights by pursuing stricter e-commerce policies, which could increase information asymmetries between both sides. Even if the guarantee of a certain level of service and support could be claimed as a leading motive, the indispensability of the constraints is not always clear (e.g. in the case of unsophisticated and well-known every-day products).Also of importance is that similar rules are planned by all major players in this segment. In view of this bundle of similar constraints, effects on inter-brand competition have to be assessed. One of these effects could be a softening of price competition.

The Bundeskartellamt is also investigating two online platforms. Here the analysis of internet-wide best price clauses addressing the consumer side is the key topic. The already mentioned barriers to entry typical of platform markets could be strengthened by this tool - in particular if it is used market-wide or by dominant market participants. If the best price guarantees function, consumers could decide to save learning and searching costs by sticking to familiar platforms. In recognition of this, the other market side may also refrain from taking part in a new platform. For example, the possibility of the entry by a maverick platform with cost advantages wishing to raise attention with low prices on both market sides could be foreclosed. Also innovative concepts could be hindered. Recently these considerations have been supported by the case of a start up business which programmed a software “app” specialized in discounted last minute offers and which successfully fought for an interlocutory injunction against the use of the best price clause by one of the platforms. Overall, competition between platforms could be softened if best price clauses are widespread in a certain market. On the other hand platform owners regularly emphasize that in a transparent environment the effort of bringing together two market sides could be exploited by free-riding. Besides the balancing of pro- and anti-competitive effects, the indispensability will have to be discussed.

[9] Offline cases where these features played a role are newspaper or credit card markets. See also BKartA, decision of 28.12.2004, B7-150/04 – SES/DPC, concerning technical platforms in pay-TV; BKartA, decision of 29.08.2008, B6-52/08, on the operation of two target-group relevant platforms (cosmetic trade fairs and trade magazines).

3.2 Examples of decisions by the Bundeskartellamt

3.2.1 Hearing aids

In October 2005, the Bundeskartellamt imposed a fine of € 4.2 million on Phonak GmbH ("Phonak"), one of the leading German manufacturers of hearing aids. Phonak was accused of having influenced the resale prices of its products in an anticompetitive manner and of having prohibited the publication of prices on the internet. Phonak denied that the conduct in question had an impact beyond the individual case but decided not to appeal against the decision.

In Germany, hearing aids are usually sold from the manufacturer to end consumers via hearing aid retailers. In the Bundeskartellamt‘s view the sale of hearing aids is characterised by a lack of price competition, both at the production level and the retail level. This lack of competition results not least from the fact that there is insufficient product and price transparency for end consumers wishing to buy a hearing aid.

In the present case, a hearing aid retailer had published its prices for hearing aids from all manufacturers on the Internet. For some products the prices for Phonak hearing aids were clearly below the minimum price level which had so far been generally applied in the market. As a result, other hearing aid retailers from across Germany complained to Phonak about the price-cutter. Phonak reacted by refusing to sell to the respective hearing aid retailer in order to induce him to raise his resale prices and to refrain from publishing prices on the internet.

Providing unilateral non-binding price recommendations is in principle allowed in Germany under competition law. However, anyone who threatens or causes disadvantages to others or promises or grants them advantages in order to enforce such price recommendations, commits an administrative offence. A refusal to sell constitutes such a disadvantage within the meaning of the law.

At the same time, such resale price maintenance can foster illegal concerted practices in the horizontal relationship between the traders without them actually having to contact each other. This can be the case if the companies observe the recommendation in the conviction that the other companies are acting in the same way.

In the Bundeskartellamt's view, the action taken by Phonak had an impact on competition far beyond this individual case. Eliminating the only retailer of hearing aids that fostered price competition was a suitable and intended means to maintain or re-establish the predominant price stability on the German market for the trade in hearing aids. Moreover, where price competition is already limited at the retail level, any further prevention of competition advances is all the more severe. The same is true for limited competition on the producer side (interbrand competition), which makes competition at the retail level (intrabrand competition) all the more important.

3.2.2 Contact lenses

In 2009, the Bundeskartellamt imposed a fine of € 11.5 million on CIBA Vision Vertriebs GmbH ("CIBA Vision"), the market leader in the contact lenses business in Germany. CIBA Vision was accused of having illegally restricted the internet trade in contact lenses of its own brand and of having influenced the resale prices of internet traders in an anticompetitive manner. CIBA Vision disputed the allegation from a factual and legal point of view, but abstained from lodging a legal appeal against the decision.

The offences as found by the Bundeskartellamt included anticompetitive agreements on the exclusion of internet trading and the prevention, in particular, of sales via eBay with regard to specific contact lenses. Claimed efficiency reasons for the necessity of a (selective) ban of internet trading included health and

safety reasons, as well as the protection of necessary investments against free-riding. The Bundeskartellamt analysed these potential efficiencies but could not follow the proposed reasoning: The argument in favour of necessary health and safety measures was not a convincing one, as contact lenses are prescription free in Germany, measurement and control services offered by (non-medical) optical stores are within the discretion of the consumers (and most often not required, especially not for repeat purchases of daily or monthly lenses), and soft lenses are also sold in a multitude of drugstores and supermarkets. The problem of potential free-riding on necessary investments for pre-sales services by brick-and-mortar sellers could not convince, as the products in question did not require any particular new investment measures. The Bundeskartellamt was of the opinion that the envisioned benefits created by a ban on internet sales could also be achieved by less restrictive means. In addition, CIBA Vision employed so-called "price management" measures, operating a surveillance and intervention system with several persons in charge of monitoring and controlling the traders' sales prices on the internet. If the resale prices of individual traders were at a certain level below the non-binding recommended retail price, CIBA Vision staff would contact those internet traders and try – in many cases successfully – to induce them to increase their sales prices.

3.2.3 Outdoor GPS Navigation Devices

In 2010, the Bundeskartellamt imposed a € 2.5 million fine on Garmin Deutschland GmbH, a producer of portable navigation devices, and on one responsible individual for establishing a resale price maintenance system. Garmin voluntarily reported this conduct (so called kick- back programme) to the Bundeskartellamt, even though the system had already been abandoned by then. The price maintenance system was designed as a programme that rewarded retailers who sold at the recommended retail price and "punished" retailers who sold on the internet below the recommended retail price. As such, the system was also an example of a dual-pricing strategy. Retailers that were found to undercut the recommended price on the internet had to pay higher prices to Garmin. If these retailers increased their internet prices for the products in question to the minimum price set by Garmin, they were granted a retroactive compensating bonus. Garmin, as well as the individual concerned, settled the case. The fact that Garmin had abandoned and voluntarily reported this conduct was considered as a mitigating factor in the calculation of the fine.

4. Concluding remarks

The challenge for competition authorities will be to protect competition without impairing the competitive, dynamic and beneficial processes in online markets. Protecting competition should not turn into intervention in these dynamics or protection from competition. Therefore, competition authorities have to analyze carefully whether positions of market power are established that are no longer sufficiently controlled by competition. In this respect competition enforcement operates in a difficult area. Nevertheless, some vertical restraints imposed on internet sales have the clear aim to delay or soften the dynamic changes to the supply chains induced by the internet. In this respect intervention may be necessary to protect the dynamism and the new opportunities of the digital economy. While the importance and frequency of particular potentially anti-competitive conduct may have changed in online sales or online services in general, the strategies employed by companies are not always new and experiences gained by competition authorities in offline markets can be adapted to online sales as well.

Competition authorities are paving new ground on a case-by-case basis. Issues that require further attention will include: How to deal with best price clauses or selective distribution systems of all kinds, which types of practices justify a stricter approach and which types could be presumed to be less harmful. Having in mind the challenges of applying competition law in fast changing markets, the competition authorities have to find the right balance between caution and intervention.

JAPAN

1. Introduction

With the increasing use of the Internet, e-commerce in Japan has trended upwards in recent years. In addition, an increase in demand for smart phones and tablets can be expected to expand the number of e-commerce users.

In light of the rapid popularization of e-commerce, the Japan Fair Trade Commission (hereinafter referred to as "JFTC") has responded aggressively to the enterprise's practices related to e-commerce including vertical restraints from the viewpoint of competition policy.

Firstly, this paper describes here the treatment of vertical restraints as defined by the Antimonopoly Act (hereinafter referred to as "AMA"), and then introduces results from a survey on the state of e-commerce, including vertical restraints "Survey of trade in B2C e-commerce such as electronic shopping malls" (December 2006). Finally, this paper describes the cases where vertical restraints related to e-commerce raised competition problems and other cases related to e-commerce.

2. Treatment of vertical restraints under the AMA

Vertical restraints may be problematic under the AMA if they fall under the unfair trade practices or private monopolization. This is also true even if vertical restraints are conducted in e-commerce.

2.1 Unfair trade practices

Article 19 of the AMA prohibits unfair trade practices. The following types of vertical restraints are regulated as unfair trade practices:

- Resale price maintenance (Item 4, Paragraph 9 in Article 2 of the AMA)
- Dealing on exclusive terms (Article 11 of Unfair Trade Practice)
- Dealing on restrictive terms (Article 12 of Unfair Trade Practice)

An enterprise is subject to a cease and desist order if it commits an activity which falls under any of the above practices (Paragraph 1 of Article 20 of the AMA). Regarding resale price maintenance, an enterprise is subject to a surcharge payment order, if it repeats a similar violation within 10 years after receiving a cease and desist order (Article 20-5 of the AMA).

2.2 Private monopolization

The Article 3 of the AMA prohibits private monopolization. Private monopolization is a practice by which an enterprise substantially restrains competition in any particular field of trade, contrary to public interest, by excluding or controlling the business practices of other enterprises (Paragraph 5 of Article 2 of the AMA).

In relation to vertical restraints, if dealing on exclusive terms or restrictive terms substantially restrains competition in any particular field of trade, contrary to public interest, by excluding business

practices of other enterprises, such an act falls under exclusionary type of private monopolization and is subject to a cease and desist order as well as a surcharge payment order (Article 7 and Paragraph 4, Article 7-2 of the AMA).

3. "Survey of trade in B2C e-commerce such as electronic shopping malls" (published in December 2006)

Regarding the businesses of so-called electronic shopping malls, which constitute one form of e-commerce for consumers (hereinafter referred to as "B2C e-commerce"), the JFTC surveyed (i) transactions between operators of so-called electronic shopping malls (hereinafter referred to as "mall-operating enterprises") and enterprises running shops in such malls (hereinafter referred to as "mall-participating enterprises"), and (ii) the relationships between enterprises aspiring to enter and develop their business in the B2C e-commerce field and supplying enterprises. Subsequently, the JFTC published its opinions under competition policy and the AMA in December 2006.

3.1 The features of the market

The B2C e-commerce business, whose scale is expanding yearly, is conducted by mall-participating enterprises opening virtual shops on the internet, mall-operating enterprises managing virtual shopping malls that are composed of virtual shops on the internet and consumers. The existence of B2C e-commerce is important and can be advantages for mall-participating enterprises, for example, by having different outlets available to sell and potentially increasing sales, and on the other side, the wide selection of goods and the low prices are merits for consumers. The B2C e-commerce transactions are concentrated in the top three mall-operating enterprises.

While the scale of operation of the top three operators is large, smaller enterprises account for a large share of mall-participating enterprises. In addition, as the top three operators dominate transactions, shop owners depend very heavily on electronic shopping mall transactions in general and sometimes have difficulty in changing business partner operators. Hence, there is an operator that holds a dominant bargaining position in dealing with its shop owners among the top three operators.

3.2 Assessment of vertical restraints in the consumer e-commerce market under the AMA

Below is an assessment of vertical restraints in the consumer e-commerce market under the AMA that were uncovered by surveys regarding the industrial structure and trade situation in the e-commerce market.

3.2.1 Dealing on restrictive terms which is imposed on mall-participating enterprises by mall-operating enterprises

Some mall-operating enterprises prevented mall-participating enterprises from using customer information once they exited the mall. This activity constitutes Dealing on restrictive terms according to the AMA if it could adversely affect competition among online shopping malls, in spite of the fact that the act is not a necessary restraint to protect private information.

3.2.2 Resale price maintenance which is imposed on mall-participating enterprises by supplying enterprises

- Maintenance of a fixed price and prohibition of price reduction

  In transactions between mall-participating enterprises and their supplying enterprises, some supplying enterprises asked mall-participating enterprises to maintain fixed prices, prohibiting price discount and set selling prices or low selling price limits that fall under Resale Price Maintenance and are prohibited under the AMA.

- Internet sales prohibitions

  In transactions between mall-participating enterprises and their supplying enterprises, some supplying enterprises prohibited mall-participating enterprises from selling certain products on the Internet and set supplying prices higher. Prohibiting mall-participating enterprises from selling products on the Internet — because mall-participating enterprises may sell them in lower prices — and setting supplying prices so high that mall-participating enterprises cannot procure the product fall under dealing on restrictive terms and discriminatory pricing which are prohibited under the AMA.

4. The cases where vertical restraints in e-commerce raised competition problems

Following are two cases that the JFTC issued cease and desist orders after concluding that vertical restraints in e-commerce fell within unfair trade practices.

4.1 Case regarding Hamanaka Co., Ltd.

The JFTC issued a cease and desist order against Hamanaka Co., Ltd. (hereinafter referred to as "Hamanaka") on June 23, 2008, on the ground that Hamanaka was engaging in conduct which falls within Paragraph 12 of Unfair Trade Practices[1](Resale price maintenance), and therefore constitutes a violation of Article 19 of the AMA. Regarding this case, although Hamanaka made the hearing request to rescind the order, the JFTC dismissed the said hearing request. In addition, the courts dismiss lawsuit to rescind the hearing decision brought by Hamanaka. Through this process, the cease and desist order became final and binding.

Hamanaka fixed the discount limit price[2] for Hamanaka wool[3] around September 2005 and thereafter requested that retailers sell the product at such discount limit price or higher and had the wholesalers request that retailers to which such wholesaler sold Hamanaka wool sell the product at the discount limit price or higher.

To assure the actual effect of the request to the retailers in paragraph a. above, Hamanaka stopped shipment of Hamanaka wool to the retailer that did not satisfy such request or the wholesaler distributing the product to such retailer.

Also for the sale of Hamanaka wool by means of Internet, Hamanaka decided around May 2007 to have retailers sell the product at a price equal to or higher than the discount limit price from July 1 that year. Hamanaka requested the retailers to sell the product at the discount limit price or higher and had the wholesalers request the retailers to which it sold Hamanaka wool to sell the product at the discount limit price or higher.

4.2 Case regarding Johnson & Johnson K.K.

The JFTC issued a cease and desist order against Johnson & Johnson K.K. (hereinafter referred to as "Johnson & Johnson") on December 1, 2010, on the ground that Johnson & Johnson was engaging in

1 By the amendment of the AMA, resale price maintenance is currently stipulated by the Paragraph 9, Item (iv)(a) and (b) in Article 2 of the AMA.

2 "Discount limit price" means the price 10% lower than the standard price for sale by the unit of a ball or other prices as the lower limit when the retailer sells the product with a discount.

3 "Hamanaka wool" means the yarn for hand knitting or handicraft in the form of a ball with the trademark "Hamanaka" or "Rich More."

conduct which falls within Paragraph 12 of Unfair Trade Practices (Dealing on restrictive terms), e.g. it forced its partner retailers to conceal the sale price for the vision corrective contact lens that was in the advertisements[4], therefore constituting a violation of Article 19 of the AMA.

In the written cease and desist order on this case, the following fact is included as a specific example of violating the act mentioned above, that is, when its partner retailer indicated the sale price of a "One-day ACUVUE 90-package[5]" in the advertisement on the top page of its website, Johnson & Johnson forced its partner retailers to eliminate the sale price from the advertisement.

5. Other cases related to e-commerce

5.1 Case regarding DeNA Co., Ltd.[6]

The JFTC issued a cease and desist order against DeNA Co., Ltd (hereinafter referred to as "DeNA") on June 9, 2011, on the ground that DeNA was engaging in conduct which falls within Paragraph 14 of Unfair Trade Practices (Interference with competitor's transactions), and therefore constitutes a violation of Article 19 of the AMA. The outline of this case is as follows.

DeNA and GREE, Inc. are companies that operate mobile social networking services (hereinafter referred to as "mobile SNS")[7], offer their own social games[8] and give their platforms for other enterprises to provide their social games.

DeNA has been an important business partner for many social game developers as it has ranked at the top in terms of revenue of social game in Japan from January 2010. Registered users of the mobile SNS that DeNA operates (hereinafter referred to as " Mobage-Town") access the website of each social game developer through choosing links displayed on the first page of a "game" on the website of Mobage-Town, and social game are provided to them. In other words, the links displayed on the Mobage-Town website were designed to lead users to the websites of social games provided by developers, and are an important channel to attract and direct Mobage-Town registered users to the websites concerned.

Under the above situation, DeNA internally specified social game developers that were important to them. Some of these developers provided social games via the mobile SNS operated by GREE, Inc (hereinafter referred to as "GREE") which has been ranked at the second place in terms of revenue of social game in Japan. In this case, DeNA forced social game developers not to provide the social games through GREE by disconnecting the links of the Mobage-Town website for the social games providing through Mobage-Town. This activity by DeNA was judged to constitute interference with a competitors' transaction and was seen as a violation of the AMA.

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4 Excluding the pages other than the top page of the website on the Internet where the advertisement was displayed as well as the advertisement at the store.

5 The product in which 90 pieces of the one-day disposable vision corrective contact lens sold by the trademark of "One-day ACUVUE" is packaged in one box.

6 http://www.jftc.go.jp/en/pressreleases/uploads/110609DeNA.pdf

7 "Mobile SNS" means the service to provides mobile website, which is equipped with the communication function among the users, and which enables the use of this function in the applications software including the games.

8 "Social game" means the games which are provided to the users through the mobile SNS and is available only on the internet.

5.2 Yahoo Japan Corporation's use of technological service such as search engine provided by Google Inc.[9]

The JFTC, in July 2010, after reviewing the plan that Yahoo Japan Corporation (hereinafter referred to as "Yahoo Japan") would use search engine and search-advertising platform (hereinafter referred to as "search engine etc.") provided by Google Inc. (hereinafter referred to as "US Google)", upon the request for consultation process from Yahoo Japan and Google (hereinafter referred to as "the two companies"), responded to the two companies that Yahoo Japan's use of search engine etc. provided by Google (hereinafter referred to as "the provision of technology") would not violate the AMA on the assumption of the two companies' following explanation :

1. Since Yahoo Japan did not have search engine etc. for its own website etc., it had so far been provided search engine etc. from Yahoo! Inc. (hereinafter referred to as "US Yahoo"). However, since it became impossible for Yahoo Japan to continuously use search engine etc. provided by US Yahoo, Yahoo Japan has decided to newly select search engine etc. provided by Google as the most suitable search engine etc. for it.
2. The two companies will independently operate their own online search services and online search advertising after implementing the provision of technology and will totally separately hold information about advertisers and their bidding prices etc., so that the two companies will remain competitive.
3. The contract period for the provision of technology is two years. After the end of the contract, Yahoo Japan will be able to select a new search engine etc., and also even in the middle of the contract period, Yahoo Japan will never be impeded from using other search engine etc.

On the other hand, because the provision of technology raises Google's share of technology of search engine etc. in Japan to about 90%, the provision of technology, if it is implemented in a different manner from the two companies' explanation, may have a strong anticompetitive impact on the online search engine and online search advertising market[10]. The JFTC conducted the preliminary investigation focusing on progress situation toward the provision of technology etc. The results of the investigation are as followed,

1. With regard to the provision of technology, it is considered that Google has provided search engine etc. to Yahoo Japan, in response to its request based on its own judgment that Google's search engine etc. is the most suitable.
2. The provision of technology has been in progress toward implementation in line with the explanation made by the two companies in the consultation process. In addition, any fact that the two companies are taking coordinated actions by means of sharing commercially sensitive information relating to advertising price, etc. has not been found at present.
3. Any specific example that the two companies are taking any action which may raise a problem under the AMA has not been found at present.

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9 http://www.jftc.go.jp/en/pressreleases/uploads/2010-Dec-2.pdf

10 The JFTC will, however, continue to monitor the provisions of technology and, when finding any indication of violations of the AMA, will vigorously conduct the necessary investigations. At the same time, the JFTC explained the results of the preliminary investigation to the two companies and demanded not to engage in conduct which may violate the AMA, including those which may cause difficulties to the business activities of their competitors or coordinated actions regarding the prices of online search advertising etc. between the two companies.

As mentioned in (i)-(iii), the JFTC concluded that it was not necessary for the JFTC to conduct further investigation toward taking legal measures of the AMA into the provision of technology at this moment and published the conclusion on December 2, 2010[11].

[11] The JFTC will continuously monitor it, and when finding any specific fact that may constitute a violation of the AMA, the JFTC will vigorously address it by conducting necessary investigations etc. In addition, the JFTC explained to the two companies the results of the preliminary investigation, and also demanded that the two companies shall not engage in conduct which may raise a problem under the AMA, for example, Google unilaterally or in conspiracy with Yahoo Japan causes difficulties to the business activities of their competitors, or the two companies take coordinated actions regarding the prices of online search advertising etc.

KOREA

1. Introduction

The online cyber market opened the door to borderless trade without restrictions on time. Its particular characteristics, compared to those of the traditional bricks-and-mortar market, result sometimes in pro-competitiveness and sometimes in anti-competitiveness. More specifically, by allowing for the rapid spread of diverse information, the online market has helped enterprises to improve their cost efficiency and competition efficiency, thus benefiting consumers by lowering prices. On the other hand, the cyber market can be afflicted by the potentially negative network effect, which includes the tipping effect and lock-in effect, where an enterpriser who has formed a monopoly is able to maintain this monopoly on an almost permanent basis. For these reasons, the necessity to preclude unfair trading behaviour in the online market has become increasingly important, alongside the need to closely monitor pro-competitive and anti-competitive behaviour.

Among unfair trading practices, product bundling, resale price maintenance, and exclusive dealing contracts are especially frequent due to the nature of the online market. In addition, given the possibility of online market growth, attempts at vertical restriction are likely to increase in the future. Consequently, it would appear beneficial to look into the possibility of an antitrust authority dealing with such vertical restrictions similar to existing competition violations in its antitrust enforcement activities.

2. Vertical restriction in the online market & Korea's Fair Trade Act

2.1 Product bundling

In the traditional offline market, it was common to see a product sold in a bundle with another product that was complementary to the former. However, as the online market has expanded, computer software has been increasingly sold in bundles with other technologically compatible products. Unlike other markets, in a market under the constraints of the network effect, technology and quality are not the only elements affecting consumer choice. A product's market share itself can also be a decisive factor in controlling consumer choice. In such a situation, enterprises seek to utilize their leverage in one market to sell a different product from another market. As part of these efforts, they are highly likely to engage in product bundling.

Article 23(1)3 of the Monopoly Regulation and Fair Trade Act prohibits enterprisers from unfairly inducing its competitor’s customers to purchase bundled products against fair trading practices. Article 36(1) of the Enforcement Decree of the Act specifies additional details in relation to sales bundling. According to the provisions, sales bundling is constituted when: 1) an enterpriser inappropriately forces clients to buy a separate subordinate product together with a main product, and 2) the act of enforcing this purchase upon the client is anti-competitive. An exception in the Guidelines for Unfair Trading Practice Review, here, is when a sales bundling practice improves consumer welfare or offers efficiency gains far larger than its competition-restriction effect. In this case, such an act is not viewed as an offence. That is, the rule of reason is applied here.

In dealing with online product bundling in a similar way to that in other market places, typical trading practices and the supply status are important thresholds to measure if a certain product is a close and

integral component of its related main product. Another important criterion is if the product is sold separately according to individual demand for this individual product alone.[1] The KFTC examines such product individuality even for products sold in bundles for technological combination reasons. Illegality is assessed in consideration of anti-competitiveness caused by the tipping effect in the network market and by entry barriers.

2.2 Resale price maintenance

Given the nature of the online market, where diverse information is exchanged freely, consumers can have easy access to various product information. Likewise, enterprisers also enjoy a broader range of information at a lower cost. These trends enable enterprisers to detect whether a firm is breaking away from a cartel, increasing the incentive for resale price maintenance.

Article 29(1) of the Fair Trade Act of Korea prohibits resale price maintenance (RPM) and RPM violation is constituted when: 1) an enterpriser sets the price in its transaction with a trading partner company or companies in subsequent phases of a transaction, and 2) there exists a behaviour of forcing trading partners to follow a set price. According to the Guidelines for Resale Price Maintenance Review, the forcefulness of an act is assessed on the basis of whether a certain enterpriser has its trading partner company or companies, in subsequent phases of transaction, follow a preset price against their free will and therefore puts them at a disadvantage.

The aforementioned Act and Guidelines also apply to online market cases. Consumer prices set in an online space are checked for their forcefulness and for their capacity to impose a disadvantage.

2.3 Exclusive dealing contract

Some online sellers are able to reduce more costs, including store expenses, than other offline sellers so that they can sell goods cheaper. Manufacturers, responding to this tendency, have concerns over the fall in overall prices and the degradation of brand image, which could possibly lead to a decrease in their own sales. Accordingly, they are more likely to work with partners under certain conditions, not to sell goods online or to trade with online sellers.

When selling identical products both online and offline, the online prices widely affect the general price of the product beyond the online space. Due to fears in this regard, some enterprisers have attempted to ban online sales or working with online sellers in order to maintain resale prices, thus generating complicated unfair trading practices in the cyber market space.

An exclusive dealing contract as prescribed in Article 23(1)5 of the MRFTA is a trading practice under conditions which unfairly confine a trading partner's business activities. Article 36(1) of the Enforcement Decree of the Act [Enclosure 1] regulates the trading region or trading partner's activity restriction as a type of confinement condition. A violation is observed when 1) an enterpriser traded on condition of confining its trading partner's business activity and 2) the conduct is illegal. The illegality, in particular, is determined according to the anti-competitiveness of the act in question, based on its intention, purpose, effect, consequences and other specific aspects as well as product traits, distribution transaction status and an enterpriser's market position.[2]

Suspicious online exclusive dealing contracts are examined for their illegality with an understanding that online prices affect offline ones and harm overall market competition.

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1 Seoul Central District Court Jun. 11, 2009; Ruling no. 2007가합90505.

2 Supreme Court Oct. 16, 2000; Ruling no. 99다30817.

3. KFTC & Court Decisions

3.1 Sales bundling

3.1.1 Microsoft's sales bundling (February 24, 2006)

The Korea Fair Trade Commission fined Microsoft for violating fair trade law. Microsoft was charged for selling the Messenger programme in a bundle with the Window Media Service (WMS) and the Window Media Player programme (WMP) on its window server operating system and PC operating system.

In the sales bundling case where the WMP, in particular, was tied to the PC operating system, Microsoft's market share in the PC operating system market and Media Player market was 99% and 60% (2004), respectively. The KFTC viewed that the WMP and the PC operating system were separable items even though they were combined technically, because the WMP and the Window server operating system were not indispensable factors and the WMP itself could be sold separately. Moreover, the KFTC recognized that other parties of the transaction were forced to purchase the WMP, although they did not want to do so, because of product bundling with the PC operating system.

Microsoft's action limits competition by creating tipping effects and entry barriers with regard to the characteristics of the Network market. As such, it was determined that Microsoft abused its market dominance for unfair purposes in transactions or in other measures. Microsoft's bundling undermined competition as the efficiency enhancement effect was so low that it did not overtake the competition limit effect.

In a similar case, the court of Korea ruled a violation of the fair trade law,[3] again with regard to Microsoft, judging that its sales practice of selling Messenger combined with the Window XP and selling the WMS combined with the Window media server were in fact sales bundling. This ruling of Microsoft's sales bundling as a violation is only the second of its kind, following the court ruling of the European Union.

3.2 Acts of Resale Price Maintenance and exclusive dealing contract

3.2.1 LG's act of Resale Price Maintenance

A similar case as that mentioned above involved LG. The KFTC punished LG for maintaining resale prices for its own agencies, which sell laptops both online and offline. LG offered a minimum retail price list to its agencies and forced them to follow its price policy. It then examined each agency's compliance by monitoring sales prices posted on a price comparison website.

The KFTC therefore determined that such an act of distributing a price list with a minimum retail price for their own suppliance of laptops was the equivalent of maintaining a resale price. It was also concluded that LG undermined free competition in prices and infringed each business operator's autonomy by artificially fixing resale prices. LG had examined whether each agency was fixing the minimum retail price policy and imposed effective measures, such as the suspension of product release, when grants were offered.

3.2.2 Goldwin Korea's act of exclusive dealing contract

The KFTC imposed actions and surcharges on Goldwin Korea's act of exclusive dealing contract. It maintained resale prices and provided disadvantageous clauses on contracts when the products were sold online.

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3 Seoul Central District Court Jun. 11, 2009; Ruling no. 2006가합24723.

In the contract signed between Goldwin Korea and its subsidiary shops, clauses mentioning a ban on opening shopping malls or selling online, a ban on supplying products to online shopping malls operated by a third party, and a ban on sales brokeraging online were included. Moreover, disadvantageous clauses mentioning a suspension of product release and contract cancellation when shops violated their duties were also included in contracts. Under these same contracts, official warning documents were sent out on many occasions indicating that Goldwin Korea would terminate transactions with shops that resumed sales online.

The KFTC confirmed that by issuing bans on online sales and including disadvantageous clauses when duties were violated, Goldwin Korea's unfair acts were illegal. These acts limited transactions by regions and parties, thereby blocking, fundamentally, online sales and restricting competition of sales measures between specialty shops. In addition, such acts deprived consumers of the opportunity to purchase items at an affordable price, thereby substantially undermining the benefits to consumers.

3.2.3 Resale Price Maintenance & Exclusive Dealing Contract by Royal Philips Electronics N.V.

The KFTC fined Royal Philips Electronics N.V. for fixing the retail price of its products sold online and excluding some product items from online stores by utilizing its leverage in the offline small electronics market. The multinational electronics company fixed the minimum retail price of its small electronic products and threatened to impose disadvantages on retailers found selling products in violation of the set price. The company was also found to have required that retailers not sell four specific product items online and intimidated them with a disadvantageous imposition in case of violation.

The Commission recognized that Royal Philips Electronics N.V. had been involved in setting and forcing a resale price because it fixed prices and imposed disadvantages on firms not following its requirements. The Commission also ruled on the fact that online distribution channels help stimulate competition not only in the online market but in the offline market and the entire small electronic appliances market as well. Therefore, acts carried out by Philips had a detrimental effect on competition within the brand and thus negatively affected general consumer benefit as a whole. The KFTC found the conduct of Philips unlawful, citing that by blocking online sales of major products, the multinational company harmed competition. By depriving consumers of their opportunities to buy cheaper goods, Philips also undermined consumer benefits, and thus these particular acts on the part of the firm were intended to reinforce resale price maintenance.

4. Conclusion

As explained above, the Korea Fair Trade Commission has treated main online vertical restrictive behaviours with the same principles as those for offline market conduct by applying the country's fair trade act in determining illegality. In other words, the characteristics of the online market are understood in the same context as those for any fair trading act violation, in principle.

However, there is a need to consider broader issues than those in the traditional bricks-and-mortar market when regulating unfair online practices so as to assess their true effects and consequences, particularly given the online market's huge potential for growth supported by rapidly changing technologies. Competition authorities must pursue antitrust enforcement as a safety tool to keep competition tight while safeguarding technological innovation by ensuring enough compensation for digital product developers. As for market definition—a basic framework for anti-competitiveness assessment—an antitrust authority should be able to decide if the online market place is to be separated from or integrated within the offline market and how to approach an offline market spanning across the world.

In addition, the KFTC presents answers to the Secretariat's questions as follows:

4.1 Does a competition authority need to make a special action against online vertical restrictions?

The KFTC does not have any separate set of regulations solely targeting vertical restrictive behaviours in the online market place. It is viewed that, rather than establishing a new set of principles for a new environment, we should review existing ideas such as network, and add more diverse considerations to enforce the Fair Trade Act.

4.2 Any special reason for manufacturers to try to restrict online market price competition?

Yes, there is. The more similar goods sold online and offline become, the stronger possibility of market integration of the two, increasing the likelihood of online prices moving into offline market places. Online stores can save more costs, such as store expenses, and sell products cheaper for that reason, thus generating a decrease in offline market prices in general. Then, manufacturers begin to worry that their products' brand value will deteriorate as a result of this situation.

4.3 Would it be effective to legalize resale price maintenance in the online market, comparable to the offline market, from an economic perspective so as to prevent free riders?

Prevention of free riders is often cited by manufacturers as grounds for using resale price maintenance since it can facilitate competition between brands in the distribution process. Thus, it is an element that can be factored in to the general assessment of RPM anti-competitiveness. A typical type of free riding is for an online store that has made no investment in public promotion, etc., to take advantage of an offline store that has made such an investment. Another type of free riding occurs when consumers who learn about a product by reading people’s online comments and feedback on a particular product then go to an offline store to buy the product. Contrary to the first example, this is a type of free riding where an offline store takes advantage of an online store’s investment. No matter how diversified free riding practices can be, however, antitrust authorities must be required to look into RPM's pro-competitiveness.

NORWAY

1. Norwegian experiences and challenges related to Internet platforms: Introduction

The emergence of web portals in Norway has taken place within a wide range of services. Internet portals can be specially adapted for the advertisement and searching for specific products and services. The web portal may be owned and run by a vertical integrated undertaking, or by an undertaking without activity in a downstream market.

In a note submitted to the OECD the 20th of May 2009*, the Norwegian Competition Authority (NCA) accounted for the experiences related to two-sided markets and Internet portals for advertising and searching for residential properties for sale. The Norwegian experience concerning the establishment of a regulation that requires the Internet portals to provide access to residential property advertisement on non-discrimination conditions is one of the cases that will be presented in this paper.

One-sided and especially two-sided network externalities are prevalent features in online platform markets. The importance of network effects in platform competition depends on the degree of differentiation between the platforms. In markets with strong network effects and a low degree of differentiation between platforms, barriers to entry are normally high. Under such market conditions, it will normally be difficult for new entrants to achieve the required critical mass to remain in the market. Such markets are therefore often highly concentrated.

Depending on the strength of the network effects and the degree of differentiation, platform competition can tip an industry to monopoly.[1] Such an outcome does not, however, necessarily reduce social welfare. An assessment of the competitive effects must thus be done on a case-to-case basis.

The NCA is of the opinion that the market conduct by the Internet platforms can lead to anti-competitive effects related to different products and services which are traded via the platform. The NCA has reviewed a few cases concerning the online services market behaviour under the antitrust rules of the Norwegian Competition Act, but has so far not found reason for intervention. However, in 2010 the NCA introduced a regulation concerning access to online advertisement of residential property on non-discriminatory conditions.

Section 2 briefly describes three Norwegian cases related to Internet platforms in which the NCA has either investigated or made observations. Section 2.1 describes an Internet platform for the collection of purchased e-books initiated by the major publishers in Norwegian. Section 2.2 gives a brief presentation of the Norwegian experiences concerning the international platforms for online hotel booking. Section 2.3 describes the Norwegian regulation that requires Internet portals to provide general access to residential property advertisement on non-discriminatory conditions. Finally, section 3 provides a short summary and the expected follow-up.

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* DAF/COMP/WD(2009)57.

1 The competition between VHS and Betamax is a good example of the importance of network effects and how an industry may tip to monopoly.

2 Experiences related to Norwegian cases

The antitrust sections in the Norwegian Competition Act of 2004 are harmonized with EC competition law. Section 10 of the Competition Act corresponds to the prohibition of agreements restricting competition in the TFEU Article 101 and the EEA Agreement Article 53. Likewise, Section 11 of the Competition Act corresponds to the prohibition against abuse of a dominant position in the TFEU Article 102 and the EEA Agreement Article 54.

The NCA has investigated a few cases under both Sections 10 and 11. This regards the residential property platforms' refusal to provide general access to the platforms. The NCA did not, at that time, find reason for intervention.[2]

In the following we will present the experiences and development related to three other Norwegian cases.

2.1 Norwegian e-book platforms

Digitalisation has led to massive changes in the publication and sales of books, particularly through the development of the electronic book, or "e-book". The market for e-books in Norway is nascent and lags greatly behind major English speaking countries like the United States and the United Kingdom.

The development and distribution of e-books in Norway has mainly been driven by the publishers. In April 2011, the Norwegian book industry launched a joint project "Bokskya". This is an Internet platform that collects purchased e-books from affiliated bookstores. Several critical articles in Norwegian newspapers have described Bokskya as difficult to use, and with a poor selection of e-books. Also, the Norwegian book industry is characterized by vertical restraints. Big publishers control a major part of the distribution and bookstore chains. These circumstances, it has been argued, may prevent or delay the development of new products and platform solutions in the e-book market.

Norwegian publishers and booksellers have traditionally enjoyed subsidies and special arrangements, including an exemption from competition law. The exemption, called “the fixed price policy”, involves pricing arrangements where retailers are obliged to sell books at the price set by the publisher. The vertical restriction limits price competition between bookstores in the fixed price period.

The Norwegian Government has recently invited comments from interested parties on the proposal for new legislation that makes the fixed price policy statutory. The purpose of the proposition is to contribute to a diversity of Norwegian literature as well as to maintain a nationwide network of physical bookstores. The discussion paper has not concluded whether e-books should be part of the proposed new legislation.

Sales of e-books in Norway have followed the existing value chain of printed books, rather than developing an e-book platform directly from the publisher. Today Norwegian e-books are part of the fixed price policy, but publishers can set different prices for paper and e-books. Unlike Norwegian paper books, the e-books have value added tax.

Further, Norway does not have a technical platform that supports innovative digital literature. There have been examples where Norwegian digital literature has been forced to be published in Denmark as there are no technical facilities in Norway to support these products. The increase in sales of e-books over the Internet is lower in Norway than in neighbouring countries, and price comparisons undertaken by the NCA shows that the price level of e-books in Norway is significantly higher than in Sweden.

[2] A2005-33, A2007-7.

The NCA has in written submissions to the Ministry of Culture pointed out that the fixed price agreement and the vertical integration between publishers and bookstores is perceived as an obstacle to competition and may hamper further development and digitalisation of the book market. Firstly, high prices on e-books contribute to the protection of printed books whereby publishers and booksellers avoid cannibalization, but at a significant disadvantage for the e-books market. Secondly, the consumers are not able to benefit from the savings associated with not having to print, physically distribute and sell the e-books.

2.2 Online hotel booking

National Competition Authorities in other countries have opened investigations into online hotel booking. In Norway, the conduct and distribution agreements of these booking services have been a concern both for the hotel industry and for the NCA.

So far, the NCA has arranged meetings with the Norwegian hotel chains to receive information on the nature of the hotel booking website services and price setting agreements, but has yet to open a formal investigation. The concerns have been linked to the undertaking Expedia and hotel booking services through its subsidiary Hotels.com. The issue has also been presented in the Norwegian media.

In September 2012, the Norwegian press reported that the major online platforms for hotel bookings had obtained an increased market share in Norway. It was also revealed that the hotels had to pay a commission to the web portals up to 30 per cent. The press also referred to a statement from one of the hotel groups claiming that the distribution agreements could represent an infringement of Norwegian competition law.

The hotels were committed to pay substantial commissions to the web platforms. Norwegian hotels claimed that the level of commission was too high, and that the web portals represent a costly intermediary. In addition, the hotel groups did not want to enter into an agreement that they feared could breach competition law. Recently, some of the major Norwegian hotel groups have cancelled their distribution contracts with Hotels.com. In total 320 hotels, covering more than half the Norwegian hotel market ended their contracts in 2012. The cancellations involve the contracts with Hotels.com. After the cancellations of the distribution agreements, the Norwegian hotels claim to have increased their sales campaigns on their own web sites. The main focus in the marketing activity has been to guarantee that the lowest hotel accommodation prices would be obtained from the hotels own web sites.

The distribution agreements contain a price parity clause. Price parity agreements mean that the consumer will face the same price from all distributors of hotel bookings. The NCA has not yet opened a formal investigation under the Norwegian Competition Act. One reason is, as explained above, that a substantial part of the Norwegian hotels have cancelled their distribution agreements, and are engaged in significant online marketing and booking services on their own websites. Since the question about price parity conditions is also part of the investigations in other jurisdictions, the NCA has decided to await further investigation at this time.

2.3 Establishment of regulation that requires Norwegian internet platforms to provide general access to residential property advertisement

Access to Internet platforms for residential property advertisement has been subject to regulation in Norway. The regulation was implemented the 1st of January 2010. Section 14 of the Norwegian Competition Act provides the legal basis for the regulation:

> *"If necessary to promote competition in the market, the King may by regulation intervene against terms of business, agreements or actions that restrict or are liable to restrict competition contrary to the purpose of the Act."*

Section 14 can be applied when two main conditions are satisfied. The first condition is that a regulation is necessary (to promote competition in the market). The second condition is that there is a business practice that restricts or is liable to restrict competition contrary to the purpose of the Competition Act. In addition there also applies a non-statutory condition that the regulation must be proportionate. It follows from the preparatory works of the Competition Act that a regulation to promote competition is necessary when the antitrust rules are not applicable, it is difficult to prove an infringement, or an individual decision would not be a sufficient means to prevent the anti-competitive behaviour in the market.

On behalf of the Ministry of Government Administration, Reform and Church Affairs, the NCA investigated web platforms conduct regarding access to residential property advertisement. Only real estate agents were permitted to advertise residential property for sales. The NCA had earlier reviewed the Internet portals' refusal to supply under both Sections 10 and 11, but the NCA had not, at that time, found a basis for intervening.

The NCA also found that an individual decision would not be a sufficient means to prevent the anti-competitive behaviour in the market. The real estate agents are the main customers of advert and could be able to move their demand to a web platform that is not subject to individual intervention. Consequently, the regulation had to apply to all the online advertisement platforms.

The sale of residential property will involve a number of services (e.g. value estimation, estate photography, marketing, contract drafting, etc.). Several of these services can be bought separately, but the real estate agents usually only offer these services as bundled packages. Due to the fact that only real estate agents had access to the Internet advertising portals and most sellers considered advertising on these portals to be essential to attract buyers, the customers (the residential estate sellers) were forced to buy the extensive bundles offered by the real estate agents. As a result of the bundling, the refusal to supply advertisement to other parties than real estate agents reduced competition, and limited the choice of services and innovation of new services related to the sales of residential property. In addition, the practice may have contributed to higher prices for services offered by estate agents. The higher transaction costs could lead to an inefficiently low number of real estate transactions.

General access to residential property advertisement on the web platforms may lead to increased competitive pressure on the real estate agents, both from private parties providing the services themselves and non-real estate agent enterprises unbundling the real estate services. Increased competition should result in more innovation and lower prices for the sellers of residential properties. General access would also increase consumer choice by giving the consumers the option of providing each of the services themselves, buying them from a non-real estate agent, or buying then from a real estate agent. On this basis, in 2009 the NCA proposed that the Ministry of Government Administration, Reform and Church Affairs should implement a regulation for general access to residential property advertisement on Norwegian Internet platforms.

The regulation for general access to Internet platforms was implemented the 1st of January 2010. Following the implementation, the NCA spent a considerable amount of resources to get the major Norwegian web advertising platform, Finn, to comply with the regulation. The main content of the access regulation states as follows:

> *"Undertakings that offer residential property advertisement on the Internet are required to provide general access to the service on non-discriminatory conditions."*

As a result of the new regulation, questions have emerged on the interpretation and the implementation of the regulation.

The regulation has been the basis for innovations of new services in the market for the sale of residential property. Central to the development is that the regulation has paved the way for a new category of professional participants in the market, who are not a real estate agent. The new parties offer packages to private sellers including services concerning value estimation, estate photography, seller's duty to disclosure, sales prospect, advertisement, advice on open house and bidding round, etc.

The main question is related to the requirement to grant access on "non-discriminatory conditions". The NCA has received complaints from different parties who have tried to get access to the Finn website. The NCA has arranged meetings with representatives from Finn regarding the access conditions for the new professional participant. At the end of 2011 Finn proposed a solution for access conditions that involve all participants. These conditions are not completely non-discriminatory, but the NCA considers that differences in access condition between real estate agents and non-real estate agents have been objectively justified.

The access conditions for the non-real estate enterprises are as follows:

- they can use the same IT-publishing tool as estate agents
- they have the same opportunity to bundle advertisements with other sale relates services
- they have the same opportunity to use their own trademark
- they have the same start-up cost as the estate agents
- they have the same opportunity to obtain quantum rebates

The differences in the conditions are as follows:

- the advertisements from the new non-real estate participants will be published as personal advertisements and with additional information about key elements of the buying process.
- Finn will, unlike for real estate agents, carry out a quality control for advertisements from both private parties and non-real estate enterprises.
- the non-real estate enterprises cannot appear on the portal as intermediaries for the transfer
- due to differences in the administration costs, the real estate agents can get larger rebates

The NCA has spent a considerable amount of resources on following-up the new regulation. This is first and foremost due to the process with Finn to decide on access conditions that corresponds to the non-discriminatory condition in the regulation. Based on the experience so far, and as a result of technical developments and changes in market conditions, the Authority can expect to spend continuous resources on the interpretation of the regulation in the future.

The National Federation of House Owners in Norway (a nationwide organization for owners of private houses, apartments and holiday homes) has pointed out that selling residential property without assistance from an estate agent is difficult. Finn has reported that residential estates sold without a real estate agent only accounted for a small percentage of the total number of residential estates advertised for sale on Finn in 2011.

As previously mentioned, the regulation has been the basis for innovations of new services in the market for the sale of residential property. Central to the development is that the regulation has paved the way for a new category of professional participants in the market, who are not real estate agents. Such new professional undertakings offer services that make it easier for private parties to sell their residential property. Given that these new businesses have general access to the web portals on non-discriminatory terms, to the consumers are likely to enjoy a wider choice of services and increased the competition among estate agents. The market will decide which new services will evolve.

3 Summary and the expected follow-up

There is a substantial demand for e-books in Norway. So far, there are indications that this demand has not been satisfied. The NCA will continue to monitor the development in the market for e-books. According to the public information of the NCA the continuing disputes concerning online hotel booking also cover the question of price parity. The NCA has not taken a final position on the issue and is awaiting the results from the investigations carried out by other Authorities.

The NCA has spent a considerable amount of resources on the regulation of the access conditions to web platforms for residential property advertisement. It is still too early to conclude on the success of the new regulation. The NCA will carefully monitor the developments, both regarding necessary modifications to the current regulation and to achieve more general competence concerning regulation of online markets.

CHINESE TAIPEI

1. Introduction

This report provides an overview of e-commerce market in Chinese Taipei and addresses the issues related to price and non-price vertical restraints in such market, and applicable competition rules as well as guidance. The Fair Trade Commission (the Commission) also illustrates vertical restraints for on-line sales by detailing several cases as examples.

2. Electronic commerce and competition in general

E-commerce refers to any transaction, such as buying and selling goods or services are carried out electronically with support of Internet technology. In other words, the trading activities that are conducted by the two parties via a virtual electronic marketplace can be called e-commerce. According to the 2007 research report on innovative e-commerce models issued by the Ministry of Economic Affairs, e-commerce can be subdivided into 3 categories: (1) business to business (B2B); (2) business to consumer (B2C); (3) consumer to consumer (C2C).

In Chinese Taipei, the most common types of e-commerce models are B2C and C2C. The report released by the Ministry of Economic Affairs in 2011[1] found that 79.2% of on-line businesses chose the "e-commerce platform" (B2C model), where a supplier starts an e-store on virtual transaction platforms, and 43.2% of them chose "auction platform" (C2C model). Only a small number of businesses set up their own websites. On-line transactions in Chinese Taipei have been growing up in double digits every year since 2006. The transaction value reached 358.3 billion NT Dollars in 2010, a 15% increase from 2009 to 2010, and the number is predicted to reach 430 billion NT Dollars in 2011. As of 2011, only 20% of e-stores selling on-line to customers overseas.

3. Competition law issues in e-commerce

A key factor of success for those who compete in e-commerce activities is to adopt a wise and flexible marketing strategy in the fast-changing information economy. As deciding marketing strategies, they must take into consideration the trends of government's laws and policies, especially those related to competition regulations. Likewise, for competition authorities, the strategy to respond in this new and increasingly complicated e-commerce market is closely related to their perspectives on the characteristics of e-commerce market place and the development of information economy.

As the Internet technology promotes free flow of information and transparency for relevant products, it mitigates consumers' concerns about information asymmetry and reduces transaction costs. Furthermore, the diversity of online information can help consumers compare prices and quality of products sold by online and brick and mortar retailers to make even better decisions. In this regard, e-commerce market mechanism ought to lead to more intensive competition. However, on the other hand, enhanced transparency and disclosure of information also facilitate collusion among e-commerce players, and effective monitoring mechanism for concerted actions.

[1] See "The Report on Survey of B2C E-Stores", Department of Commerce, Ministry of Economic Affairs, 2011.

In response to the current development of the Internet transactions made through on-line platforms, the Commission in its 617th Commissioners' Meeting on September 4th 2003 decided to issue the "Policy Statements on E-Market Places", so as to formulate a comprehensive administrative regulations on the "electronic marketplaces" derived from the e-commerce. The purpose of the policy statements is to provide guidelines for participants in the "electronic marketplaces" to follow relevant regulations of the Fair Trade Act (FTA) under the principles of "ensuring the fairness in e-commerce market competition" and "not deviating from the nature of Internet technology nor obstructing its development possibility". It also focuses on "the product markets traded in the electronic marketplace" as well as "the market of the electronic marketplace itself" in analyzing issues regarding restriction of competition and unfair competition, such as information sharing agreements, monopsony power exercised by the buyer-groups, exclusive agreements between participants who compete in the relevant electronic marketplace and marketplace providers for excluding specific rivals or to discriminating against rival companies, and the competition environments of the relevant markets.

Another issue of online sales is the definition of relevant market and whether the business has market power. In defining online sales' relevant market, competition authority should take into consideration the development of technology, dynamic movement, and then adopt case-by-case decision making approach. In addition to those traditional factors such as substitutability of relevant products, sales model, technology, capacity, length of time, cost and consumption habits, other items such as network bandwidth, types of network transmission, features of products, and should also be put into consideration. Accordingly, the Commission amended the second point of the "Policy Statements on E-Market Places" on the 838th Commissioners' Meeting on 29th November 2007 to fit the required criteria of market definition in electronic marketplaces[2].

As for business to consumer (B2C), Chinese Taipei's consumer protection authority has implemented the "Guidelines for Consumer Protection in the Context of E-commerce" since 2002. B2C transaction regulations are consumer protection-oriented because they include transaction safety, privacy protection, Internet fraud and other issues. These issues often involve consumer disputes and criminal investigation. They are subject to the guidance of the "Guidelines for Consumer Protection in the Context of E-commerce" and other relevant laws and regulations, and are supervised and overseen by relevant government authorities. The Commission is the competition authority responsible for regulating market competition and, according to the current FTA, there are no specific exceptions or exemptions for online transactions. Therefore, all participants in e-commerce activities, including e-retailers and platform providers, in Chinese Taipei shall comply with the FTA and relevant regulations. For cross-border e-commerce activities that violate competition laws of other jurisdictions, international cooperation between competition authorities or corporate culture of self-discipline might be alternatives rather than competition law enforcement.

[2] The Commission's 782nd Commissioner' meeting, on 26 December 2006, on the decision of "*YAHHO!KIMO* Auction Website *(www.tw.bid.YAHOO.com*) alleged to be abusing monopolistic position and improperly charged for transaction fees in violation of the Fair Trade Act" referred to the above policy statement. The website's market share among Chinese Taipei's auction websites was as high as 69.4%. However, 1.5 month after the website began charging for transaction fees, the number of products listed, products sold and total amount of transactions dropped by 12.3%, 22.5% and 43% respectively and its competitors' number of products listed increased dramatically. The Commission held that *YAHOO!KIMO* Auction Website still has to face intense competition with other auction websites and marketplaces, which limited its ability to set a high transaction fee. The Commission thus concluded that the website did not have the ability to exclude competition and was not a monopolistic enterprise considered by the FTA to abuse its market power.

4. Vertical restraints for e-commerce

Vertical restraints for on-line sales are often seen in those platforms for B2C, C2C or B2B2C models. The reason for this is that online sellers face stronger competition as entry threshold is relatively low, compare to the brick and mortar retailers, and they tend to compete with prices due to the popularity of the Internet and transparency of information which is favorable for consumers to compare prices. The price competition becomes an incentive for upstream manufacturers and online distributors to maintain resale prices. In Chinese Taipei, Articles 18 and 19 of the FTA is well applied to the regulation of online vertical restraint and currently, apart from the "Policy Statements on E–Market Places", no other specific regulations on vertical restraints for online sales.

4.1 Price constraints

For the regulation on vertical price constraint, pursuant to Article 18 of the FTA: "Where an enterprise supplies goods to its trading counterpart for resale to a third party or such third party makes further resale, the trading counterpart and the third party shall be allowed to decide their resale prices freely; any agreement contrary to this provision shall be void.", it provides that upstream manufacturers shall not deprive downstream businesses' ability of setting prices according to their cost structure to ensure free and effective competition in the market. Online sales are no exceptions of this regulation. Though the Commission plan to amend this article referring to international trends, such as setting highest resale price with justification will not be subject to this regulation, in the next amendment, current practice should still comply with the current law.

With respect to the vertical restraint of platforms, similar products might be sold on different electronic marketplaces (transaction platforms) at the same time and form competition. The competition among platforms will be affected by both "nature and scale of the network effect" and "marketplace providers' operation practices". Marketplace providers may inappropriately encourage or require both trading parties (including businesses with the rights to run the marketplace) to engage in transactions only in the electronic marketplace and prohibit members from trading in other marketplaces. The marketplace might also use various rewards (such as prime rates, discounts and income sharing to reward a certain number of users) or punitive measures (such as minimum amount of transactions, minimum proportion of transactions, prohibition of investments in other marketplaces, prepaid membership, software investment or putting pressure on suppliers and buyers) as operation methods. If an online seller in one marketplace try to use or support other marketplaces and the original marketplace provider try to raise the seller's cost by asking it to discard profit or paying for the breach of contract to exclude competition, this practice may violate the FTA for restrictive competition[3].

4.2 Non-price constraints

For non-price restriction, according to Item 6, Article 19 of the FTA, "No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition: …6. limiting its trading counterparts' business activity improperly by means of the requirements of business engagement", e-commerce operators engages in anti-competition conducts that inappropriately limits its trading counterparts' business activities are subject to this regulation. As to the justification of the restriction, according to Article 27 of the "Enforcement Rules of the Fair Trade Act", it should be determined by the totality of such factors as the intent, purpose, and market positioning of the parties, the structure of the market to which they belong, the characteristics of the goods, and the impact that carrying out such restrictions would have on market competition.

[3] See "Policy Statements on E-Market Places."

In general, distribution contracts signed by product manufacturers and distributors are arranged by a selective distribution system. Distributors may also sell other brands apart from selling the major brands. They adopt different market strategies with different brands in accordance with their cost difference. Each distributor has different sales models, management and marketing costs, selling price and profit. Through online sales, prices of different brands are made transparent. If a distributor buys out the product, the ownership will then be passed to the distributor, which means the manufacturer should by then allow the distributor to determine sales channel based on its cost. A ban on the distributor's online sales will restrict its freedom of competing for transaction and sales arrangements for different brands. With the thriving of Internet marketing, consumers have an alternative model of transaction, online shopping, other than the traditional physical transaction model. Restricting online sales will limit the diversity of consumers' choices of transaction channels.

Manufacturers may argue that restricting online sales is to reduce the problem of counterfeit products and protect consumers' interests. However, if counterfeit is involved, there are other remedies for manufacturers' infringement claims. Concerning the free-ride issue in online sales, consumers' choice of using physical or online transaction is related to their consuming habits and the level of their faith in the online transaction. Some consumers may shop online after survey at physical stores. However, as the Internet fulls of information; there are many consumers who may collect information from the Internet and, after considering the safety of online transaction, choose to buy products from brick and mortar retailer.

Manufacturers may also argue that they restrict online sales for the safety of the product. Nevertheless, online transactions are diverse and many consumers may order online and pick up the products at a physical store. There are also consumers with professional ability capable of ensuring products' safety. Therefore, consumers' freedom to choose their ways of transaction should not be taken away. Furthermore, distributors adopt online sales are not aimed at specific a consumer, it is a passive sales model. Therefore, distributors engage in online sales will make transaction information transparent and strive for trading opportunities. Restricting distributors' on-line sales will lessen transparency of price information and take away distributors'' right to compete for trading opportunities. It also deprives their way of deciding sales strategies for different brand, which could be considered as a conduct of restrictive competition.

4.2.1 Case: Restriction on Downstream Distributor's On-line Sales Imposed by Merida Co. in Violation of the Fair Trade Law

Wei-Fong Co. (Wei-Fong) filed a complaint to the Commission that in August 2008 that it approached the northern general distributor of Merida Co. (Merida) and agreed to purchase and become one of Merida's retailers in Taipei. However, Wei-Fong never signed a contract with Merida Co. or the distributor. Wei-Fong has always purchased by buyouts from Merida. In 2008-2009, the number of Merida's retailers increased dramatically and they all racked their brains to find opportunities to raise sales. Wei-Fong began posting advertisements on *YAHOO!KIMO* Auction Site, including discounted bicycles from Merida and other brands since it opened in 2008. On 4 March 2010, Wei- Fong received a notice from Merida that informed it not to post advertisement and sell products on-line or else its retailership will be revoked. In May 2010, Wei-Fong received a letter of evidence from Merida and had its retailership revoked. Wei-Fong held that both parties conducted the transaction through buyout and yet Merida revoked its retailership. Merida further announced on its website that the company never authorized any on-line sales and products purchased on-line will not have original warranty. Merida restricted Wei-Fong's on-line sales and caused its unsold inventory to lose original warranty. Merida was likely to violate the FTA.

Merida confirmed that its market share in domestic bicycle market was approximately 10%. According to the Commission's industry database, bicycle producers that held the largest market share in 2009 and 2010 were Giant Manufacturing Co. (Giant) and Merida. Giant's market share was 34.54% and

36.36% in 2009 and 2010 respectively and Merida's was 19.37% and 14.04% respectively, which met FTA's 10%-threshold for monopolistic power in the market. According to bicycle retailers the Commission interviewed, Giant and Merida were the largest brands of bicycles in the market. Both of them set up distribution districts with retailing points which are often similar with a single set point so it is difficult for retailers to change brands. The Commission held that based on Merida market share and possibility of counterparty deviation, it should be held that Merida has considerable market power.

The Commission's investigation further revealed that Merida's website on retailing points expressly shows that its system of distribution includes flagship stores, exhibition centers, the brand stores and uncategorized retailing points (also called franchisees) which never signed any sales contracts with Merida but is part of the distribution system, such as Wei-Fong. According to the "Marketing Communication" that Merida sent to Wei-Fong on 8 February 2010 and 4 March 2010 respectively and the letter of evidence on 10 May that says "Your sale of our company's product on *YAHOO!KIMO* Auction Site is proved to be a serious violation of the company's regulations. If said situation is not improved in s given period or another violation is discovered, your retailership will be revoked." and "The Company sent you a letter on 8 February to inform you the violation of company's regulations regarding your sale of our products on *YAHOO!KIMO* Auction Site…we see that you have not made any changes after our investigation on 4 March. Your retailership has been revoked in accordance with to the Company's regulations." on 10 May 2010. From the above documents, it is obvious that the issue is related to Wei-Fong's online sales.

Although Merida denied the existence of such disputes and that of online sales restrictions, through random selection of 200 businesses in Merida's distribution system, most (28 in 36 businesses that responded to our investigation) acknowledged that they have been notified not to engage in online sales. They also said that violators would be punished by warnings, revoke of distributorship and refusal of supply of the product, etc. At least 18 of the businesses said that violators would have their distributorship revoked. Even excluding retailing points that do not have a contract (uncategorized), there are still 14 flagship stores, exhibition centers or brand stores that said Merida was involved in a dispute of online sales restriction and punishment.

Only 2 of 36 businesses that were investigated by the Commission said they engaged in online sales on bicycles and are still able to do so. However in a further interview, the two businesses said, although they did sell bicycles online, they never sold Merida bicycles online. The Commission found these two businesses on PChome Website's Merida E-store and Ruten Auction Website but there were no Merida's products.

The Commission then searched online with Merida's product keywords and only found introductions of its exhibition centers and other uncategorized retailers' stores with no relevant products sold online. Although there was a website of a retailer that has information on sales of Merida's bicycles, the latest update was on 8 October 2009 and all products were labeled "sold out, restocking". The Commission called to asked, the retailer said the website was no longer in use due to Merida's restriction on online sales.

The Commission further conducted on-site investigations. Besides Wei-Feng, 2 retailers were subjected to Merida's online inspection. One was warned (the distributor expressed that due to its strong sales channels-3 flagship stores, 2 exhibition centers and cooperation to immediately delete the on-line sales webpage, its distributorship was not revoked). Another distributor was removed from the website's list of retailing points. It is undoubted that Merida was involved in online sales restriction. All distributors Merida listed in its website could register for product warranty but they could no longer log in without a password after being removed from the list. To ensure they can provide original warranty service to consumers and gain their trust, distributors have to comply with Merida's restrictions of online sales.

The Commission concluded that Merida's ban on its distributors' online sales has limited retailers to sell product or to disclose their selling price information on the Internet. As transparency of information is an important element to ensure effective competition and Merida already had considerable market power in the bicycle market, the practice has impeded competition among distributors and limited their freedom to seek trading opportunities. It also deprived distributors of their rights to determine their marketing approaches and suppressed transparency of trading information that facilitates effective competition. It thus impeded market competition and was in violation of Item 6, Article 19 of the FTA, the Commission ordered Merida to cease the unlawful conduct and also imposed the company an administrative fine of NT$2,000,000.

TURKEY

With each passing year as the world moves deeper into 21st century, our daily lives become more digitalized. Information technology increases their effect on how people communicate, how they spend their leisure time and also how they shop. In the past decade the share of online sales vastly increased and as it's the case with almost all technological markets this brought the question, forca the competition practitioners, whether the traditional tools used to handling cases in traditional markets are well suited for the competition issues that may arise in this more "technological" sector.

Although it can be argued that this new growing sector tagged along some competition problems, it also brought what competition authorities mostly desire: several benefits directly for consumers. Online retailing enabled consumers to shop whenever they want from wherever they want with a chance to explore countless stores within few hours. With this decrease in transaction costs, consumers now have the chance to compare the quality and price of increased number of products which results in increase in both consumer welfare and degree of competition. Consumers can instantly get informed about a product through videos and user reviews which are widely available through the web. They can also have the ability to check the lowest price of the product that they desire using the price-check web sites, a process which clearly has a positive impact on the price competition among on-line retailers.

Besides its listed advantages, expansion of on-line retailing also made consumers vulnerable to certain abuses. Credit card frauds or retailers selling without stock or proper planning and thus making consumers wait for the product for prolonged times are maybe the most encountered problems in Turkey. While these abuses definitely have a negative impact on both the competitive process and consumers severely, it is expected that they are dealt with consumer protection provisions because of their nature.

As mentioned above, as the online retailing grew bigger and started to account for an important part of the sales, the importance of the competitive process in this sector also grew. In this respect application of the competition law regarding vertical restraints posed new questions for all authorities as well as for the Turkish Competition Authority (the TCA).

The TCA declares resale price maintenance as a hard-core restraint like most of the other jurisdictions. Although it is yet to be decided about a case where RPM provisions are forced to an online retailer, it can be deducted from the TCA's past decisions that those provisions will be accepted as infringements of the law and unlikely to be exempted.

The reasoning behind this is simple. RPM provisions applied to online retailers take away their main strength: to reflect their cost advantages to consumers and price lower than brick-and-mortar retailers. Besides, they are usually defended by their role in avoiding free-riding on classic retailers' investments. Although this argument is widely put forward, it can be said that TCA is looking that firms should provide solid proofs for this argument to be accepted. The signs of this approach could be seen from a recent decision dealing with RPM in LCD TV market. In *Anadolu Elektronik*[1], the TCA found that wholesaler of LCD TVs imposed RPM clauses to its retailers which included electronic markets such as Media Markt as well as its own retailers of white goods. Although the undertaking concerned claimed that a rule of reason

1 Decision dated 23.06.2011 and numbered 11-39/838-262.

analysis is required in order to take into account the positive effects of the practice, the TCA did not accept this argument and imposed a fine on the undertaking as it sees RPM as a hard-core restraint directly infringing the law. The TCA stated that the defense lacked solid proof of positive effects required for exemption, although the market is one of those that preemptively considered one of those where pre-sale services are important.

As nowadays online retailers also supply consumers with a wide variety of pre-sale services, such as product review videos, expert reviews and also user reviews, the argument about free-riding further looses its virtue. Also these pre-sale services cost less to produce then their traditional counterparts such as to hire a full-time assistant and in addition to that they are costless to reproduce for each customer.

This nature of online pre-sale services makes it also unlikely to accept the argument that a RPM provision could be used to protect online retailers' investments.

When non-price restraints are taken into consideration, the TCA seems to have a more tolerant approach when the undertakings do not ban internet sales directly but reserves them for themselves instead.

In its *Marks&Spencer* decision[2] where a franchise agreement is examined under exemption rules, the TCA concluded that the provision allowing *Marks&Spencer* to reserve itself the right to make online sales should be understood as the suppliers act to reserve an exclusive consumer group. After considering this provision as a mean aimed at allocating exclusive customer groups between the buyer and the supplier itself, the TCA reached the conclusion that the restraint is within the limits of the Block Exemption Communiqué on Vertical Agreements which allows restriction of active sales to exclusive customer groups and territories.

Same type of restraint was also the subject of two other TCA decisions[3]. Again in both decisions the TCA concluded that suppliers acted to reserve online sales solely to themselves did not cause the agreement to be deprived of exemption. Moreover, in these two decisions the TCA also argued that by appointing an undertaking to distribute through classical shops, the supplier was basically increasing the number of firms selling to the market. The TCA also noticed that having two different suppliers selling via different channels would increase intra-brand competition.

As mentioned the TCA considers acts of suppliers to reserve online sales exclusively to themselves is within the limits of the exception to the territorial/consumer restrictions imposed to buyers whereas it chooses to deal with a direct restriction of online sales provision under individual exemption analysis.

The TCA have two decisions in this context. In its *Yatsan* decision[4], it states that the ban imposed onto the buyer in order to restrain online sales could be considered as one of the hard-core restrictions listed in the Block Exemption Communiqué as it restricts the passive sales of the buyer. In the same decision, the TCA conducts an individual exemption analysis. In this analysis, it lists several justifications that it may consider while evaluating a constraint regarding online sales. First of all, the TCA acknowledges that restricting the online sales of a product could be exempted if there is an objective justification on the basis of public safety. Furthermore, the TCA states that in some cases passive sales, including online sales, could be restricted for a period of time if the supplier is trying to penetrate into a new market and thus need protection for a period of time to have a full return from its investments.

2 Decision dated 15.04.2010 and numbered 10-31/485-181.

3 Decision dated 08.11.2007 and numbered 07-85/1036-398 and decision dated 09.02.2012 and numbered 12-06/190-52.

4 Decision dated 23.09.2010 and numbered 10-60/1251-469.

However as the products considered in this decision are beds and the supplier has a well know brand, the TCA dismisses these arguments. The Authority also refuses the undertaking's arguments that the ban is issued to protect its brand value of the product and also to prevent free-riding. In its reasoning, the TCA points out that there are less restrictive means a supplier can undertake such as imposing quality standards to online sales, requiring buyer to have a physical store, imposing offline sales quotas and limiting sales per consumer in order to achieve argued efficiencies. In this respect, the TCA reaches the conclusion that as there are less restrictive ways available to the supplier to protect its brand value and to prevent free-riding, the complete restriction of the buyers' ability to sell online can not be granted individual exemption.

Whereas in *Antis* decision[5] the TCA grants individual exemption to an agreement which sets up a selective distribution system between a semi-professional selective cosmetic products supplier and its buyers, despite restrictions regarding the online sales. In its assessment, the TCA favors the argument that it is hard for consumers to choose the right product in respect to their skin type and age without the help of the sales person and testing; a process which could not be achieved through online sales. According to the TCA, by restricting online sales, the supplier will be able to avoid any negative impact on its brand image which it states could emerge if the consumers buy the products online without testing.

Although it has few decisions in this area, some deductions could be made to reach the TCA's point of view regarding vertical restraints in online retailing. First of all, as with other sectors, the TCA views RPM as a hard-core restraint which is unlikely to be granted an exemption. When non-price restraints are taken into consideration, although it can be said that the TCA values a restriction on buyers' capacity to sell online similar to a RPM provision, on the other hand it grants exemption when online sales are not banned but exclusively reserved for supplier. Here it can be said that as long as the goods is supplied through the web by someone TCA does not evaluate if the buyers can.

[5] Decision dated 08.052008 and numbered 08-32/401-136.

UNITED KINGDOM

1. Introduction

This submission outlines recent developments and issues arising from certain vertical restraints in the context of online sales in the UK.

The development of the Internet and e-commerce continues to have a profound impact on the UK economy. Based on the UK's Office of National Statistics, total e-commerce sales were estimated at £482.9 billion in 2011 in the UK.[1] Another report on the transformation of the UK economy resulting from the Internet estimated that the 'UK Internet economy is likely to grow by 10 per cent per year, reaching 10 per cent of GDP by 2015.'[2]

However, certain increasingly prevalent vertical restraints have the potential to undermine some of the benefits e-commerce and the Internet has brought about for consumers, including the enhanced ability to compare prices, obtain product information, make informed choices and reduce search costs.

These vertical restraints may have become more prevalent in online distribution settings because it is easier to monitor and enforce such restraints in an online environment and, absent these restraints, there is the potential for stronger competition. As such, there is greater ability and greater incentive for firms to engage in such restraints.

This brief paper sets out a number of observations relating to price restraints that are increasingly relevant to online sales. More specifically, the paper raises a number of questions for discussion and outlines implications and potential harm arising in the context of Best Price Guarantees and retail-price MFN clauses and briefly examines the role of agency agreements in this context.

The paper focuses primarily on retail-price MFN clauses. This paper considers some of the circumstances in which retail-price MFNs may soften competition between online retailers/platforms,[3] and may raise barriers to entry and expansion for other, potentially more efficient online retailers.

The paper also considers whether retail-price MFNs may have the potential to give rise to RPM in circumstances where, in practice, they result in suppliers taking control of retail prices across distribution channels.

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1 Consisting of £129.1 billion in website sales and £353.8 billion in sales over electronic data interchange, see http://www.ons.gov.uk/ons/rel/rdit2/ict-activity-of-uk-businesses/2011/stb-ecom-2011.html#tab-Total-e-commerce-sales.

2 '*The Connected Kingdom'*, report by the Boston Consulting Group, October 2010.

3 For the purposes of this paper, the term 'online retailer' is not intended to have any legal meaning or connotation. It should be taken to include sales agents and other intermediaries selling goods or services on behalf of others in return for a commission payment and may also include online retail platforms.

2. Best price guarantees

Given the enhanced search options the internet offers consumers, online retailers increasingly offer Best Price Guarantees (BPGs) which may appear to obviate the need for consumers to shop around for the best deal. BPGs are often combined with a promise to match or beat competitors' prices. They appear to offer potential benefits to consumers, for instance if relatively small players in fragmented markets reference their competitors' prices in this way, and they may be a signal of good value if they are credible.

However, BPGs may also have the potential to give rise to competition concerns, for example when the online retailer offering BPGs imposes contractual restrictions on its suppliers that may have the effect of preventing competing retailers from offering lower prices. Possible concerns emanating from both BPGs and retail-price MFNs are briefly outlined below.

2.1 Potential competition concerns arising from BPGs

To the extent that BPGs discourage consumers from shopping around and comparing prices, they may soften competition between retailers, both online and offline. Rival retailers' incentives to lower prices may be reduced in circumstances where these retailers know that any price reduction will quickly be matched or beaten. This reduced incentive to cut prices may in turn result in less vigorous competition and, consequently, potentially higher prices than would be observed in the absence of BPGs.

BPGs may also have the potential to facilitate collusion. Given that effective collusion is partly predicated on the ability to detect and punish breaches of the agreed collusive outcome, reciprocal price matching strategies adopted by competing firms may provide a simple focal strategy for coordination and deviation that can be very easy to detect. This is also true for RPM type agreements, where BPGs may help overcome difficulties in detecting deviations from the agreed fixed or minimum price. Customers may effectively provide a monitoring service for parties engaging in RPM type practices.

A further competition concern which may arise from BPGs relates to the creation of barriers to entry and expansion. Large incumbent retailers often have intrinsic advantages over potentially more efficient new entrants, for instance based on their reputation and established customer base. New, potentially more efficient retailers may seek to enter the market or expand their share of the market by undercutting the incumbent's prices.

BPGs offered by the incumbent may discourage entrants from offering lower prices insofar as they provide a credible commitment for the incumbent retailer to match any entrant's prices. In the face of such a commitment a potential entrant may not be able to reach a minimum efficient scale if its prices will be immediately replicated by the incumbent firm.

2.2 BPGs underpinned by retail-price MFN clauses

As noted above, competition concerns may also arise where BPGs are combined with or underpinned by contractual restrictions imposed by retailers on their suppliers on the basis of which competing retailers are – at least de facto - likely to be prevented from offering lower retail prices. In such circumstances, BPGs are not a credible signal of low, competitive prices, but rather a result of contractual restrictions preventing price competition. Such 'retail-price MFN clauses' or 'retail-price MFNs' are discussed below.

3. Retail-price MFN clauses

Where a supplier of a good or service agrees to a retail-price MFN clause with an online retailer, the supplier is contractually obliged to ensure that this online retailer is in a position to offer the lowest retail price on its website.

3.1 Retail-price MFN clauses different from 'wholesale-price MFNs'

This is fundamentally different from a (very common) wholesale-price MFN clause, which will typically contractually oblige the supplier to offer a wholesale price to the retailer that is no greater than the wholesale price offered to any other retailer. As such, wholesale-price MFNs allow scope for retail price competition between retailers as retailers are free to independently set their own margins and retail prices.

3.2 Retail-price MFN clauses operating in practice

By way of example, a retail-price MFN clause imposed by online retailer A on supplier X may provide that, in the event that another, competing retailer were to offer a lower price for supplier X's goods or services, supplier X would have to lower the retail price of those goods or services on online retailer A's website to match the lower retail price of the other, competing retailer.

In certain circumstances, for a retail-price MFN clause to operate effectively, supplier X may seek to establish some ability to control the retail price offered by the different retailers which sell supplier X's goods or services in competition with online retailer A.

In practice, the retail MFN clause imposed by online retailer A has the potential to result in a situation where supplier X imposes minimum sale prices on its downstream retailers with a view to ensuring that the retail price displayed on online retailer A's website is not undercut by competing retailers. Any imposition of minimum sale prices may in turn amount to RPM.[4]

3.3 Potential harm arising from retail-price MFN clauses

In addition to the possibility of leading to RPM, retail-price MFN clauses may also have an adverse impact on competition in other ways.

Retail-price MFN clauses may also have an impact on competition between online retailers. By way of example:

- Retail-price MFNs may soften competition among online retailers. For example, retail-price MFNs may reduce the incentive for other retailers to reduce their margin or commission. Without a retail-price MFN, if another retailer lowers its margin or commission relative to other retailers, the supplier's cost of selling via its website will decrease. This may create the incentive for the supplier to charge a lower price when selling via this online retailer's website. Retail-price MFN reduces its ability to influence the relative price charged on different websites. Accordingly, retail-price MFNs may have the potential to increase the retailers' margin or commission and, as a consequence, the prices charged to customers.

- Retail-price MFNs may also raise the barriers to entry and expansion of other, potentially more efficient, online retailers and may have the potential to result in anticompetitive foreclosure. Potential entrant online retailers may be prevented from charging lower retail prices on their websites, for instance by sharing some of their margin or commission revenue with consumers.[5] This has the potential to restrict their ability to use price discounting to attract an initial customer base from competing retailers and may prevent them from generating sufficient scale to compete effectively in the market.

4 See below for further observations on agency agreements in online distribution settings.

5 This is often referred to as 'flexing the margin'.

3.3.1 Questions to consider in assessing retail-price MFN clauses

A relevant question to consider in assessing retail-price MFN clauses is the degree of market coverage likely to be required for retail-price MFN clauses to give rise to a material anticompetitive impact. While this will vary in relation to the facts of any given case, not all retailers would need to impose retail-price MFNs in order for there to be the potential for competition to be restricted in the ways set out above, even if retail distribution is relatively fragmented.

For example, if a retail-price MFN imposed by a single online retailer requires that its retail price is the lowest available online, this may reduce the incentive of all other online retailers to lower their commissions, as their retail price cannot be lowered relative to the price of the online retailer imposing the retail-price MFN. In any event, the anticompetitive potential of retail-price MFNs may be strengthened in the presence of a network of such agreements.

Another interesting and important question relates to the incentive of the supplier to accept the imposition of a retail-price MFN by a retailer, given that this may create the incentive for all retailers to raise their commissions and consequently may be likely to reduce the supplier's overall profit. While the reasons may vary significantly from case to case, there appear to be two main ways in which suppliers could be persuaded to accept retail-price MFNs. One is that suppliers may be coerced by the retailer, by virtue of the retailer having a strong bargaining position, for example derived from being a 'must-have' distribution channel, generally or for a specific sector or market. Another could be if profits arising from the restriction of competition between retailers are in some way shared with the supplier, for example through the use of rebates or other forms of non-linear pricing.

It should also be noted that online retailers imposing retail-price MFN clauses on their suppliers are in a *position* to offer a BPG without having to truly engage in retail price competition. The benefits of meta-search engines like price comparison sites may be undermined if retail-price MFNs result in a loss of retail price competition.

3.3.2 Potential efficiencies to be assessed on a case-by-case basis

Notwithstanding the above, in certain circumstances, retail-price MFN clauses may also result in efficiencies as well as potentially anti-competitive effects. A case-by-case basis analysis is required to establish whether potential efficiencies have merit and whether the restrictions imposed under a retail-price MFN are indispensible to achieve them.

4. Retail-price MFNs and RPM

As outlined above, contractual compliance with a retail-price MFN clause may - at least in practice – be predicated on the supplier's ability to set minimum retail prices across its distribution channels to ensure that online retailers imposing retail-price MFN clauses display the lowest retail price. This may, in turn, have the potential to result in the imposition of RPM-type discounting restrictions.

To the extent that retail-price MFNs result in some form of RPM, it may be possible to consider the anti-competitive impact arising from such RPM independently of the retail-price MFN.

4.1 Harm arising from retail-price MFNs independent of (and potentially stronger than) RPM

However, an interesting issue is the extent to which the anticompetitive impact of retail-price MFNs may go beyond the harm that any RPM may result in.

In this regard, retail-price MFNs have the potential to exacerbate the possible harm from RPM by explicitly introducing a horizontal element to an otherwise vertical agreement - the retail price set for one retailer is conditioned on the retail price set for other retailers.

In the case of RPM, particularly where the RPM is 'retailer-led', this horizontal element may sometimes be implicit. For example, a retailer may enter an RPM agreement with a supplier on the understanding that the supplier will enter similar agreements (setting the same retail prices) with other retailers, potentially enabling a restriction of competition between retailers. However, a retail-price MFN goes further by introducing this element as an explicit contractual commitment. As such, a retail-price MFN may result in greater (and different) harm than RPM in relation to its impact on competition downstream.

In any event, it is apparent from the principal sources of harm identified in section 3 above that any harm arising from retail-price MFNs is not limited to scenarios in which these clauses result in the imposition of RPM.

5. Retail-price MFNs and agency agreements

The growing prevalence of retail-price MFN clauses has reinvigorated the debate around the legality of restrictions imposed under agency agreements in certain online distribution settings.

In light of the possible link between retail-price MFN clauses and the supplier's de facto control of retail prices, the question arises under which circumstances it may be legitimate for suppliers to set minimum retail prices on online retailers' websites or to otherwise restrict online retailers' ability to determine prices on their websites. Such restrictions may consist of, for instance, preventing online retailers from lowering the effective price by sharing their commission revenue with customers.

5.1 'Genuine agency' agreements – the concept of the 'single economic unit'

In general, restrictions on an online retailer's ability to determine the sale price independently may constitute RPM unless that online retailer can be regarded as forming part of a 'single economic unit' with the supplier (such that the online retailer's position can be regarded as being equivalent to a 'commercial employee' of the supplier). Where supplier and online retailer can be regarded as forming part of a 'single economic unit', price restrictions imposed on the (online) retailer fall outside the scope of EU and UK competition law. This is often referred to as a 'genuine agency' agreement.

5.2 Risk as a key determining factor – differences between bricks and mortar and online retailers

In terms of determining whether an online retailer qualifies as a 'genuine agent', a number of factors need to be taken into account. The degree of commercial or financial risk borne by an online retailer is one key factor. If an online retailer bears material risks in relation to the activities for which he has been appointed, the online retailer cannot be regarded as forming part of a 'single economic unit' with the supplier. [6]

In traditional bricks and mortar distribution settings, key risks borne by a retailer often relate to the financing and maintenance of stocks or costs of transporting the contract goods. The risk profile of online

[6] See European Commission Guidelines on Vertical Restraints, [2010] OJ C 130/01 ("Vertical Guidelines"), paragraphs 12 to 21. Under section 60 of the UK's Competition Act 1998 (the Act), the OFT must ensure that so far as is possible questions arising under the relevant provision of the Act are dealt with in a manner which is consistent with the treatment of corresponding questions arsing under EU competition law.

distribution settings is different: unlike traditional bricks and mortar retailers, online retailers often do not take title in goods or services prior to selling them to customers. In other words, they often do not 'buy' and 'resell'. Virtual goods or services sold online also don't give rise to the same transportation cost risks.

However, this does not mean that pricing restrictions imposed on online retailers necessarily fall outside the scope of competition law. The relevant question for the purposes of assessing such restrictions remains whether supplier and online retailer can be regarded as forming part of a 'single economic unit', such that the online retailer's position is equivalent to being a 'commercial employee' of the supplier.

In circumstances where the online retailer bears material market-specific investment[7] risks, for instance as a result of investing in market-specific advertisement without adequate reimbursement, pricing restrictions are likely to remain subject to competition law, in particular where other factors also point to a lack of unity of conduct between online retailer and supplier.

5.3 Retail-price MFNs as a relevant factor in determining 'genuine agency'

One such factor may be the existence of a retail-price MFN. Where an online retailer imposes a retail-price MFN on the supplier, the online retailer has influence over the supplier's commercial strategy relating to the pricing of its goods or services. As such, the imposition of a retail-price MFN may be at odds with the concept of a 'commercial employee' and therefore may be indicative of the online retailer not qualifying as a 'genuine agent' for UK competition law purposes. Other factors indicating a unity of conduct (or lack thereof) between supplier and online retailer are also relevant to the assessment.

6. Conclusion

In summary, the OFT considers that certain vertical restraints that appear to have become increasingly prevalent in relation to online sales may have the potential to prevent, restrict or distort price competition, which may in turn lead to higher prices being paid by end-consumers, and a reduction in choice.

Retail-price MFN clauses have the potential to give rise to harm which, given their horizontal focus on competing online retailers, may exacerbate types of anticompetitive harm typically associated with RPM. In any event, the possible harm emanating from retail-price MFN clauses may occur irrespective of whether these clauses result in RPM.

From the perspective of consumers, these restrictions have the potential to undermine the benefits of the transparency and the enhanced search functions brought about by the Internet and the possibilities offered by e-commerce.

Well-functioning markets depend both on competition working well and on consumers making good, well-informed choices. Consumers drive competition where they are empowered to shop around through access to readily available and accurate information about the products they are seeking and the various offers available in the market. Competition authorities should therefore remain vigilant and intervene where vertical restraints threaten to undermine the benefits e-commerce can bring about for consumers.

[7] Market-specific investments are specifically required for the type of activity for which the agent has been appointed by the principal. They are usually sunk, meaning that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss, see Vertical Guidelines, paragraph 14.

UNITED STATES

Vertical restraints policy in markets with and without online sales

This paper responds to the Chair's letter of December 18, 2012, calling for submissions for the roundtable on Vertical Restraints for Online Sales. The first antitrust question posed is "Does the development of e-commerce call for an overall revision of the indications contained in guidelines and other policy documents, or can they be easily applied to the new economic and technological setting?" This paper explains why the U.S. antitrust agencies do not see a need to develop specific rules for their analysis of vertical restraints in markets with online sales. It also explains why such rules could be counterproductive.

The treatment of vertical restraints in the United States has evolved over time and continues to develop. Currently non-price and price restraints are subject to rule of reason treatment under U.S. law.[1] The U.S. agencies' analysis of the competitive effects of vertical restraints turns on an evaluation of case-specific evidence under the rule of reason standard, consistent with existing case law, informed by insights from the economic literature on vertical restraints. The U.S. antitrust agencies and federal courts have had limited experience to date with rule of reason treatment of resale price maintenance, however, and look forward to analyses of the data on the competitive impact of resale price maintenance as these practices are implemented.[2]

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1 Treatment of vertical restraints under U.S. law has evolved over time, from a strict divide between per se illegal vertical price restraints and rule of reason treatment for non-price vertical restraints (*see Continental T.V., Inc.,* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977); *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373 (1911)), to rule of reason treatment for all vertical restraints except minimum resale price maintenance (*see State Oil* v. *Khan*, 522 U.S. 3 (1997)), to the current standard established by the U.S. Supreme Court in *Leegin* that all vertical restraints, price and non-price, should be evaluated under the rule of reason (*see Leegin* Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)). Despite the ruling in Leegin, state law in a number of U.S. states continues to treat RPM as per se illegal within their jurisdictions. See, e.g., Michael A. Lindsay, Overview of State RPM, Antitrust Source Aug. 2012, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_lindsay_chart_7_31f.authcheckdam.pdf, for chart identifying relevant authorities concerning the treatment of RPM in each state. For a more in-depth review of U.S. legal developments related to resale price maintenance, see "Note by the United States," OECD Roundtable on Resale Price Maintenance, June 25, 2008.

2 See Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks as Prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program, (Oct. 7, 2009), available at: http://www.justice.gov/atr/public/speeches/250635.htm ("I am not ruling out the possibility that Leegin's dissenters were right in thinking the effort to develop a new analytical framework will not succeed or that evidence will show that the actual uses of RPM are almost always harmful. The Division looks forward to analyses of any data that becomes available as a result of RPM practices implemented in the wake of Leegin and appreciates that the states will serve as important laboratories for obtaining this data. With respect to the natural experiments in the years ahead, we urge courts, commentators, and enforcers to keep an open mind because, as has occurred both in the antitrust and other contexts, accumulated experience on the effects of RPM and the litigation of RPM cases will be instructive." (citations omitted). See also In the Matter of Nine West Group Inc., Order Granting In Part Petition to Reopen and Modify Order Issued Apr. 11, 2000, FTC Docket No. C-3937 (May 6, 2008), at 14 and 17, available at: http://www.ftc.gov/os/caselist/9810386/080506order.pdf, ("At this early stage of the application of the teaching of *Leegin* by the lower courts and the Commission, the *Leegin* factors can serve as helpful guides

The presence, absence, or extent of online sales in a market is a fact that is considered as part of any analysis, but in and of itself is not a fact that would require changing the analytic process, for two main reasons. First, the conditions under which vertical restraints may be procompetitive or anticompetitive can arise in markets irrespective of the degree of online sales.[3] The analysis and conclusions depend on these conditions and related evidence, and the extent of online sales in a market does not, by itself, add probative value. The ability to make online sales may elevate the importance of certain factors in some cases. For example, the ability to make online purchases may exacerbate free riding off the service effort of brick and mortar retailers, or make network effects more likely to entrench market power. However, the importance of free riding, network effects, and other relevant factors will vary from case to case, and the extent of online sales would not be expected, in the abstract, to provide any guidance as to that effect. Second, even if future empirical research were to find a relationship between the extent of online sales in a market and conditions that increase or decrease the likelihood of harm from vertical restraints, this finding would not obviate the use of rule of reason analysis in each investigation consistent with current U.S. law.

Conditioning the treatment of vertical restraints on the extent of online sales could distort not only firms' vertical contracting practices, but also their choices over distribution channels. Since economic analysis and our experience examining cases currently provide no basis for adjusting the treatment of vertical restraints based on the extent of online sales, doing so would risk harming distributional efficiency and welfare by causing firms to adjust their distribution strategies in potentially inefficient ways.

This paper is organized as follows. Section 1 provides an overview of the economics of vertical restraints. Section 2 explains why online sales have no specific characteristics warranting a different analytical framework than brick and mortar sales. Section 3 addresses some specific questions raised by the Chair.

1. The basic economics of vertical restraints

Vertical restraints have been defined in the economic literature as contracts with two essential elements: (i) they arise between upstream and downstream producers—firms that play complementary roles in facilitating the sale of products to customers—and (ii) they involve terms that are more complex than simple per-unit prices.[4]

For example, a manufacturer needs a means to distribute its products to consumers. If the manufacturer does not have its own distribution outlet in an area, it may contract with an independent

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to begin an assessment of when RPM deserves closer scrutiny. Through the Commission's own enforcement work, research, and external consultations such as workshops, we anticipate further refinements to this analysis, including the further specification of scenarios in which RPM poses potential hazards and those in which it does not." The Commission further noted that, "[p]art of Nine West's rationale, if not its only rationale, for its desire to engage in resale price maintenance is unproven competitive efficiencies. Therefore, to aid the Commission in monitoring Nine West's use of resale price maintenance, we require Nine West to file a report with the Commission one, three, and five years after the Order has been modified that provides information describing Nine West's use of RPM and its effect on its prices and output. . . The Commission may challenge its use of such a program should it appear illegal.").

3 A large body of economic literature identifies conditions under which vertical restraints can have pro-competitive or anticompetitive effects. Surveys of this literature include Katz (1989), Rey and Tirole (2007), Cooper et al., (2005), Lafontaine & Slade (2005), and Rey and Verge (2008).

4 We follow Mathewson and Winter (1984) and Tirole (1988) in defining vertical restraints as vertical contracts that involve terms other than linear pricing. This is consistent with the definition in the EC's "Guidelines on Vertical Restraints," available at http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

retailer to purchase and stock its equipment and resell it to final consumers. In a simple contract with no vertical restraints, the upstream manufacturer would charge the downstream retailer a per-unit ("linear") price for each product. Under a variety of conditions, however, linear pricing is inefficient.

1.1 Inefficiencies from simple contracts

The economic literature on vertical restraints identifies numerous reasons why simple contracts with linear pricing may be inefficient. We briefly describe three of the issues that feature most prominently in the literature.[5]

Double Marginalization. The wholesale price set by the manufacturer becomes a component of the retailer's marginal cost. If the manufacturer has market power[6] and is restricted to charging a linear price, it will raise the wholesale price above its marginal cost. If the retailer has market power,[7] it will add an additional mark-up. The successive mark-ups of the manufacturer and retailer lead to "double marginalization," which entails higher prices and lower output than would arise if the firms could choose prices as an integrated unit to maximize their joint profits.

It is useful to think about the double marginalization problem as arising from externalities present when producers of complements (in this case, upstream and downstream firms) choose linear prices independently. When the manufacturer and retailer set their own prices, each ignores the negative externality inflicted on the other from raising price.[8] These *vertical pricing externalities* that arise under linear pricing generally cause firms to set higher prices than they would if they internalized these externalities and priced as an integrated unit.

Under-provision of Effort. If the demand for the manufacturer's products depends on the investment or selling efforts put forth by the retailer, the manufacturer, or both, then contracts with linear pricing typically cause firms to exert less effort than the jointly optimal amount. This inefficiency also arises from vertical externalities, but in this case the externalities come from independent sales or investment decisions rather than independent pricing decisions. Specifically, when choosing its effort level independently, the retailer will account for the effect of its effort on its own profit, but it will ignore the effect on the manufacturer's profit, and vice versa. If the manufacturer and retailer both have positive mark-ups, these *vertical service externalities* may lead to less effort by the manufacturer and retailer than they would exert if they internalized the externalities by making decisions as an integrated unit.

Retailer Free Riding. If the manufacturer sells its products through multiple retailers, and if the selling efforts of one retailer affect the sales of another, then the retailers typically choose inefficient effort levels. The classic example is retailer free riding, which occurs when customers visit a retailer that offers high pre-sale services to learn about the product, and then visit another retailer with lower services and lower costs to purchase the product at a lower price. For example, a customer wishing to purchase golf clubs may visit a retailer that offers a practice area and fitting services to test and be fitted for golf clubs, but then

5 Among the motivations for vertical restraints not addressed here are risk sharing and price discrimination, including screening and bundling.

6 "Market power" in this context simply means that the manufacturer has a downward sloping demand curve.

7 The retailer has "market power" in the sense used throughout this paper if the demand it faces for the manufacturer's product slopes downward. This does not imply that the retailer earns supra-normal profits.

8 The externalities are as follows: an increase in the wholesale price by the manufacturer inflicts an externality on the retailer by raising the retailer's marginal cost; an increase in the retail price by the retailer inflicts an externality on the manufacturer by reducing the quantity demanded for the manufacturer's product and lowering its profit.

purchase identical clubs from an online retailer or a store that does not offer a practice area and fitting services. The ability of low-price retailers to free ride on the efforts of the high-service retailer may lower the high-service retailer's incentives to offer such services. The result may be lower service and output than would occur if the manufacturer and retailers internalized the service externalities by making decisions as an integrated unit.[9]

1.2 Potentially procompetitive vertical restraints

The economic literature identifies a range of vertical restraints that firms may use to address the inefficiencies just described, three of which we mention here. The purpose of the restraints in these circumstances is to internalize the vertical externalities so that the manufacturer and its retailers effectively choose prices and investment or service efforts as an integrated unit. This effect of internalizing the externalities typically increases output.

Perhaps the simplest vertical restraint is nonlinear (i.e., not per unit) contracting, which involves conditioning the payment from the retailer to the manufacturer on the quantity purchased in a nonlinear (i.e., not per unit) way. Examples include two-part tariffs, quantity forcing, and all-units discounts (sometimes called "retroactive rebates"). All of these contracts can reduce or eliminate double marginalization, increasing output and welfare.

Inefficiencies associated with the under-provision of effort and free riding by retailers can potentially be addressed by resale price maintenance (RPM), exclusive territories (ET), and nonlinear pricing in various combinations, depending on the details of the economic environment.[10] While a complete delineation of the cases is beyond the scope of this paper, we describe an example that illustrates some key points.[11]

Consider a retail golf shop that sells a manufacturer's golf clubs and golf shirts in competition with other retailers. Customers are more likely to purchase golf shirts at the shop after seeing an attractive display in the store. The effort putting together an attractive display might not be susceptible to free riding (i.e. it might not cause customers to purchase more of the manufacturer's shirts at rival stores), but it likely increases the sales of the manufacturer's golf shirts at the store that develops the display. In addition, the retailer may offer a practice area and fitting services to help customers select the proper clubs. These services clearly are susceptible to free riding, since customers can obtain an important service at one store and purchase the clubs at another store that does not offer the service. Since the golf shop faces competition from rival retailers, the margins it earns on both golf shirts and golf clubs under simple

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9 The service externality that arises under free riding has both vertical and horizontal elements. The provision of service by one retailer has a positive external benefit on both the manufacturer and rival retailers.

10 See, for example, Mathewson and Winter (1984). The potential benefits of RPM and ET identified in the economic literature are recognized in U.S. case law. *See Leegin*, 551 U.S. 877 ("Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Retail price maintenance can also increase interbrand competition by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent free riding.) (citation omitted); and *GTE Sylvania*, 433 U.S. at 56 ("[N]ew manufacturers and manufacturers entering new markets can use the [exclusive territory] restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.") . U.S. case law also recognizes potential anticompetitive effects of these practices. *See* § 1.3 below.

11 The example that follows is loosely based on the analysis in Mathewson and Winter (1984).

contracts with linear pricing will be lower than the margins an integrated manufacturer would earn. This means that in the absence of more complex vertical contracts, the golf shop owner is likely to exert less effort to provide these services than the manufacturer would if it were integrated.

In this example, minimum RPM accompanied by nonlinear pricing (two-part tariffs are sufficient) may induce the retailer to exert the same effort level an integrated firm would choose by giving retailers margins sufficient to encourage them to provide the integrated level of effort. RPM may do this for services related to the sale of golf clubs, which are subject to free riding, and for services that enhance the demand for golf shirts, which may not be subject to free riding. [12] A strong form of an exclusive territory restraint (assigning each customer to a specific retailer[13]) along with nonlinear pricing may also induce the integrated outcome, although in many cases it is not feasible to assign customers to retailers. Weaker forms of exclusive territory restraints, such as separating retailers geographically while allowing customers to shop where they like, may lead to retail margins that are too low to align completely manufacturer and retailer incentives if customers can economically shop multiple retailers. Vertical restraints that effectively mitigate retailer service externalities can increase retailer effort and total output.

The potential benefits of the vertical restraints in the example that we have just described are a result of internalizing vertical externalities, not a separate cost savings effects. If vertical externalities are present, these benefits likely will exist to some degree, and will be weighed against potential anticompetitive effects in the competitive effects analysis.[14]

Empirical evidence supports the predictions from economic theory that vertical restraints frequently have intrinsic benefits, although these benefits may not always outweigh the restraint's anticompetitive effects.[15]

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12 A number of commentators have questioned the frequency with which free-riding occurs in RPM arrangements. *See Leegin* 551 U.S. at 915-16 (dissent) ("[T]he ultimate question is not whether, but *how much*, "free riding" . . . takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." *See, e.g.*, Brief for William S. Comanor and Frederic M. Scherer as *Amici Curiae* 6 – 7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551-555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, *Why Dr. Miles Was Right*, 8 Regulation, N. 1, pp 27, 29-30 (Jan/Feb 1948 (similar analysis)") (emphasis in original). The Scherer & Ross article cited in the dissent is F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 335-339 (3d. ed. 1990).

13 Mathewson and Winter (1984) call this strong form of exclusive territory "closed territory distribution."

14 The benefits of internalizing vertical externalities provide the economic motivation in the theoretical literature for treating vertical contracts under a different legal standard than horizontal contracts. An analogy with horizontal restraints helps explain this point. When two horizontal competitors with market power make independent output decisions, an increase in output by one firm typically reduces the profit of its competitor—a negative externality. The externalities cause competing firms to produce more than they would if they chose output jointly and shared the profit, i.e., more than they would if they colluded. A contract between firms that internalizes the externalities (e.g., explicit collusion) typically causes firms to compete less aggressively and reduce their outputs. This is what motivates the per se rule against naked horizontal collusion. By contrast, when two vertically related firms make independent decisions, an output-enhancing decision by one firm typically increases the profit of the other firm—a positive externality. When acting independently, firms will not account for these externalities and will choose less output (via higher prices or less effort) than they would if they could make decisions jointly and share the profit. A vertical restraint contract between the firms that internalizes the externalities can lead to actions that increase their joint output.

15 *See* Cooper et al. (2005) and Lafontaine and Slade (2005) for surveys of the empirical literature. *But see* F.M. Scherer, *Comment on Cooper et al.'s "Vertical Restrictions and Antitrust Policy"*, Comp. Policy Int'l, Autumn 2005, at 65, 71-74 (reviewing studies showing potential consumer savings from termination of resale price maintenance in light bulb, retail drug, blue jeans, and other sectors); and Cooper et al.'s response to Scherer, http://www.antitrustinstitute.org/files/413b.pdf.

1.3 Potentially anticompetitive vertical restraints

Although vertical restraints may have procompetitive justifications, they also may cause anticompetitive harm, and for this reason they are not per se legal under U.S. law.[16] (Indeed, in some states RPM remains per se illegal.[17]) Factors relevant to the rule-of-reason analysis include the market power of the entities involved, the scope of the restraint, the number of entities within the market adopting the restraint, and the restraint's source.[18] The potential anticompetitive effects of vertical restraints can be grouped in three general classes: (i) collusion, (ii) competition softening, and (iii) entry deterrence. The likelihood of any of these effects occurring depends upon the specific market attributes surrounding the arrangements. We provide a truncated discussion here that is sufficient to reach the conclusions drawn in this paper.

RPM can facilitate collusion among manufacturers by making it easier for manufacturers to detect cheating from a collusive arrangement. This can occur if retail prices are easier to observe than wholesale prices. In one variant of this concern,[19] defections from a collusive agreement over retail prices set through RPM are obvious because retail prices are observable, while defections from a wholesale price agreement are less obvious because wholesale prices are private information. Under a wholesale price agreement, firms may use information on retail price changes to draw inferences about whether firms have defected from the agreement, but the inferences are imperfect because retail price changes may reflect factors other than cheating on the agreement.

RPM may also facilitate collusion among retailers.[20] It may be easier for retailers to sustain a collusive agreement on price if they can convince manufacturers to help enforce the agreement through

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16 *See Leegin*, 577 U.S. at 892 ("While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases. . . "); *id.* at 894 ("the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated"); *Nine West*, *supra n.2* at 11 ("Our obligation is to ask whether a modification is appropriate in light of *Leegin's* cautions about the circumstances in which the establishment of an RPM program could be anticompetitive and subject to prohibition under the rule of reason"). *See also In the Matter of IDEXX Laboratories, Inc*. Decision and Order, Docket C-4383 (Feb. 12, 2013), *available at*: http://www.ftc.gov/os/caselist/1010023/130212idexxdo.pdf, (*prohibiting* IDEXX from enforcing exclusive territorial agreements in light of IDEXX's alleged 70% market share).

17 See, e.g., Michael A. Lindsay, Overview of State RPM, Antitrust Source Aug. 2012, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_lindsay_chart_7_31f.authcheckdam.pdf, for chart identifying relevant authorities concerning the treatment of RPM in each state.

18 Leegin, 577 U.S. at 897-98; Business Elecs. Corp. v. Sharp Elecs. Corp., 488 U.S. 717, 725 (1988).

19 See Julien and Rey (2007). Telser (1960) also argued that RPM may facilitate coordination by manufacturers. Scherer and Ross note (1990, p. 550) "although the logic is persuasive, there are few documented cases of the use of RPM to strengthen manufacturer cartels". RPM can also facilitate tacit collusion, for example, by "prevent[ing] price competition from 'breaking out.'" Leegin, 551 U.S. at 911 (Breyer, J., dissenting); In re Sony Music Entertainment Inc., FTC Dkt. No. C-3971 (August 2000) (minimum advertised price policy independently adopted by five largest distributors of prerecorded music alleged to stabilize prices in violation of Section 5 of FTC Act) (Analysis to Aid Public Comment available at http://www.ftc.gov/os/2000/05/mapanalysis.htm).

20 Leegin, 551 U.S. at 893 ("A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.").

RPM.[21] RPM can also be used by a powerful dealer (or dealers acting with or without collusion) to prevent lower-cost or more-innovative retailers from expanding, thereby inhibiting innovation in retailing.[22]

RPM can provide a strategic commitment that softens competition between the products of two manufacturers. The way this works is that a commitment to RPM by one manufacturer is observed by retailers selling rival products before they set the retail prices for the rival products. If the commitment to RPM is expected to raise the retail price of the product sold under RPM, then retailers may react by raising the prices of rival products.[23]

Exclusive territories can also soften competition between the products of different manufacturers. If a manufacturer imposes exclusive territories and charges a higher wholesale price, retailers may raise the prices of rival products in response. This softens competition and may increase the profit of the manufacturer imposing the exclusive territory.

Exclusive dealing[24] can deter entry or investment in markets by denying entrants the scale required for entry or investment to be profitable. Although retailers typically require compensation for agreeing to carry only a single manufacturer's product, this compensation may be small enough to make exclusive dealing a profitable exclusion strategy if production is subject to economies of scale or if retail competition is sufficiently intense.[25]

1.4 The sensitivity of the effects of vertical restraints to details of the economic environment

The effects from vertical restraints described above (procompetitive and anticompetitive) are all clear possibilities. However, the literature on this point is not designed to provide the kind of general principles useful for broad policy rules. The models of vertical control are highly sensitive to several key assumptions that will tend to vary from case to case. While each prediction is internally consistent and would be a valid prediction when the facts align with assumptions in the model, the U.S. agencies have a limited basis (particularly with respect to enforcement experience of RPM) to assess whether those facts are typical enough to form the basis of policy. Consider:

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21 There are reasons to believe that retailer cartels are unlikely to be common, *see* "Note by the United States," *OECD Roundtable on Resale Price Maintenance*, June 25, 2008, p. 7, but such cartels are not unheard of, s*ee In the Matter of National Association of Music Merchants, Inc*., FTC File No. 001-0203 (Apr. 10, 2009) (Order), available at: http://www.ftc.gov/os/caselist/0010203/090410nammdo.pdf (settling allegation that National Association of Music Merchants retailer members discussed the adoption, implementation, and enforcement of minimum advertised price policies). Ippolito (1991) surveyed empirical evidence from cases and concludes that collusion theories were potentially applicable to at most 15% of the cases in her sample. Scherer and Ross state (1990, p. 550) "studies of numerous RPM cases suggest that only a minority, and perhaps a small minority, of the adoptions for particular products came as a primary consequence of organized dealer pressure."

22 *Leegin*, 551 U.S. at 893-94 ("dominant retailer . . . might request resale price maintenance to forestall innovation in distribution that decreases costs," and the "manufacturer . . . accommodate[s] the retailer's demands [because] it believes it needs access to the retailer's distribution network.").

23 For examples of this type of argument in somewhat different environments, *see* Shaffer (1992) and Innes and Hamilton (2009), and Rey and Verge (2010). The FTC's workshop on RPM provides further examples. See http://www.ftc.gov/opp/workshops/rpm/.

24 By "exclusive dealing" we mean an agreement between an upstream and downstream firm that the downstream firm will not deal with rival upstream firms. The term "exclusive dealing" is sometimes used to mean restrictions on manufacturers dealing with rival retailers, which we have been discussing as "exclusive territories."

25 *See*, for example, Rasmusen et al (1991), Segal and Whinston (2000), and Simpson and Wickelgren (2007).

- The theoretical analysis showing that RPM sometimes makes collusion easier also shows that RPM sometimes makes collusion harder.[26] The likelihood that RPM will make collusion easier rather than harder depends on the degree of market power, and experience has not yet established a basis to say what range of market power is likely to generate one result or the other in general practice.
- The commitment value of RPM and ET in competition softening models may vanish if firms can write nonlinear contracts that are unobservable to rivals.[27] For example, if a manufacturer that employs an exclusive territory can offer private nonlinear price schedules, then the exclusive territory contract may not soften competition.[28] How likely such contracts are or whether this effect typically happens with exclusive territories in practice is not well-established.
- The ability to profitably exclude rivals via exclusive dealing can disappear if rivals can bid for the exclusive or if firms will breach their exclusive contracts when it is efficient for them to do so in the face of better offers. This can occur when the gains from breaching are high enough both to fully compensate the injured party and still increase the gains to the breaching party.[29] Again, the likelihood of this happening in practice is not well-established.

These examples are representative of the sensitivity of theoretical models of vertical restraints to the facts of particular cases.[30] This sensitivity prevents the theoretical literature from providing general policy prescriptions without more empirical foundation to generalize assumptions.

2. The Effects of vertical restraints in markets with and without online sales

Summarizing the preceding section, economic theory makes three broad predictions about the effects of vertical restraints. First, vertical restraints internalize vertical externalities and frequently have intrinsic benefits. Second, a pre-condition for vertical restraints to have anticompetitive effects is the presence of (or the potential to create) significant market power.[31] Third, the effects of vertical restraints are highly sensitive to myriad details of the economic environment. These predictions do not provide a basis for treating vertical restraints differently depending on the presence or extent of online sales in the market.

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26 In Julien and Rey (2007), the short run gain from defection (stealing profit from rivals) is higher and the long run cost of defection (a breakdown in collusion) is lower when RPM is enforced than when it is not. The reason for this is that retailers respond more efficiently to demand shocks in the absence of RPM (*see* Julien and Rey for the details). This factor, by itself, makes collusion harder under RPM. However, another effect of RPM is to make it easier to detect cheating, and this effect dominates if firms have sufficient market power.

27 For example, if the manufacturers offering exclusive territories in Rey and Stiglitz (1995) can offer private nonlinear price schedules, exclusive territories will not soften competition. The reason is that an adjustment in one retailer's wholesale price that is unobservable to rival retailers does not affect the rivals' behavior.

28 The reason is that an adjustment in one retailer's wholesale price that is unobservable to rival retailers does not affect their behavior.

29 *See* Simpson & Wickelgren (2007).

30 In general, the predictions depend on the degree of market power in the upstream and downstream markets, the nature of competition (e.g., Cournot v. Bertrand, upward v. downward sloping reaction functions), the nature of the financial terms of the supply contract (e.g., linear v. nonlinear), whether a retailer's contracts are public or private information, how retailers form out-of-equilibrium beliefs about their rivals' contracts, etc.

31 Of course, "in a case of RPM imposed by a powerful dealer, the relevant power is that of the dealer in the market in which it purchases." 8 Philip E. Areeda & Hebert Hovenkamp, *Antitrust Law* para 1620e (3d ed. 2010).

As we have noted, the potential benefits of vertical restraints described in the economic literature are a result of internalizing vertical externalities, not a separate cost savings. These potential benefits are likely to exist whenever vertical externalities are present. Externalities associated with double marginalization are present whenever the upstream and downstream firms in a vertical channel both have market power. This occurs whenever the downstream firm faces downward sloping demand, a weak condition that surely exists in many markets with and without online sales. Vertical service externalities exist if firms earn positive margins and make non-price effort decisions that enhance demand, conditions that also arise in markets with and without online sales. An example in a market with online sales is an investment to create or enhance a website. Service externalities associated with free riding can also be a problem for products distributed online. This may involve services provided in brick and mortar stores. For example, an online retailer offering elaborate education resources that allow customers to research a product may be susceptible to free riding by other online retailers or brick and mortar retailers that do not offer these services.

Unfortunately, the primary economic screen for potentially anticompetitive vertical restraints—market power at one or both levels in the vertical chain—has limits. Market power is a necessary, but not sufficient, condition for harm because it does not take into account potential procompetitive benefits. In addition, according to economic theory, the benefits of internalizing vertical externalities often arise when firms have market power, and some of these benefits increase as the degree of market power rises. For example, the benefits from eliminating double marginalization are typically higher the greater the degree of market power in the upstream and downstream markets. The benefits from eliminating free riding tend to decrease with the degree of downstream market power, but they tend to increase with the degree of upstream market power. Therefore, while market power is a necessary condition for vertical restraints to be harmful, the degree of market power may not necessarily be a good indicator of the likely competitive effects of vertical restraints. U.S. law relies on case-specific evidence to make this determination.

Relevant case-specific evidence includes business documents and case-specific empirical analysis. This evidence can be helpful for distinguishing potential theories of harm and benefit. It can also be useful for identifying "experiments" that allow inferences about the effects of vertical restraints. For example, firms may use vertical restraints in some areas but not others, in some channels but not others, or in some time periods but not others. They may also change their practices over time. Evidence on how certain informative indicators relate to firms' vertical restraints practices across areas and channels or over time can help determine the likelihood for vertical restraints to be harmful. This type of evidence ranges from documents or testimony describing the effects of specific practices to data that permits statistical analysis. Again, the nature of this inquiry is the same irrespective of the extent of online sales in the market.

3. Answers to some specific questions about vertical restraints for online sales

3.1 Does the development of e-commerce call for an overall revision of policy indications presented in guidelines and other policy documents, or can they be properly applied as they are to the new economic and technological setting?

Much of the economic literature on vertical restraints does not suggest the need for a different U.S. vertical restraints policy for markets with online sales. This is true both because: (i) the conditions under which restraints may be beneficial or harmful arise in markets irrespective of the degree of online sales; and (ii) economic literature does not provide a basis to believe that tailoring the policy to the extent of online sales in a market would be appropriate.

It certainly is true that online sales may have particular characteristics that affect the analysis of vertical restraints. For example, certain kinds of online distribution may exhibit network effects, which are

often associated with market power.[32] As we have noted, the presence of market power is a necessary condition for vertical restraints to have anticompetitive effects. On the other hand, market power also can make the efficiency benefits of vertical restraints larger. In addition, the ability to make online sales might reduce the costs of entering some markets and tend to eliminate market power. Because these factors are similar to those seen in brick and mortar sales, U.S. law treats online and off-line sales similarly and requires a case-specific analysis in determining competitive effects.

It may be easier for firms to observe their rivals' prices for online sales than for sales in brick and mortar outlets.[33] Other factors equal, this might make coordination easier in markets with online sales, with or without the use of vertical restraints. However, price transparency in online markets may also intensify competition between retailers in some markets by reducing customer shopping costs, increasing the number of competitors in the market, or both. Again, U.S. law requires the agencies to consider the net effect of these factors on a case-specific basis.

3.2 Two broad categories of vertical restraints are generally defined, price and non-price restraints. Is this classification really useful? Is it still valid for online sales?

Since the *Leegin* decision in the U.S., both price and non-price restraints have been treated under the rule of reason by federal courts. This treatment allows for the recognition of the potential procompetitive benefits of vertical restraints while acknowledging that, in some circumstances, a vertical restraint may harm competition. *Leegin* also suggested that the rule of reason approach for resale price maintenance may employ presumptions.[34]

3.3 Is the distinction between "active" and "passive" sales valid/applicable for online sales?

U.S. law does not distinguish between active and passive sales in the treatment of vertical restraints. The economic literature does not provide a strong basis for such a distinction. Vertical externalities may exist for both active and passive sales. This means that vertical restraints can have procompetitive benefits in either case. The use of vertical restraints in markets in which retailers play a more active role in marketing or selling may offer greater scope for efficiency benefits from vertical restraints than in markets where retailers are more passive. This factor is relevant and is accounted for in case-specific analysis.

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32 Of course, network effects can also arise in markets that emphasize other distribution channels.

33 Online sales do not automatically make it easier for firms to observe their rivals' prices. For example, the use of discount or coupon codes can make it hard to observe the prices at which sales actually occur.

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

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BIAC

1. Introduction

The Business and Industry Advisory Committee ("BIAC") to the OECD welcomes the opportunity to submit these comments to the OECD Competition Committee for its roundtable on Vertical Restraints for On-line Sales at the meeting of the OECD Competition Committee on 27 February 2013. This is a timely discussion in light of increased scrutiny afforded by competition authorities to the online arena in recent times[1] and the ever-increasing importance of electronic commerce.

The internet and, more recently, mobile technologies have quickly resulted in substantial changes to the sale and distribution of goods. This has been reflected in firms' business models, in consumer behaviour and in the overall economy.

The last decade has seen the emergence of significant new online-only (and, over the last few years, 'multi-channel') economic players as well as the addition of the online and mobile channels to the distribution strategies of many traditional bricks-and-mortar businesses. Innovation and technological advancements such as mobile platforms, electronic and mobile payments[2] and high-speed broadband mean that the online sales environment continues to develop rapidly.

It is difficult to quantify precisely the importance to the economy of online sales as few countries account for those separately[3], and therefore may underestimate the size of the sector.[4] Nevertheless, the available statistical analyses demonstrate that online sales are of considerable economic significance in a number of countries. By way of example, in the UK, it is estimated that online sales in 2011 amounted to €59.4 billion or 12% of UK retail trade up from 8.6% of UK retail trade in 2008. For Europe as a whole, the total online market was estimated to be €200.52 billion in 2011, (representing an increase from €117.84 billion in 2008). It is anticipated that these figures will continue to increase in the coming years.[5] Total online sales in the United States were estimated to be $202 billion in 2011, and are forecasted to reach $327 billion by 2016.[6] [7]

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1 *See*, for example, the *Ebooks* case (European Commission) and *Online Hotels Booking* case (OFT).

2 As discussed at the Roundtable on Competition Issue in Payment Systems on October 24, 2012.

3 Robertson "*Online sales under the European Commission's Block Exemption Regulation on vertical agreements: Part 1*", European Competition Law Review 2012, p. 1

4 Centre for Retail Research, http://www.retailresearch.org/onlineretailing.php, accessed on 24 January 2013.

5 Centre for Retail Research, http://www.retailresearch.org/onlineretailing.php, accessed on 24 January 2013.

6 Forrester Research Online Retail Forecast 2011-2016 (U.S.).

7 Andreas Lendle, Marcelo Olarreaga, Simon Schropp & Pierre-Louis Vézina, "There Goes Gravity: How eBay Reduces Trade Costs," (Aug. 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2153544. The paper suggests that significant potential consumer welfare benefits in GDP if more international trade were to be moved online.

However, it is interesting to note that some disparities may occur between EU countries regarding the relative importance of online sales to their economies. According to a Eurostat survey, while e-commerce accounted for 26% of company turnover in Ireland in 2008, only 1% of company turnover in Bulgaria and Cyprus[8] [9] was generated from e-commerce.[10] EU consumers may also encounter difficulties in cross-border shopping online. In 2010, these difficulties were highlighted by Commissioner Almunia, who estimated that 7 out of 10 cross-border transactions attempted online in the EU ultimately failed.[11] Nevertheless, it is important to also recognise that consumer experiences in this regard continue to improve.

2. Electronic commerce and competition in general

Any competition law assessment necessarily requires a detailed consideration of a variety of complex legal, factual and economic factors. The complexity of this assessment is increased in respect of electronic commerce due to the ever-changing nature of the environment leading one commentator to describe the task as being "*as difficult as taking a neat photo of a cruising rocket*."[12] Nevertheless, it is possible to discern some general pro-competitive effects and anti-competitive threats that can be attributed to the development of electronic commerce.

Online sales have resulted in a number of clear pro-competitive effects as they fulfill one of the fundamental aims of competition policy – improvement in economic and consumer welfare. One of the primary effects of online sales has been increased competition on price (and other variables) between online retailers, and between online and bricks and mortar retailers. This has resulted in a direct benefit for consumers. Furthermore, consumers have been empowered to make more informed choices about their purchases. Search engines and price comparison websites have enabled customers to obtain information about products and services and compare prices, thereby reducing search costs. Consumers have also been afforded the opportunity to purchase a wider range of products unencumbered by constraints of geographical location, or their ability to visit bricks-and-mortar shops.

For businesses, the advent of electronic commerce has resulted in a divergence from the traditional distribution networks of bricks-and-mortar shops. A wealth of online business models (including online-only retailers, "click-and-mortar" retailers and third party platforms) has been established enabling suppliers to distribute their products to a broader range of consumers.

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8 Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

9 Note by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

10 Eurostat "Information and Communication Technologies: E-Commerce accounted for 12% of Enterprises' Turnover in the EU27 in 2008". Robertson "*Online sales under the European Commission's Block Exemption Regulation on vertical agreements: Part 1*", European Competition Law Review 2012, p. 2.

11 Speech by Commissioner Almunia "*Competition in Digital Media and the Internet*", SPEECH/10/365, (London: July 7, 2010), noting that "*Although most barriers to e-commerce are regulatory.competition polcy does have a role to play in promoting the internal market*" and the need for simple, secure and efficient payment services.

12 Accardo "*Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions on Online Distribution under EU and U.S. Competition Laws*", TFLF Working Papers No. 12, 2012, page 4.

Moreover, the online environment generally entails significantly lower barriers to entry than the traditional bricks-and-mortar retail environment. Online retailers can benefit from lower start-up and ongoing costs, while more sophisticated marketing techniques can help businesses to tailor product offerings and stock levels to consumer needs.

Nevertheless, the online sales environment may also present certain threats to competition. In the first instance, there are some concerns that increased pricing transparency (which is of benefit to consumers) may facilitate collusive conduct between competitors by enabling easier monitoring of each other's activities. However, it is important that such concerns are not overstated, as greater transparency in the market as a whole is generally considered to result in a pro-competitive outcome.

A further concern is that dominant companies in the online sales environment may engage in abusive conduct, thereby foreclosing the market.[13] This threat cannot be ruled out entirely, although the fluid nature of the online sales environment and the generally lower barriers to entry[14] mean that foreclosure may be more difficult than in the bricks-and-mortar environment.

As noted above, competition authority assessments in the online environment will not be straightforward. Even basic concepts, such as definition of the relevant market can become quite complex, while establishing dominance and the degree of contestability in those relevant markets may also be difficult.[15]

Despite these complications, competition authorities have been keen to highlight their commitment to application of competition principles to the online environment. In the European Union, successive Competition Commissioners have emphasised this point both in their public pronouncements[16] and legislative activities.[17] In 2010, Commissioner Almunia reiterated that "*the principles of competition must be maintained in the digital economy with the same intensity that they are imposed in the brick and mortar world.*"[18] U.S. antitrust authorities have also emphasised the importance of the application of antitrust principles in the online sphere. In 1999, David A. Balto, Assistant Director, Office or Policy and Evaluation, Bureau of Competition, Federal Trade Commission, discussed the application of antitrust laws to electronic commerce. Balto stated, "*The Federal Trade Commission has a vital role to play in electronic commerce markets. The Commission stands in the role of a referee, to protect the process of competition so that such competition occurs on the merits. We want to make sure that innovation in electronic commerce is not compromised by artificial barriers to entry erected by incumbent competitors or established by regulatory fiat. We are there to assure that private forces do not impede the development or growth of the market through exclusionary conduct, either collective or unilateral*."[19]

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13 Speech by Commissioner Almunia "*Competition in Digital Media and the Internet"*, SPEECH/10/365, (London: July 7, 2010).

14 See paragraph 9 above.

15 Speech by Commissioner Almunia "*Competition in Digital Media and the Internet"*, SPEECH/10/365, (London: July 7, 2010); Speech by Federal Trade Commission Chairman Pitofsky "Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems" (February 25-26, 1999).

16 Speech by Commissioner Almunia "*La politique de la Concurrence de l'UE en 2010 et au-delà*" SPEECH/10/25 (Paris: February 15, 2010); Speech by Commissioner Kroes "*Consumer Welfare: More Than A Slogan*", SPEECH/09/486 (Brussels: October 21, 2009).

17 Regulation 330/2010 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; Guidelines on Vertical Restraints, 2010.

18 Speech by Commissioner Almunia "*Competition in Digital Media and the Internet"*, SPEECH/10/365, (London: July 7, 2010).

19 http://www.ftc.gov/speeches/other/ecommerce.shtm.

Despite apparent agreement as to this general principle, competition authorities on either side of the Atlantic have taken differing approaches to the controversial issue of vertical restraints in online sales. While the European Commission in 2010y adopted guidelines dealing specifically with restrictions of online sales in distribution agreements, U.S. antitrust enforcement is content to rely on general antitrust principles and has decided not to adopt specific rules for such restrictions. This lack of consistency in treatment reflects the divergent approach of the authorities to vertical restraints generally[20] but is of particular concern in relation to online sales policies since it creates significant additional complexity with resulting costs for businesses that are active themselves in the online environment, or engage with online distributors in the EU and the U.S. The specific features of online commerce demand a more internationally convergent competition law regime if this important sector is to develop freely so as to maximise benefits to consumers.

3. Vertical restraints in online sales

Suppliers enter into distribution agreements with external undertakings where this represents a more efficient option than vertical integration. However, such suppliers may wish to maintain some control over how and where their products are sold.[21] Specifically, and particularly when e-commerce was in its infancy, some suppliers were concerned and may consider that the distribution of products online would result in less control over marketing and distribution, or (in certain cases) harm the image and goodwill of their brands.[22] In order to alleviate such concerns, distribution agreements will include vertical restraints to regulate the conduct of either or both parties.

It is generally accepted that vertical restraints are less harmful to competition than horizontal restraints and may provide substantial scope for efficiencies. This is because businesses are involved at different levels of the supply chain and will generally have an incentive to keep prices as low as possible to maximise product demand and so will only impose unilateral vertical restraints which they consider best-suited to achieve this objective.

Consequently, it is possible to discern a number of pro-competitive effects from the imposition of vertical restraints. In particular, vertical restraints can result in substantial efficiencies through the promotion of non-price competition and improved quality of services.[23] This is of particular relevance where a company has limited or no market power and is seeking to differentiate itself through optimising manufacturing or distribution processes.[24]

One of the primary arguments advanced in support of vertical restraints in online sales is that they are necessary to counteract the problem of free-riding. This line of reasoning suggests that restraints are necessary to prevent online sellers from free-riding on investments by bricks-and-mortar retailers in enhanced pre-sale services or promotional efforts. A restriction of online sales could therefore provide distributors with an incentive to keep up the provision of services that add to the value of the supplier's brand.

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20 On which BIAC has commented elsewhere but which is not the subject of this paper.

21 Waterson & Dobson *Vertical Restraints and Competition Policy*, UK Office of Fair Trading, (1996); Accardo "*Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions on Online Distribution under EU and U.S. Competition Laws"*, TFLF Working Papers No. 12, 2012, page 18.

22 Accardo "*Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions on Online Distribution under EU and U.S. Competition Laws"*, TFLF Working Papers No. 12, 2012, page 18.

23 Guidelines on Vertical Restraints, para. 106.

24 *Id*.

It is necessary to recall in this context that whether customers actually benefit from such extra services or promotional efforts will depend on whether the extra promotion informs and influences (and therefore actually benefits) consumers. Already in 2009, research observed a "reverse free-riding" phenomenon whereby consumers conduct significant research into products online before carrying out their purchases in a bricks-and-mortar store,[25] thus undermining in certain circumstances the justification for imposing such restrictions. It is also possible that the importance of so-called "reverse free-riding" has been exaggerated on the basis that consumer research online may gravitate towards manufacturer-generated (rather than retailer or distributor-generated) content.[26]

One specific instance of the "free-rider" problem arises where a supplier enters a new territory. In those circumstances distributors will need to make "first time investments" to establish the brand on the market. It may be necessary to confer territorial protection on that distributor to prevent online retailers from free-riding on those investments. This ensures that incentives for suppliers to enter particular markets are preserved, which may ultimately be to the benefit of consumers.

It is also necessary to consider the extent to which vertical restraints in the online arena may result in anti-competitive effects, thus undermining the pro-competitive effects of online sales outlined above. However, it is submitted that the existence and extent of any such effects should be examined on a rule of reason basis.

By way of example, it is possible that a blanket restriction on online sales, if operated by suppliers with very substantial market power, could lead to the anti-competitive foreclosure of potential retailers from the relevant market. Such restrictions could result in fewer online retailers competing in the online sales channel, with a consequent reduction in inter-brand competition (i.e. reduced competition between a supplier and its competitors). This outcome could have a negative impact on consumer welfare due to higher wholesale prices, limitations on product choice or lowering the quality of or innovation in products.[27]

Further, the online arena means that the traditional distinctions between so-called suppliers and retailers can easily become blurred. One example is the airline sector, where airlines retail their own flights via their website while also distributing those flights via travel agents. In that instance, questions may arise whether vertical restraints imposed by those airlines could also result in the reduction of horizontal competition between the airline and the travel agent at the retail level.

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25 Kinsella & Melin "*Who's afraid of the Internet? Time to Put Consumer Interests at the Heart of Competition*", GCP, March 2009, Release One, p.9; Commission Report on E-Commerce, 2009.

26 Note that the discussion about free-riding is ongoing. For example research from the UK's Ofcom's UK Communications Market Report 2012 show that 57% of smartphone owners in the UK have used their smartphones when out shopping for (among other things) comparing prices between online and high street shops (25%), researching product features online (19%), and acquiring more product information by scanning bar codes (21%) - OFCOM International Communications Market Report 2012, 13 December 2012 http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/icmr/ICMR-2012.pdf (see page 209) and OFCOM Communications Market Report, July 2012, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/CMR_UK_2012.pdf (see page 227).

27 Guidelines on Vertical Restraints, 2010, paragraph 101. Robertson "*Online sales under the European Commission's Block Exemption Regulation on vertical agreements: Part 1*", European Competition Law Review 2012, p. 4.

A reduction in intra-brand competition (i.e. competition between distributors who are distributing the same products) may also ensue from vertical restraints but it is generally accepted that a reduction in intra-brand competition alone is only detrimental where there is significant market concentration. [28]

Negative competitive effects of such vertical restraints in the online market can be reinforced where several suppliers and buyers organise their trade in a similar way, leading to so-called cumulative effects.[29] However, the high degree of innovation in online markets means that cumulative effects will be less likely to arise than in the context of more traditional industries.

From the above, it is clear that vertical restraints may have pro-competitive or anti-competitive effects in practice, depending on the particular context. This is particularly so in the online context where, for example, free riding may represent a clear issue in one scenario and may not be a concern in another.

Adopting too strict an approach to vertical restraints may unduly undermine investment incentives in the online sector. It is therefore advisable that each vertical restraint is considered on a "rule of reason" basis, taking into account any resulting efficiency gains and anti-competitive effects.

4. EU approach to vertical restraints in online sales

Until the adoption of the 2010 VBER and Guidelines on Vertical Restraints, there was little guidance under EU law regarding the application of the rules on vertical restraints to the online distribution of goods. As online sales were in its infancy at that time, it is of little surprise that the previous version of the regulation and guidelines were vague on the topic of online distribution (and in fact, it seems that the paragraphs on online sales were only added by the European Commission in a penultimate draft).[30] The 1999 Guidelines prohibited restrictions on "*passive sales*" which included blanket bans on online sales. The Guidelines did not elaborate on other issues affecting the online environment, such as free-riding.

When revising the 1999 Block Exemption Regulation and Guidelines in 2010, the European Commission responded to calls for further guidance on the instances where vertical restraints in online sales may be permissible. In comparison to the approach adopted by U.S. antitrust authorities, the guidelines are very specific indeed.

As a general proposition, the Guidelines confirm that a prohibition on internet sales is considered to be a ban on "*passive sales*" which represents a hardcore restriction. [31]

From this starting point, the Guidelines provide additional rules on the extent to which online sales restrictions can be included in vertical agreements. Such rules include the following guidance:

- Suppliers **may not restrict the proportion** of overall sales made by the distributor over the internet (but may require the distributor to sell a certain absolute amount (in value or volume) of products offline).

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28 See Guidelines on Vertical Restraints, 2010 paragraph 101 for the Commission's concerns regarding restraints on intra-brand competition.

29 Guidelines on Vertical Restraints, 2010, paragraph 105.

30 Dolmans and Leydens, e-Competitions, No. 45647 "*Internet & Antitrust: An overview of EU and national case law*".

31 When announcing the new Guidelines and Regulation, Competition Commissioner Almunia said that the new rules were "internet friendly" and clearly limited "the possibility of suppliers to restrict online sales". Speech 10/172, available http://europa.eu/rapid/press-release_SPEECH-10-172_en.htm?locale=en

- Suppliers **may not charge different wholesale prices** for products to be sold online or compared to offline (but may agree a fixed fee with the buyer to support the latter's offline or online efforts).
- An **exclusive distributor** cannot be prevented from allowing customers located in another exclusive territory from viewing its website. Such customers should not be re-routed to the manufacturer's or another distributor's websites.
- As a pre-condition for joining a supplier's **selective distribution** system:
  - Suppliers may require distributors to operate one or more bricks and mortar shops or show rooms;
  - Suppliers may impose quality standards on the use by distributors of an internet site to resell its goods (and may impose quality conditions on third party platforms).
- Guidance is provided on what constitutes "active" and "passive" sales in the online context e.g.:
  - provision of language options on national websites (passive)
  - responses to unsolicited consumer requests (passive)
  - online advertisement specifically addressed to certain customers (active).

These guidelines attempt to translate the EU rules applicable to traditional bricks and mortar distribution rather literally across to the online sales environment. In light of the generally pro-competitive impact of online sales and the consumer benefits they bring and of the drive by business to find innovative ways to develop this new environment, BIAC would urge a more nuanced approach to vertical restraints here. The very flexibility inherent in EU competition law, which was recognised to accept selective distribution policies initially in the bricks and mortar environment, could usefully be applied to ensure suppliers have the necessary renewed flexibility to best developing their online sales policies.

In fact the adoption of these EU guidelines has not been motivated solely by competition concerns but also the desire by the Commission to advance other policy aims, in particular single market objectives. As such, the EU guidelines should not be taken as a precedent for competition rules in other jurisdictions where these single market policy objectives do not apply.

National competition authorities: Prior to the adoption of the revised guidelines in 2010, national competition authorities in the EU had not adopted a uniform approach when considering the permissibility of restraints on internet sales falling short of outrights bans. By way of example, the German national competition authority rejected an argument that restrictions imposed on online sales of contact lenses were necessary to protect consumer health (on the basis that less restrictive methods could have been used to achieve this aim). On the other hand, the Netherlands national competition authority found that issuing different sets of supply conditions to online retailers compared to traditional retailers was permissible due to the difference in added value between the two distribution systems.[32] This resulted in uncertainty for business.

The speed of the development of online sales in the past decade has meant that the specific rules set out in the 1999 Guidelines were swiftly overtaken by market developments, resulting in confusion among national competition authorities and industry regarding the extent to which vertical restraints could restrict online sales, Ambiguity regarding the application of concepts of "active" and "passive" sales to this new environment resulted in further uncertainty for businesses.

[32] Dolmans and Leydens, e-Competitions, No. 45647 "*Internet & Antitrust: An overview of EU and national case law*", p.4.

The Commission may have considered that the elaboration of the meaning of "passive sales" in the 2010 Guidelines will resolve some of this uncertainty for businesses. Uncertainty still remains but it is important to note that while the Guidelines are not binding on national competition authorities, they are likely to be of considerable assistance in ensuring the consistency of decisions going forward.

Financial importance of online sales: The European Commission has consistently emphasised the importance of online sales to the EU economy, and has singled out the digital economy in its Europe 2010 growth strategy as one of the pillars of the EU's economic recovery. Commissioner Almunia has specifically noted the "*political mandate to ensure that this sector grows to its full potential*" and that *"[i]t is clear to me that competition policy must be a key part of this strategy as a way to ensure market access and opportunities to all efficient players capable of delivering new value.*"[33] It is therefore possible that the specific limitation in the 2010 guidelines on the scope of vertical restraints are informed by wider policy considerations of developing further the online economy rather than competition concerns alone.

Internal market: Successive competition Commissioners have also emphasised the importance of the promotion of online sales for the completion of the internal market.[34]

Completion of the internal market remains an important aspect of EU competition policy and it is clear that the online environment will represent an important aspect of achieving this aim. Nevertheless, it is also important that over-regulation of the online environment does not dis-incentivise investment, thereby endangering the single market imperative. This is particularly the case as there are persuasive arguments in favour of considering vertical restraints in online sales on a rule of reason basis, taking into account the specific circumstances of each case rather than prescribing strict rules..

Although it is perhaps too early to assess the full impact of the 2010 Vertical Guidelines in the online sector, the further development in this area since 2010 (in particular the impact of mobile devices and smart payment systems) is presenting new opportunities as well as challenges for business. Therefore, it remains to be seen whether these updated specific rules regarding vertical restraints will strike an appropriate balance between the promotion of online sales and the protection of legitimate business

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33 Speech by Commissioner Almunia *"Competition in Digital Media and the Internet"*, SPEECH/10/365, (London: July 7, 2010).

34 In a 2010 speech Commissioner Almunia has confirmed specifically that the revised Vertical Guidelines were underpinned by internal market considerations: *"Although most barriers to e-commerce are regulatory or have to do with, competition policy does have a role to play in promoting the internal market. With our recently adopted rules on distribution agreements, we have taken some steps towards safeguarding consumers' rights to shop online across the EU. Companies are not allowed to establish artificial barriers that partition the internal market to the detriment of consumers and I believe that evidence of such market segmentation should be met by enforcement.*

The influence of the internal market aims can be seen clearly in several instances in the revised Guidelines. By way of example, the prevention of restrictions based on location of the consumer clearly references the Commission's finding in its Communication on e-commerce that many online shops are not prepared to sell to consumers from every EU country. Speech by Commissioner Almunia *"Competition in Digital Media and the Internet"*, SPEECH/10/365, (London: July 7, 2010).

After the adoption of the Guidelines, the then Director General for Competition at the European Commission, Alexander Italianer stated that (Interview in The Antitrust Source, April 2011) *"the promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers and generally speaking, enhances competition. But that doesn't meant that we should treat online sales differently from offline sales...We have tried to strike a balance between strongly promoting online sales on the one hand and on the other hand, requirements that are indispensably linked to the branding and sales of certain products"*.

interests and investment incentives. However, as discussed above,[35]BIAC is concerned that the certainty of the guidelines comes at too great a cost in terms of flexibility for business to innovate and choose their optimum distribution policy in the online environment.

5. U.S. approach to vertical restraints in online sales

The United States takes a different approach than the EU to its assessment of vertical restraints. Following the Supreme Court's 2007 decision in *Leegin*,[36] virtually all vertical restraints, including price restraints, are evaluated under a rule of reason approach, primarily based on §1 of the Sherman Act, which balances any pro-competitive and anticompetitive effects.

It is interesting to note that the Department of Justice did issue Vertical Restraints Guidelines in 1985. However, these Guidelines were not generally enforced in practice and were withdrawn in 1993. Anne K. Bingaman, Assistant Attorney General for the Department of Justice's Antitrust Division, announced the withdrawal of the Guidelines thus: "*The Vertical Restraints Guidelines do not set forth the Division's current analysis of vertical practices and are not consistent with judicial interpretations of the antitrust laws. They are misleading both to practitioners attempting to counsel clients as well as businesses attempting to conform with the law. For these reasons, it is appropriate to withdraw the Vertical Restraints Guidelines.*"[37] After the withdrawal of the Vertical Restraint Guidelines, the Department of Justice has not enacted any specific policy in respect of vertical restraints.

The U.S. authorities have also made the conscious decision to refrain from legislating specifically in the online sector. As far back as 1999, the Federal Trade Commission's David A. Balto stated, "*Although the growth of this [online] market may be unprecedented, traditional antitrust principles still apply*." Therefore, the same rule of reason approach has been applied to internet sales and sales through traditional brick-and-mortar channels.[38]

The adoption of the rule of reason approach has meant that companies have much broader flexibility to impose vertical restraints on distributors, including in respect of online sales and there is greater emphasis on freedom of contract.

Very little legal precedent exists in the United States on the specific issue of vertical restraints in online sales. It may be that plaintiffs have been deterred from bringing cases due to the fact that the rule of reason approach adopted by the U.S. authorities has made it more difficult to establish an antitrust infringement. In addition to the low probability of success under the rule of reason standard, U.S. plaintiffs face additional hurdles in the form of heightened pleading standards requiring a showing of plausible grounds to infer an agreement.[39]

However, this does not mean that the U.S. authorities have been silent on the importance of e-commerce. As part of the process of examining possible barriers to e-commerce, the Federal Trade Commission has strongly encouraged policymakers to adopt rules that encourage e-commerce. For example, the Federal Trade Commission filed a staff comment before the Connecticut Board of Opticians, which was considering additional restrictions on out-of-state and Internet contact lens sellers, and in an

35 See paragraph 33

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

37 http://www.justice.gov/atr/public/press_releases/1993/211653.htm.

38 http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-comments/2009/09-09/comments_proposal_ec. pdf-34k-2012-11-05.

39 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

FTC Staff Report, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers.[40]

The U.S. approach represents a firm adherence to traditional (broad) U.S. antitrust principles and a rejection of the stringent application of specific rules in the online sector. There has been broad acceptance in the U.S. that this approach is "sufficiently flexible, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents". This point has also been emphasised by the U.S. Supreme Court, which has noted that "antitrust doctrine "evolv[es] with new circumstances and new wisdom."[41]

6. Conclusions

In conclusion, it can be said that the increase of online sales is presenting competition authorities with novel issues and novel problems. This does not, however, in BIAC's view, require the adoption of novel legal approaches or specific rules. Competition law has always needed to be flexible to adapt to changes in the economic environment and market practices.

In a global online market, it is important for businesses that rules are consistent and applied in a consistent manner. Given the broad geographic context in which many online businesses function, inconsistency between the rules, such as currently exists between EU rules and rules elsewhere, can impose additional costs and create risks for market operators and make it more difficult for international online commerce to flourish.

The rule of reason approach applied under U.S. law is one which can adapt itself to a variety of circumstances, including the novel aspects of online markets. This approach enables a competition authority to consider each vertical restraint on its own merits and in the actual economic context, taking into account any resulting efficiency gains or anti-competitive effects. BIAC would commend this approach to all competition authorities considering vertical restraints, including price and non-price ones, in the context of online sales.

40 http://www.ftc.gov/os/2003/10/031030ecommercewine.shtm.

41 Accardo "*Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions on Online Distribution under EU and U.S. Competition Laws*", TFLF Working Papers No. 12, 2012, page 117.

VERTICAL RESTRAINTS IN RELATION TO ONLINE SALES: SOME CAUSES, EFFECTS, AND CAUTIONARY NOTES

By Mr. Michael Baye [*]

1. Introduction

Vertical restraints are controversial, as is evidenced by differences in laws across legal jurisdictions. Consider, for example, minimum resale price maintenance—a restriction imposed by a manufacturer (or supplier) on the lowest price retailers (or distributors) can charge for its product. In the United States, there is not a *per-se* prohibition against this practice at the federal level, but the practice is *per-se* illegal in a number of states. Similar differences exist among different countries for these and other vertical restraints, including minimum advertised prices (MAP) and Colgate policies (such as a manufacturer requiring retailers to engage in no-haggle pricing, to not sell its product online, or requiring retailers to adhere to "suggested" retail prices and unilaterally terminating any retailer violating such policies).

Since the internet tears down geographic boundaries, a manufacturer domiciled in one jurisdiction typically sells through retailers operating in multiple jurisdictions. Since it is costly for manufacturers to tailor contracts and pricing practices to many different countries, laws and enforcement actions by one member of the OECD may result in externalities (positive or negative) on manufacturers, retailers, and consumers in other jurisdictions.

My goal is three-fold: (1) to provide a simple paradigm that helps identify when vertical restraints are likely to be pro-competitive and when they are not, (2) to explain how online retail markets complicate the analysis, and (3) to provide some suggestions and caveats to agencies burdened with the task of distinguishing between potentially harmful and beneficial vertical restraints. My written comments are brief, as you requested. I would be happy to elaborate and answer any questions during the oral portion of my testimony.

2. Preliminaries: Manufacturers Prefer Low, Not High, Retail Prices

A common misperception is that manufacturers favor (minimum) resale price maintenance and other vertical restraints because they directly benefit from the higher retail prices arising from a lessening of intra-brand competition. This reasoning is incorrect. A manufacturer earns revenues based on its wholesale price, not the retail price. By the law of demand, consumers buy fewer units at higher retail prices, and this means that the direct effect of reducing intra-brand competition among retailers is to reduce the manufacturer's profits. In fact, assuming the manufacturer has market power, heightened competition among retailers selling its product results, other things equal, in higher profits. Indeed, if retailers compete in a perfectly competitive fashion to sell the manufacturer's product, retailers will price at marginal cost (the wholesale price) and the manufacturer earns the maximum possible profits. In contrast, when retailers also possess market power, double-marginalization occurs and retail prices are higher than the level that

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maximizes the manufacturer's profit. This harms not only the manufacturer, but also consumers who end up paying higher retail prices.

The punch-line is simple: Other things equal, a profit-maximizing manufacturer benefits from heightened competition among retailers selling its product. Manufacturers want to reach more— not fewer—customers, so lower retail prices and broadening its reach into online channels are beneficial to a manufacturer, other things equal.

3. Why, Then, Do Manufacturers Impose Restrictions on e-Commerce?

Why, then, would a profit-maximizing manufacturer impose restraints—such as (minimum) resale price maintenance, territorial restrictions, or refusing to deal with online retailers—that lessen intra-brand competition or seemingly limit its geographic reach? In answering this question, a little notation is helpful. Notice that the number of units (q) that the manufacturer sells depends on orders from retailers, which in turn depends on the *retail* price, p. At a retail price of p, demand is $q = q(p)$, so retailers order q units from the manufacturer. The manufacturer's profit is, in turn, given by

$$\pi = (w - m) \times q - F, \qquad (1)$$

where w is the *wholesale* price, m is its unit cost of production, and F is the manufacturer's fixed cost.

A higher *retail* price reduces quantity demanded through the retail channel, and thus reduces the number of units that retailers order from the manufacturer. Other things equal, a lower q in equation (1) translates into lower profits for the manufacturer. Thus, it is profitable for a manufacturer to *unilaterally and voluntarily* impose a vertical restraint only if doing so:

- increases the number of units the manufacturer sells (q), or
- reduces the manufacturer's unit (m) or fixed costs (F) of production, or
- increases the manufacturer's wholesale price (w).

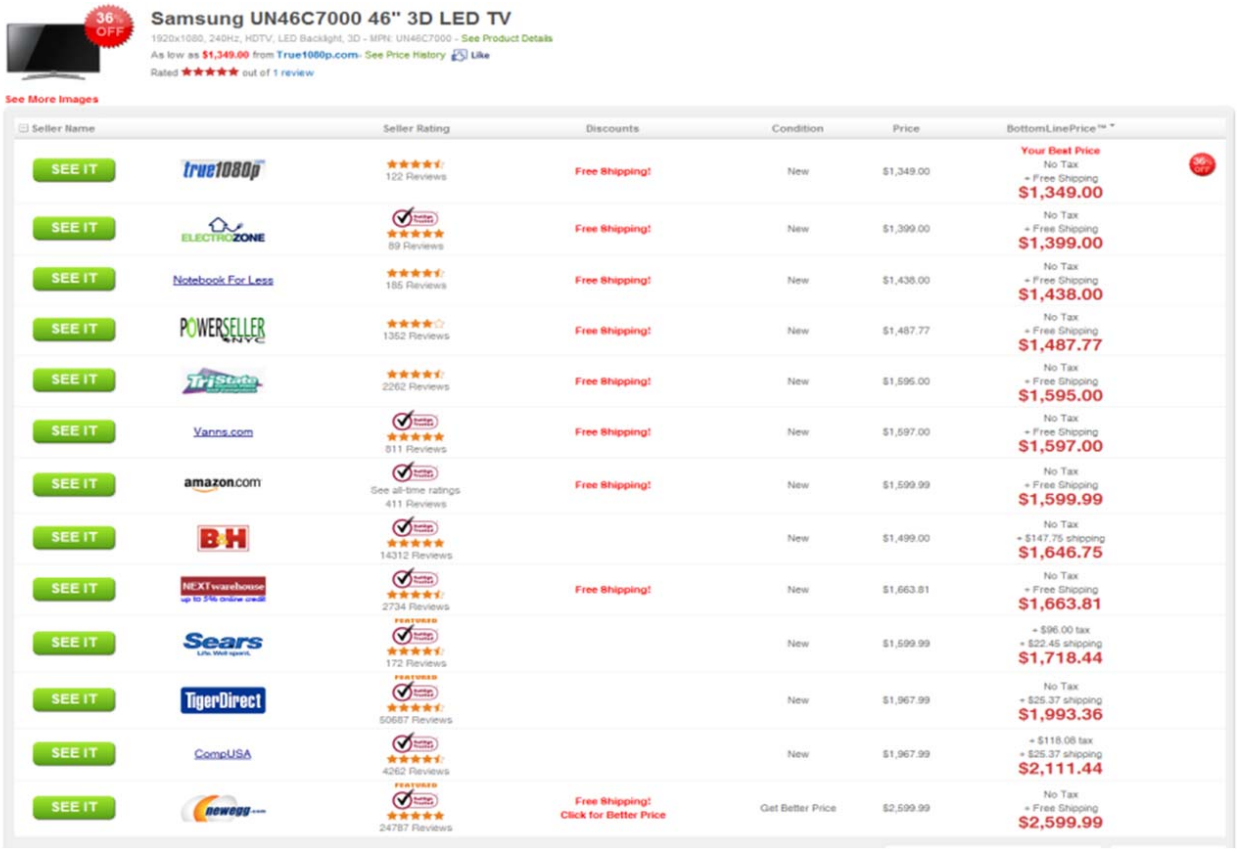
Otherwise, the higher retail price stemming from the vertical restraint leads to fewer units sold and lower profits for the manufacturer, which means that the manufacturer did not have a unilateral incentive to voluntarily impose the restraint in the first place.

The punch line here is also simple: The only reason a profit-maximizing manufacturer would ever *unilaterally and voluntarily* impose vertical restraints is because doing so somehow increases output, reduces costs, or raises the wholesale price. Only one of these three possible reasons—an increase in the wholesale price—adversely affects the welfare of consumers.

4. An Example from E-Commerce

Several potentially relevant issues are captured in the following hypothetical. Consider a consumer who, based on his past purchase decisions and knowledge of televisions, travels to a brick-and-mortar store to purchase a Sony 46" television. The store stocks a variety of brands including Sony and Samsung and allows the consumer to watch several competing brands while inside the store. After doing so, the consumer decides that the Samsung UN46C700 46" 3D LED TV—priced at $1,995.00 plus tax—is the best match for his preferences. Armed with this information the shopper travels home, visits the price comparison site, PriceGrabber.com (see Figure 1), and purchases the TV from an e-retailer to save over $600.

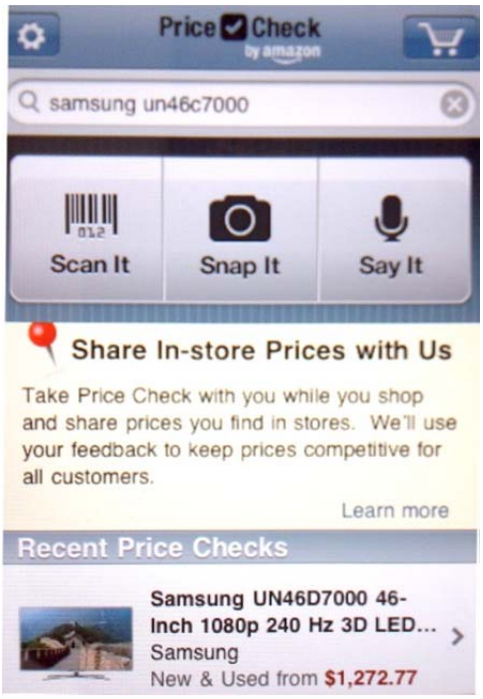
Figure 1: Screenshot from the PriceGrabber.com
(A Price Comparison Site)



What is the effect of this behavior on the manufacturer? Other things equal, Samsung doesn't care if the consumer buys its brand from an e-retailer for $1,349 or from a brick-and-mortar retailer for $1,995; in either case, it receives the wholesale price, not the retail price.

But recall from the hypothetical that the consumer went to the store to buy a Sony television; only after watching pictures on different sets did he learn that Samsung was a better match for his preferences. As shown in Figure 2, thanks to Apps such as Amazon's price check, consumers with a mobile device can actually purchase the item from an online retailer before leaving the brick-and-mortar store. And notice that this sort of shopping behavior reduces the brick-and-mortar retailer's incentive to continue to stock (and promote) Samsung TVs. In the longer run, this could harm both Samsung (by reducing its sales, q) as well as consumers who are unable to physically compare TVs before making a purchase decision. Manufacturer-imposed restraints—such as minimum resale price maintenance or restricting online sales of products—are a potential "fix" for this and other problems.

Figure 2: Screenshot from Amazon's Price Check (An App for the iPhone)



There are, of course, other potential solutions to this problem, such as the manufacturer integrating into downstream retail markets to directly sell its product to consumers, or writing more complex contracts with downstream distributors and/or retailers. Importantly, however, these and other potential solutions entail different costs, and a profit-maximizing manufacturer will take these costs into account in determining the optimal way to mitigate any deleterious effects of this type of behavior. Restricting manufacturers' tools for solving these sorts of problems can force them to turn to more costly options, which may raise wholesale (and hence retail) prices.

Additionally, if this behavior induces brick-and-mortar retailers to quit stocking Samsung TVs, or ultimately to go out of business, consumers who are on the "wrong" side of the digital divide or who are leery of purchasing without viewing different models, may be harmed. Thus, competition between traditional and online retailers may benefit consumers on one side of the digital divide at the expense of consumers on the other.

5. A Broader Look at Why Manufacturers Might Impose Vertical Restraints

As a matter of economic theory, vertical restraints may increase or decrease welfare, regardless of whether they are imposed in traditional or online markets. The formulation in equation (1) allows one to broadly organize pro- and anticompetitive theories according to how the restraints impact output, costs, and *wholesale* prices. Vertical restraints that increase a manufacturer's (quality adjusted) output, or that permit it to compete against the brands of other manufacturers at a lower cost than alternative mechanisms, are generally pro-competitive. In contrast, vertical restraints designed to reduce competition among *manufacturers* have the effect of increasing *wholesale* prices and are generally anti-competitive.

Below I provide a very coarse discussion of some issues to consider in evaluating these potential effects.

5.1 Agency Issues

In some instances, vertical restraints may be the most cost-efficient way for a manufacturer to solve agency problems that would otherwise lead retailers to underinvest in such things as inventories, service quality, or efforts to match consumers with the best product or brand for their tastes. There are of course a variety of different types of vertical restraints, as well as many different ways a manufacturer could mitigate agency problems. In considering different potential solutions to agency problems, a profit-maximizing manufacturer will consider not only their effectiveness, but also the associated costs. These are likely to vary across different types of products.

5.2 Free-Rider Issues

Free-rider issues can arise from the behavior of consumers (who physically inspect products at brick-and-mortar stores or receive advice from knowledgeable sales staff before purchasing them from an online seller with lower overhead costs), or retailers (who free-ride off of the general advertising efforts of competitors).

5.3 Counterfeits/Fraud

The internet provides unscrupulous retailers a plethora of means of selling counterfeits and versions of products intended for other uses or markets. In order to protect the reputation of its brand (thereby increasing its long-run output), a manufacturer might limit distribution to retailers having a brick-and-mortar presence. Different solutions to this problem entail different costs, which may vary depending on the characteristics of the product, the size and sophistication of the manufacturer, as well as the number of different legal jurisdictions in which it ultimately sells its product.

5.4 Pressure from Retailers Harmed by Online Competition

Existing brick-and-mortar retailers may be harmed by heightened competition from online merchants and attempt to pressure manufacturers into imposing vertical restraints. In the absence of adverse output effects arising from such competition (lower quality adjusted sales due to free-rider or agency issues, for example), it is not generally in a manufacturer's interest to give in to such pressure because doing so would reduce the manufacturer's profits. However, if the retailer has significant market power, can credibly threaten to "drop" the manufacturer's product from its stores, and if the manufacturer cannot withstand the short-run effects of being dropped, such pressure might induce a manufacturer to impose vertical restraints.

Notice that in this scenario, the vertical restraints reduce the manufacturer's profits relative to what they would have been "but for" the retailer's exercise of market power and also harm consumers. Retailer market power is of course necessary (but not sufficient) for this theory of consumer harm.

5.5 Competing with Other Brands

It is important to stress that vertical restraints can lead to pro-competitive output effects in the absence of free-rider issues, point-of-purchase service requirements, and the need to physically inspect goods prior to purchase. The key is to consider retailers' incentives to promote one manufacturer's product instead of another. In brick-and-mortar stores, this involves product placement (where products are displayed within the store), product recommendations (which product the sales staff "pushes" to shoppers), and so on. In the online channel, this includes the location of a manufacturer's product on the retailer's web page, product recommendations, shipping and return policies for the item, and so on.

For example, suppose a retailer's margin on brand X is 5%, while that on brand Y is 20%. Since the retailer's opportunity cost of carrying (or promoting) brand X is the 15% lost margin on sales of brand Y,

the retailer has an incentive to promote the higher margin product over brand X. This reduces manufacturer X's sales. To the extent that vertical restraints raise the retail margin on brand X and thus increase retailers' incentives to stock or promote it, consumers may be provided access to a greater variety of brands than in the absence of such policies.

5.6 Commitment

As a matter of economic theory, it is possible that industry-wide vertical restraints, such as RPM, may be imposed as a commitment mechanism to soften price competition among manufacturers and raise the wholesale price. Other things equal, this reduces consumer welfare.

Two points are worth noting here. First, the appropriate "screen" for detecting such practices is the wholesale rather than the retail price, and this can be directly tested with data. Second, it is not sufficient to demonstrate that all manufacturers in a given industry are unilaterally imposing similar vertical restraints. Indeed, if product characteristics are such that one firm finds it in its unilateral interest to impose vertical restraints to mitigate, for instance, agency or free-rider problems, it is likely that other manufacturers face similar problems and thus have similar unilateral incentives. Thus, the mere fact that vertical restraints are being imposed by several manufacturers in a given market does not imply that they are anti-competitive. As discussed below, it is an entirely different matter if the restraints are imposed in a coordinated rather than unilateral fashion.

5.7 Manufacturer Cartel

Vertical restraints that are imposed in a coordinated rather than unilateral fashion are problematic because they may be used to mitigate competition among manufacturers, thus preventing the *wholesale* price from falling toward the competitive level. Other things equal, a higher (collusive) wholesale price results in higher retail prices, which reduce consumer welfare. Notice that this also harms retailers, regardless of whether they sell online or offline.

An important question is how vertical restraints might facilitate collusion among wholesalers. For the case of RPM, a common answer is that it aids manufacturers in circumventing problems with unobservable wholesale prices. In my view, this reasoning is not particularly compelling in online markets where manufacturers can readily obtain information about prices without the need for RPM (See Figure 1, for instance).

Another possibility is market-sharing agreements among manufacturers that are implemented through vertical (or territorial) restraints. To the extent that they are imposed in a coordinated fashion, the restraints may permit manufacturers to soften (wholesale) price competition and harm both consumers and retailers.

As a matter of economic theory, cartel and collusive theories of vertical restraints typically require a relatively small number of manufacturers. These theories of harm may be directly tested using data on wholesale prices.

5.8 Signaling

In some markets, consumers use price as a signal of product quality. To the extent that a manufacturer uses vertical restraints to prevent retailers from pawning off lower-quality versions of a manufacturer's product as being higher quality, such restraints may result in higher quality adjusted output and benefit consumers.

6. A Few Caveats

In considering whether vertical restraints are pro- or anticompetitive, it is helpful to focus on the incentives of manufacturers as summarized in equation (1). Restraints designed to increase quality-adjusted output or to economize on the costs of mitigating free-rider or agency problems generally improve the welfare of consumers and manufacturers, while restraints designed to mitigate inter-brand competition and increase wholesale prices harm consumers. As a general rule, wholesale prices and quantity-adjusted output are better indicators of whether a particular vertical restraint poses antitrust concerns than levels of retail prices or quality-unadjusted quantities. Below I discuss some caveats in interpreting different types of evidence that often surface in cases involving vertical restraints.

6.1 Evidentiary Caveats

6.1.1 Complaints from Online Retailers

Even in situations where vertical restraints are unambiguously pro-competitive and benefit both consumers and the manufacturer, the practices may adversely affect pure-play online retailers. In response, they may attempt to protect their self-interests by engaging in rent-seeking to influence antitrust authorities. Here, it is important to remember that the purpose of antitrust is to protect competition and consumers, not competitors. Consequently, a certain degree of caution is appropriate in weighing evidence that an online retailer is harmed by a particular type of vertical restraint.

6.1.2 Complaints from Traditional Retailers

Likewise, traditional retailers harmed by online competition are prone to "complain" about competition from online retailers, regardless of whether such competition benefits or harms consumers. But unlike online retailers who typically target antitrust authorities, traditional retailers sometimes have little recourse other than communicating their concerns to manufacturers. In light of agency issues, complaints that inform a manufacturer about free-rider problems, agency problems or low margins are potentially efficient. Retailers generally have better information about customer attitudes and behavior than manufacturers, and armed with such information, a manufacturer is in a better position to determine whether its overall output (and profit) is best enhanced by imposing vertical restraints. Thus, the mere fact that a traditional retailer unilaterally communicates concerns to manufacturers, or that a paper trail seems to indicate that vertical restraints were "instigated" by a retailer, does not imply that consumers were harmed.

In contrast, evidence that a retailer leveraged its market power to induce a manufacturer to impose a restraint that reduces output (and thus, the manufacturer's profit) is indicative of harm to consumers. For these reasons, output and manufacturer profit tests are likely to result in fewer "false positives" than relying on documentary evidence regarding whether the restraints were instigated by a retailer or manufacturer.

6.1.3 High Retail Prices.

Levels or changes in retail prices are not particularly helpful in distinguishing between pro- and anticompetitive vertical restraints. By their very nature, vertical restraints reduce intra-brand competition. As discussed earlier, it is not in a manufacturer's best interest to unilaterally increase retail prices unless it results in higher quantity-adjusted output (through sales and promotion efforts of retailers) or reduces the costs of mitigating other problems in distribution, such as counterfeits.

6.1.4 Fair Trade Laws and other Government Imposed Restraints

On the surface, vertical restraints might appear similar to government imposed restraints such as fair trade laws (which prevent *all* retailers from pricing below some specified level) or laws that limit retail shops' hours of operation. They are fundamentally different, however. Vertical restraints are implemented by a *manufacturer* to protect the manufacturer's interest, and in terms of their effect on retail prices, manufacturer interests are more aligned with consumers than retailers. In contrast, fair trade laws are implemented by governments to protect *retailers*, not consumers. Additionally, legitimate vertical restraints are *unilateral* and enforced by a manufacturer; fair trade laws have *coordinated* effects and are enforced by an outside entity. For these reasons, evidence that the elimination of fair trade laws or other government-imposed restraints improve consumer welfare is not helpful in deducing the welfare effects of eliminating vertical restraints.

6.2 Other Caveats

6.2.1 Rent-Seeking

Vertical restraints, by their very nature, adversely affect some retailers or distributors, and benefit others. This provides disadvantaged parties a strong incentive to engage in rent-seeking activities with agencies in an attempt to protect their own interests (as opposed to the interests of consumers or competition). For example, if a manufacturer imposes a vertical restraint that limits distribution to retailers operating in physical channels, one would expect online retailers to cry foul even if such practices are in the best interest of consumers. Similarly, to mitigate the double-marginalization problem in less competitive physical channels, a manufacturer might decide to shun traditional retailers in favor of online distribution. Here, traditional retailers have an incentive to cry foul even if the practice benefits consumers.

6.2.2 Distributional Effects

It is well-documented that, despite the reductions in information costs consumers have enjoyed as a result of the internet, prices of identical products remain dispersed (See Figure 1). While consumers using online markets to purchase products may benefit from heightened online competition, consumers who do not may be harmed if their local stores go out of business or stop carrying or promoting products sold online. Thus, there may be a tension between the effects of policies on the welfare of consumers on different sides of the digital divide. Even today, the penetration of internet sales varies widely among countries, and also varies across different products sold within a given country. Consequently, there is no universal answer to the question, "which consumer segment is the largest or most important?"

6.2.3 Short vs. Long-run Effects

It is important to consider both the long-run and short-run effects of vertical restraints. Even in situations where consumers are harmed in the short-run from vertical restraints, preventing firms from using this tool can reduce long-run consumer welfare. In the hypothetical discussed earlier, for example, consumers checking out products at brick-and-mortar stores before purchasing them online at lower prices would clearly be harmed if such an option was eliminated, but in the longer-run may be worse off if, the next time they wish to examine products prior to purchasing them online, no such comparisons are possible.

6.2.4 Small Firms, Global Markets

While firms have options other than vertical restraints (such as paying slotting allowances, using more complex contracts, and so on), the costs of these options may exceed those of simple vertical restraints. This is particularly true for smaller manufacturers. Differences in the costs of different options may also

arise due to asymmetries in the operating costs, business models, and sizes of firms operating in different markets and different channels (e.g., online and traditional markets).

6.2.5 Unilateral versus Coordinated Vertical Restraints

While there are many reasons not to treat unilateral vertical restraints such as resale price maintenance as inherently suspect, this is not the case for vertical restraints that are imposed in a *coordinated* fashion. Coordinated vertical restraints are more likely to increase wholesale prices, which as discussed above, improves manufacturer welfare at the expense of consumers and retailers, other things equal. I note that, while these concerns are typically covered by laws against collusion, effects can be directly tested by examining whether the restraints led to industry-wide increases in wholesale prices that are not attributable to exogenous factors, such as increases in labor costs.

6.2.6 Property Rights

To the extent that a manufacturer has made the investments required to bring a product to market, and possesses a clear property right on the product, one might argue that it has the right to choose the most efficient method of distributing its product to end-users. To the extent that a manufacturer has market power sufficient for exclusion or foreclosure to be antitrust concerns, this can be dealt with directly on the merits of the concerns.

6.2.7 Vertical Integration

It is useful to remember that a producer (a farmer, for instance) that is fully integrated into downstream channels (sells directly to end-consumers in the local farmers' market, say) typically has full flexibility with respect to its pricing and distribution decisions (subject, of course, to other relevant laws). Vertical restraints may be more efficient than vertical integration, and without the ability to impose vertical restraints a manufacturer may choose vertical integration when it, and consumers, would be better off with vertical restraints.

SUMMARY OF DISCUSSION

By the Secretariat

The Chair, Frederic Jenny, opened the roundtable on vertical restraints on on-line sales by noting that the discussion and contributions will be organised around four main topics. There would be, first, a general introduction to the impact of electronic commerce on competition with a discussion on whether e-commerce requires the application of a specific regulatory regime. Second, they would look at some of the vertical restraints that can be observed in e-commerce, in particular at the price restraints. Third, they would look at the non-price vertical restraints on on-line sales. Finally, they would discuss other competition issues of interest in E-commerce.

The Chair also noted that there were 15 contributions for this roundtable on vertical restraints on on-line sales. He introduced the two experts: Professor Baye that had previously contributed to the hearing on the digital economy and Mr Buccirossi from LEAR Consulting who previously worked at the Italian Competition Authority.

1. General introduction on the impact electronic commerce on competition and whether e-commerce requires the application of a specific regulatory regime

The Chair first invited Mr Buccirossi to give a brief introduction, to be followed by Professor Baye.

Mr Buccirossi started with a short summary of the economics of vertical restraint and the legal approach to vertical restraints.

He pointed out that, in most cases, firms engage in vertical restraints for efficiency reasons. Vertical restraints are mostly used to overcome problems that arise from some form of externalities. The first type of externality occurs when firms have to make investments that are specific to a certain relationship with another party and when this other party can take much of the value of the investment. Therefore, the main reason why firms enter into long-term contracts is to try to discipline the behaviour of the other firm. The second type of externality stems from the existence of vertical externalities. Firms at both levels of the supply chain make decisions that affect the profit of both firms but only take into account the impact of their decision on their own profit. The best known example of vertical externalities is the double marginalisation problem. The third type of externality is horizontal: retailers have to decide whether to undertake demand-enhancing investments where other retailers can free ride on these investments.

Externalities can also occur when manufacturers and retailers have access to different forms of information. Typically, manufacturers know the demand for the products in a general sense while retailers have better information on the local market and local competition conditions. Therefore, manufacturers and retailers may wish to group their information to make better strategic decisions.

However, there also may be anticompetitive motives behind engaging in vertical restraints. For example, vertical restraint may limit the possibility of other manufacturers or other distributors to enter the market or force some of them to leave the market because they limit the possibility to reach end-consumers.

The two competition concerns that are generally associated with vertical restraints are (i) the risk of facilitating collusion and (ii) the risk of softening competition. In case (i), firms can try to reach a long term collusive equilibrium with higher prices and lower quality of services by monitoring the behaviour of the other firms and punishing firms that deviate from the collusive pact. In case (ii), there is a different situation where firms have a reduced incentive also in the short run to adopt aggressive strategies and there is no role for monitoring and punishment.

Therefore, economic theory can provide a framework for the competitive assessment of vertical restraints, although it cannot provide clear-cut rules for their assessment. The framework requires to balance the competitive risk of vertical restraints with their efficiency gains both in the upstream and the downstream markets.

Francine Lafontaine and Margaret Slade published a paper where they surveyed a significant body of empirical research on this subject. They conclude that vertical restraints imposed by manufacturers tend to increase their own profits but also typically allow consumers to benefit from higher quality products and better service provisions.

On the other hand, when restraints are imposed on manufacturers by government intervention, the effect is typically to reduce consumers' well-being as prices increase and service levels fall. The reason behind this is, in general, that manufacturers and consumers have allied interests in how they want the distribution system to be organised. Both manufacturers and consumers want a system that allows consumers to buy products at the lowest retail price and that provides consumers with auxiliary services that would improve their wellbeing. This is true in most of the cases, although there are exceptions.

Regarding the legal approach to vertical restraints, in some jurisdictions like the US vertical restraints are subject to the rule of reason, which is applied on a case-by-case basis. This rule of reason would cover any type of vertical restraint including resale price maintenance (RPM). In the EU and in the European Member States, the Block Exemption Regulation introduced a number of rebuttable presumptions. This could be better described as rule with a number of rebuttable presumptions. The first presumption is that vertical restraints are legal if parties do not have a substantial market power, which is approximated by the market shares of the parties. However some vertical restraints are qualified as hard-core restraints that are presumed to be a restriction by object. In that case, the competition authority does not need to prove that they have anticompetitive effects. In the case of an individual exemption, through the application of Article 101(3), there is always a possibility to consider the efficiency motivation for the vertical restraints. Therefore, both approaches allow the application of the economic framework described before. They both hinge on the idea that there must be some market power for vertical restraints to have anticompetitive effects, they both try to find the proper balance between the efficiency justification and the anticompetitive risk, and they try to find different balances between legal certainty and the risk of making mistakes.

There is also a general consensus in the application of competition law to vertical restraints and it is about the fact that inter-brand competition is in a way more important than intra-brand competition for consumer welfare. For instance, the EC guidelines assert that if inter-brand competition is strong, it is unlikely that the reduction of intra-brand competition will have negative effects for consumers. This is because strong inter-brand competition makes it more likely that manufacturers and consumers will share the same interest about the way the distribution system has to be organised.

Regarding the question of whether the development of e-commerce changes the economic framework and the legal approach towards the application of competition law to vertical restraints, one has to understand how e-commerce impacts on competition and on consumers' social welfare.

The literature on the subject has examined four issues: (i) search costs, (ii) how e-commerce affects the geographic scope of transactions, (iii) the distribution cost and (iv) how e-commerce will affect the existence of information asymmetries between consumers and suppliers. For each of these topics there is a clear statement made by the economic literature, followed by a "but".

Regarding (i) search costs, the Internet obviously allows consumers to shop around more easily and to compare prices across suppliers, which will reduce search cost. The bold prediction by the economic literature was that the Internet would bring search cost to zero but this did not happen because, first, consumers have exogenous search costs and, second, search firms adopt tactics to make more difficult for consumers to compare prices, thus creating endogenous search costs. These costs together still lead to a strong price dispersion, even on the Internet.

As for (ii) the increase of the geographic scope for transactions brought about by the Internet, again the initial prediction was that consumers would strongly benefit from the erosion of the geographical barriers to shop around, and that businesses would have the possibility to reach distant markets. In this case, there is also a quite convincing literature that proves that, for several reasons, distances still matter. For example, consumers, buyers and sellers may prefer to shop within limited distances since they share the same cultural features, because the contracts are more easily enforced within the same jurisdiction and because they share the same tastes. So, even if there is the possibility to shop in other countries, in other jurisdictions, most of the e-commerce still takes place within neighbouring areas.

For (iii), the distribution costs, two phenomena occur. First, the Internet allowed manufacturers and consumers to trade directly. This lead to some intermediaries being driven out of the market, such as physical travel agents, but also to the emergence of new intermediaries and the creation of electronic platforms. Second, there are reduced inventory costs and thus online retailers can carry a much wider variety of products and this allows them to also serve niche consumers. At the same time, shipping costs have become an important part of the price that consumers have to pay to make their purchases on-line.

Finally, regarding (iv) information asymmetry, buying on-line may create information asymmetry that would not exist in the off-line world. For example, consumers cannot test the product they are going to buy and thus it is more difficult for retailers to build a reputation. Similarly, in general consumers believe that buying on-line is less secure. At the same time, the development of the Internet has brought new ways to overcome these information asymmetries because consumers can rely on the feedback provided by other buyers and on-line retailers can adopt strategies that would allow consumers to test their products and to give them back if they don’t like them.

The consequences of these characteristics of e-commerce on competition are manifold. First, the Internet is making price competition more intense, which does not necessarily mean that competition is becoming more intense because there are other forms of competition that may conflict with one another. Second, geographic markets are certainly becoming wider and the Internet is favouring the integration of markets. It is also allowing consumers to buy products that would not be available in the physical world because very few consumers want to buy them and so it is not convenient for distributors in the physical world to stock them.

These developments should lead to an increase in consumer welfare. However, at the same time, the emphasis on price competition may in some cases reduce the ability and willingness of retailers to undertake investments that can improve consumers’ welfare. Moreover, within the Internet there is a tendency to have a concentrated market because there are network externalities that may make it harder for other firms to enter the market.

However, these developments should not need a new economic approach to assess the competitive implication of vertical restraints. The efficiency justifications that have been discussed in the economic literature would equally apply to on-line and off-line sales and this would also be true for the anticompetitive motives that may be behind the adoption of vertical restraints. Thus, the general framework is still valid and can be adapted to the new environment with no need to change it completely. It is also true that manufacturers and consumers still have aligned interests concerning the development of the Internet as a new form of distribution.

However, there are two novelties to point out. The first one is that Internet is not only a new way of distributing products but it has been a way to create new products. This is the case of e-books where you can have a new way of selling traditional books and where, at the same time, the Internet has brought about a new way of reading books. This may be an important novelty because manufacturers' and consumers' interests may not be aligned any more with respect to the production and distribution of this new product. The second novelty is a new pricing policy for the e-market place called "across platforms parity agreements". It is an agreement between a seller and an electronic trade platform where the seller undertakes not to charge on that platform a price that is higher than the price that he is going to charge on other platforms.

The efficiency justifications for this type of agreement are that the platform owner wants to protect the investment that he has made to develop the platform and to provide ancillary services that consumers value. This is an important issue in two-sided markets because unless they are able to do that they will not only lose the possibility to have consumers on their platform but at the end of the day sellers will also leave the platform. But there are also, of course, some competitive risks. The first one is that this kind of agreement will prevent the entry of new platforms that could offer lower fees to the sellers with the hope that it will be passed on to consumers in the form of lower prices for purchasing that good. These kinds of parity agreements may also soften competition across platforms because platforms have stronger incentives to raise the fee they charge to sellers. Similarly, these agreements may also facilitate collusion, because sellers will have an incentive to provide platform owners with information on the conditions that other platforms apply to them. This is a real novelty and several competition authorities are carrying out investigations into this practice. For example, the Bundeskartellamt is investigating this practice as applied by Amazon for the sale of books.

To summarise, the Internet is not the first change in the distribution and retail sector, there have been other changes before and competition law and competition authorities have proved to be able to adapt to these new situations and to apply the economic framework and the legal approach that have been developed in the previous world to this new scenario. Probably the Internet has had a lot of attention compared to other changes because it is a powerful means that is going to change the way the economy works but also because it may serve other policy objectives such as the integration of markets and this may explain why some institutions are so keen on the development and diffusion of e-commerce. The economic framework and the traditional antitrust tools are, in general, still valid but there are some novelties that will deserve further research and that we do not yet understand perfectly well at present.

The Chair then invited the second expert, Professor Baye, to speak.

Professor Baye said he wanted to build on what Mr Buccirossi had said and to try to understand how the advent of the Internet has impacted on vertical restraints and how incentives of manufacturers to potentially impose vertical constraints are affected. He presented the "minimum advertised price" as an example of resale price maintenance. For a firm with only a virtual presence, the prices it posts on its website also serve as an advertisement as they would show up in an Internet search as comparatively low prices. Other examples of on-line vertical restraints are "*Colgate prices"*, where a manufacturer prevents on-line retailers from selling its products or requires the retailer to have at least 60% of its sales in a

physical channel before it can sell on on-line channels. Under US Federal Policies and the "Colgate doctrine", the manufacturer would just have to, without any communication, unilaterally terminate the relationship with a retailer that violated such a rule. This would potentially eliminate the possibility of some efficient communication, which is quite unrealistic to imagine.

He noted that there are different types of jurisdictions around the world and that, although in the US the minimum resale price maintenance is a doctrine under the rule of reason, there are many states within the United States for which resale price maintenance is *per se* illegal. Since the Internet tears down geographic boundaries and a firm operating in one state in the US might operate in another state or in another country, the laws in any given state or country can well impact the decisions of manufacturers domiciled elsewhere. So there can be huge externalities – both positive and negative - in antitrust policies across legal jurisdictions.

Another example of vertical restraint particularly relevant for on-line markets would be what is called "*versioning*". This practice is when, for example, a clothing manufacturer produces two different grades of shirts, one shirt to be sold in an on-line channel, another shirt to be sold in traditional bricks and mortar stores with subtle differences in the quality of those products. For example, it is not uncommon for manufacturers selling shirts on the on-line channel to put fewer buttons on, or not to include a pocket on the shirt. There can also be exclusive arrangements with particular sellers, where a manufacturer might limit distribution purely to those retailers that are operating in the physical channel rather than in the on-line channel. An extreme form of vertical restraint would be for a manufacturer to vertically integrate into retailing, effectively forbidding any other retailer from selling its product.

But other things equal, manufacturers want low (not high) retail prices. So one should not focus on retail prices and the right thing to do is to ask the question why would a manufacturer be imposing a vertical restraint in the first place. The higher retail price would lead to lower retail sales and lower orders from the manufacturer: for any given wholesale price, the manufacturer would make less money.

The same is true for extending geographic regions to other geographic markets. A manufacturer that reaches more consumers across different geographic markets by taking advantage of the Internet, sells more units and, so, for a given wholesale price, makes more money. Therefore, suppliers have an incentive not only to keep retail prices low but also to expand to other geographic regions and other distribution channels, not to restrict them.

So, it is important to note that a manufacturer earns a profit off the wholesale margin, which is the difference between the wholesale price and its unit cost of production and distribution, times the number of units it sells. Therefore, as a matter of mathematics, a vertical restraint is going to be profitable for a manufacturer only if its allows it to sell more units, or if it somehow reduces its cost, by achieving scale economies or through lower distribution costs, or somehow raises the wholesale price.

Vertical restraints that raise the wholesale price are designed to directly benefit the manufacturer by restricting competition with other brands. The other two reasons a manufacturer might impose a vertical restraint are benign or helpful to consumers so it is important to keep these things in mind.

Starting from an example of someone trying to buy a TV set, one can see that after choosing the more appropriate Samsung model at a bricks and mortar store, the customer finds that, by comparing the price of this item online (perhaps even using a smart-phone application that allows him to do it at the store) he can purchase the item online and order it through a third party, saving 600 dollars in the process. Now, from the point of view of the manufacturer, Samsung, it does not really matter where the consumer buys the product as it collects the wholesale price of the good. The only concern the manufacturer might have is that this behaviour ultimately induces the local bricks and mortar stores to stop selling Samsung television sets

and people going into that store might only see Sony television sets, possible sold at higher-than-before prices. Also, the manufacturer may no longer be able to physically reach that customer. As a result, next time the customer wants to buy a stereo set or a TV he will be unable to personally inspect those products to determine which is the best match for his preferences. Thus, he will be worse off. In general, manufacturers impose vertical restraints to avoid these sorts of problems.

Other pro-competitive reasons why manufacturers might impose vertical restraints could be to mitigate service-related-free-rider problems similar to this example. It might provide incentives for the retailers to engage in costly demand-enhancing activities like advertising.

But it is also possible that vertical restraints can be pro-competitive even in the absence of service-related and free-rider issues. As a manufacturer, you want to provide retailers an incentive to promote your brand of product over a rival's brand. Now, in physical stores, even in environments where that does not involve service by a retail sales agent or where free-riding might not be a big issue, you may promote a product by placing it in a convenient location on an aisle or at eye level. You will do this for products that earn you a higher margin. In the on-line world the key is where the product shows up in the page display or in the search results. To the extent that a platform or an on-line retailer has discretion in where that price and product might show up, the product margin could well affect the incentives of retailers to push or promote that product.

In that setting, vertical restraints like minimum resale price maintenance can ensure a margin for a retailer. This provides an incentive to promote the brand instead of hiding it on the lower shelf in the physical store or demoting it to page three of search results at a particular on-line retailer's website.

Of the anticompetitive rationales that exist for vertical restraints on on-line trade, one can be highlighted: as new distribution channels emerge, existing retailers that have bricks and mortar stores may have an incentive to try to prevent a manufacturer to use an on-line seller. For a product that does not require any service, there would be no obvious free-rider problems and thus no obvious reasons why that product should be sold in the traditional channel rather than on an on-line channel. If the retailer has sufficient market power it might threaten to completely drop that manufacturer's product from his offerings and effectively might induce the manufacturer to impose vertical restraints. The key point here is that this type of vertical restraints harm the manufacturer and they are due to coercive action from the retailer. The only reason the manufacturer is imposing these restraints is because doing so is better than the alternative of losing 60 or 70% of its sales if the traditional retailer shuns the manufacturer. So, the retailer is going to have to have sufficient market power to effectively induce the manufacturer to engage in an action that is not in his interest. Nevertheless, there can be many instances when the retailer coercion theory exists only in appearance but not in reality. If the retailer is found to be claiming that someone else is selling this product on-line and undercutting its margins and to be threatening to drop the manufacturer this could be, on the surface, consistent with the retailer coercion story. However, this could also be consistent with the general agency issue where there is separation between the production of the manufacturer's product and the retailer's operation of trying to sell it to consumers. Therefore, if the manufacturer has the discretion to choose whether to impose a vertical restraint to make himself better off, he can weight the evidence and determine whether free-rider issues are such that overall output will be greater if he allows the on-line channel to sell the product or not.

The main point to keep in mind is whether there is evidence that the manufacturer was harmed by the imposition of vertical restraints. If he was harmed then it means that the output is going to be falling and that therefore consumers are likely to be harmed as well.

Regarding the classic arguments about RPM as a collusive mechanism, it is not clear that these would actually work in an on-line environment. There is already tremendous price transparency and thus vertical

restraints cannot act as a way to make it easier to enforce the collusive output of a cartel. Therefore, there should be fewer reasons for concerns from RPMs in an online environment.

Professor Baye agreed with Mr Buccirossi that the legal analysis and economic theory used to analyse vertical restraints in traditional markets work well in on-line markets but that there are some subtle differences. For example, in on-line markets there is significant price dispersion.

Therefore, assessing the impact of a policy on price becomes very difficult to do. More importantly, there will be two sets of prices that are going to prevail in a market that involves on-line sales and traditional bricks and mortar sales. So, going back to the example of the customer that purchased a TV, one can find that the on-line price was lower than the off-line retailer price but, at the same time, the on-line channel ultimately destroys the off-line channel, because traditional bricks and mortar stores are unable to compete in the service that they provide. Alternatively, it might leave small towns with only one or two bricks and mortar stores, which could increase the prices of off-line retailers. Therefore, consumers who do not have access to the Internet or who do not want to purchase products on-line without first physically examining them, might be worse off with on-line competition.

The likelihood of harm from these different practices will vary across different types of products and different countries with varying levels of Internet penetration.

Data suggests that, first, the market share of on-line sales is fairly modest across most countries and it varies significantly across countries. Thus, different countries will be in situations where the scenarios described are going to be more or less relevant.

More importantly, different types of products are better suited for different distribution channels. Digital products are very well suited for distribution via the on-line channel while other products where inspection and product service, like perfume for instance, might be more suited for physical channels.

Other data from the US and the UK suggest that in electronic products there is a greater percentage of sales in on-line channels than off-line channels and that is because the very first products that were sold on price comparison sites like mySimon,shopper.com and Kelkoo were consumers electronics products. Other products, like house wares for example have a smaller share.

So, if a policy designed to enhance on-line competition might raise prices at bricks and mortar stores by reducing the number of stores that carry products, a question that may be raised is which consumers are more important, the consumers that want to buy on-line or the consumers that prefer the bricks and mortar store? The answer to that question will vary significantly across jurisdictions as well as within a jurisdiction and vary significantly across products. Again, there is no one size fits all approach here to analysing the market.

Following Professor Baye's introduction, the Chair invited competition authorities to discuss the general issues of vertical restraints in e-commerce. The first competition authority the European Commission (EC), explained its Block Exemption Regulation guidelines on vertical restraints in its submission with a section on how this applies to on-line sales.

The delegate from the EU started by asking some questions to Professor Baye. Specifically, he wanted to understand the situation where two brands have different margins and where the suggestion appeared to be that RPM would allow to increase the margin that is low. He questioned what would happen if the reason one of the brands had a high margin was due to RPM and whether one should advocate RPM for the other brand with the lower margin. He further questioned whether this would not exactly be the potentially anticompetitive effect of RPM, that it imposes an externality on the rival so that if Y starts to impose RPM it basically forces X to also impose RPM and we have a negative effect on consumers?

Professor Baye agreed that there are theories under which resale price maintenance and vertical restraints can actually have the effect of limiting competition between brands. His point was not that such effects could never occur but that one should analyse the impact of a particular type of vertical restraint on the wholesale price, not on the retail price.

There are many possible reasons why margins may be higher for one brand than for another and competition between brands is going to be influenced by how profitable it is for a retailer to push one product versus another. Collusion and other factors can operate through vertical restraints to reduce competition between brands and therefore have the effect of elevating the wholesale price. Now in the hypothetical scenario discussed above, all other things equal, RPM could only be anticompetitive if it raised the wholesale price. The example from the EC showed a situation where that happened. Vertical restraints are not always pro-competitive and the economic literature is clear that they can have both pro- and anti-competitive effects.

The delegate from the EU asked then whether it would not be the classic example of a harmful RPM, where RPM increases the retail price and makes it more attractive for a dealer to sell a certain brand and thus creates an incentive for a second brand to increase the retail price through RPM? He also asked whether vertical restraints can be harmful not just through foreclosure and collusion but also by enhancing the possibilities of manufacturers to price discriminate.

Professor Baye addressed the second question first. He pointed out that the economic literature suggests that price discrimination can be pro-competitive and it can be anticompetitive in some circumstances, as well. For instance, price discrimination can be very important when there are substantial fixed costs or when there are geographic locations where it cannot be viable for a producer to charge a single price and cover its costs. Therefore, price discrimination can allow the producer to extract more rents to cover its costs.

Mr Paolo Buccirossi pointed out that with price discrimination some consumers would be harmed and some consumers would benefit and so the welfare consequences are ambiguous.

The delegate from the EU pointed out that in case of first-degree price discrimination, where the producer can fully extract the consumer's surplus - which may be more likely to occur in an on-line environment – price discrimination is certainly bad for consumers. Similarly, in the case of third degree price discrimination, if it does not increase output significantly then it will certainly be bad for consumers. Price discrimination can only increase both profit and consumer welfare when it leads to a significant increase in output. Therefore, there are good reasons to look at price discrimination in vertical restraints because, there is no alignment between manufacturer and consumer's interest.

Mr Paolo Buccirossi agreed that a better measure of the impact of price discrimination on consumer welfare comes from considering the output and not the price. He also agreed that sometimes competition authorities stress the impact on price rather than on quantity. Therefore, when deciding whether price discrimination is welfare enhancing, one should analyse whether it would allow some consumers who were not able to buy the product before to do so.

The Chair then asked the EC to explain how it applies its guidance to on-line sales.

The delegate from the EU noted that EU competition rules are applied to on-line and off-line the same way for several reasons: the possible anti- and pro-competitive effects are more or less the same and the rules are flexible enough. Further, it is very difficult to separate on-line and off-line sales because many sales start on-line and end off-line or the other way around, so there is not always a clear distinction between the two channels of distribution.

The EU rules constitute an overall effect-based approach because the Block Exemption Regulation gives a safe harbour for most vertical restraints (exclusive dealing, selective distribution, franchising, etc.) below 30% market share. Above 30%, there is an individual assessment of cases and there is a limited list of restraints that the Commission considers to have negative effects and where the likelihood of positive effects is rather limited or absent. In these latter situations there would normally not be a possibility to exempt these restraints under Article 101(3).

Regarding hardcore restrictions, the delegate from the EU wanted to discuss i) the restriction of passive sales and ii) RPM.

- The passive sales restriction is an expression of the concern that vertical restraints can be used not just to foreclose but also to segment markets, to reduce competition and to allow price discrimination that exploits the consumers. For example, marketing is basically the art of price discrimination: it is about segmenting and trying to extract more profit from the market. The 1999 EU guidance was extended in 2010 to give more clarity on what is a restriction of passive sales in an on-line world. As an example, the prohibition to have a website would be seen as a restriction of passive sales because it disallows a retailer to reach a wider territory. The same applies to dual pricing, that is, to the situation when a higher price is charged to sell products on-line: this is equivalent to when a retailer has to pay a higher price to export and that limits his possibilities to reach wider territories and more customers. The same applies to the obligation imposed on retailer to terminate or re-route customers: when a retailer is told it has to block a customer from buying if he has an IP address outside its exclusive territory, this would also be seen as a prohibition of passive sales. These are not new hardcore restrictions; they are just a clarification of a previously existing policy.

- For resale price maintenance, in the EU, like in most jurisdictions around the world, maximum resale price maintenance has never been a hardcore restriction and has always been covered by the Block Exemption Regulation because we can expect more often positive effects than negative effects. For example, maximum resale price maintenance can often be used to avoid double marginalisation, a competition issue identified by the experts. But that result does not necessarily apply to fixed or minimum resale price maintenance. In the numerous fixed or minimum RPM cases of the EC and also of the ECN – the European Competition Network - in the last ten years, there were never any credible efficiencies found but usually only price increases.

The delegate from the EC also addressed the question whether there is a reason to think differently about RPM because of on-line sales, and in particular whether one should expect on-line sales to free ride on off-line sales. He expressed a concern that, like in the example with the Samsung TV set, there may no longer be any brick and mortar shops in the future. The concern regarding free-riding stems mainly from the idea that on-line prices are lower than off-line prices. However, the Commission studied this and surprisingly found that it is generally not the case. Prices may be somewhat lower on-line than off-line but it depends very much on the product. They found that prices, on average, might be 5% lower on-line than off-line but that was excluding delivery costs. Price differences also vary across countries. Now, in case there would be free riding, it is doubtful whether RPM would be a useful tool to fight this. Even with RPM, a retailer will tend to invest in after-sales services, services over which the others cannot free ride. On the contrary, the solution could actually be to require the on-line retailers to provide similar services to those they are free riding on. Finally, even it is not clear whether free riding is really a problem: the EC's research shows that in the EU there is as much use of on-line research before buying off-line as there is search off-line before buying on-line. But as the on-line world is much smaller in terms of how much sales are being made, effectively you can say that there are many more people who end up buying in a shop after an on-line search than the other way around.

Finally, there was a study made by Hector Goma, the Italian brand association, where they asked on-line purchasers why they were purchasing their Italian branded products on-line and half of the customers in the US and the EU and 8% in China said it was in order to avoid shop assistance. This puts into context how often we should expect efficiencies to arise from vertical restraints and how strong is the need to protect retailers or manufacturers with price restraints.

The Chair then invited the US delegation to explain their approach.

The delegate from the US Federal Trade Commission (FTC) pointed out that there were still some areas of difference between the US and the EU. This is mainly due to the "rule of reason" approach to vertical restraints. For the moment, US approach to vertical restraints in Internet businesses is very much case by case. Where experience is lacking, the US FTC is reluctant to intervene and would rather see what is actually happening in the market place.

As a matter of economic and legal theory, they do not think that there are cases where enforcement is never warranted. Both in cases of vertical price and non-price restraints and certainly in exclusive dealing context, it is aware of the prospects and possibilities of foreclosure. This is demonstrated in the recent Dentsply decision where the US courts have upheld liability for exclusive dealing when foreclosure reaches a dangerous level. Therefore, the rule of reason approach is not an approach of per se legality and there are many circumstances in which vertical relationships can lead to anticompetitive outcomes.

The US Department of Justice representative pointed out that although the rule of reason has been generally applied to non-price vertical restraints since at least 1977, it has only become the approach to price restraints since the US Supreme Court made a decision in the Leegin case in 2007. Consequently, US antitrust agencies and the Federal Courts have had a limited experience with rule of reason treatment in this area. However, as suggested by the Court in the Leegin case, as they develop experience regarding the pro- and anti-competitive effects of resale price maintenance, Federal Courts and US antitrust agencies may devise fair and efficient ways to prohibit any anti-competitive restraints and to promote pro-competitive ones. Presently, they address the specific characteristics of on-line sales through the rule of reason analysis and they will wait and see how both the economic literature and the case law evolve over time.

According to the Chair, the approach of the EC seemed to be that when a practice is considered *per se* anticompetitive, it is because *de facto* it has been very hard to find cases where it would lead to increased efficiency. He asked the US delegates whether they ever found that a restriction on on-line sales was in fact pro-competitive or it remained only a theoretical possibility

The US delegates replied that they not have yet had a public enforcement case that raises these issues in the on-line world. The Supreme Court decision in 1977, whereby vertical non-price restraints should be reviewed under the rule of reason, came after a long evolution. However, the decision created an uncomfortable position, because the Court's rational in that case (the GTE-Sylvania case) was word for word applicable also to vertical price restraints. Therefore, after some years the Court eventually aligned the approach to vertical price restraints. The Court found that there were so many loopholes in the *per se* rule against resale price maintenance that it was no longer well applied. Now it is up to the enforcement agencies to prove harm. Therefore, they first look for evidence of harm and not for evidence of benefit. They never get to the question of benefit if they don't first cross the hurdle of proving harm.

The Chair pointed out that this was quite different from the EU approach. He then turned to BIAC and asked for their view on this.

The delegate from BIAC noted that this was a relevant discussion because the Internet and mobile technologies are driving substantial changes to the sale and distribution of goods.

These changes imply significant benefits for the consumers, like increased price competition between retailers on-line and off-line, more informed choices for consumers with the usage of price comparison research engines and the ability to purchase a wider range of goods from a wider geographic selection. There are also competition concerns arising from increased price transparency, the possibility of foreclosing by dominant players or the introduction of certain contractual obligations.

Vertical restraints may allow for a more efficient way of distributing goods for some companies than vertical integration and may also generate efficiencies for companies through the promotion of non- price competition and improved quality. They may have pro- or anti-competitive effects depending on the context.

BIAC is concerned about a lack of consistency in the EU and US approach. This is particularly true for the on-line market which is becoming increasingly global.

BIAC representative noted that the EU approach tried to translate the EU rules applicable to the traditional bricks and mortar distribution to the on-line world, which implied less flexibility than a rule of reason would allow. He pointed out that it was too early to assess the full impact of the EU guidelines but that it remained to be seen if they strike an appropriate balance between the promotion of on-line sales and the protection of legitimate business interests and investment incentives. In the US, there is a different approach where all vertical restraints including price restraints are evaluated under the rule of reason that balances the pro- and anti-competitive effects. The increase of on-line sales presents competition authorities with novel issues and novel problems, which does not necessarily mean that they need to adopt novel legal approaches or specific rules. Competition law has always been flexible enough to adapt to changes in the economic environment and market practices. But in a global on-line market it is very important for businesses that rules are consistent and are applied in a consistent manner. Inconsistent rules can impose additional cost and create risk for market operators and make it more difficult for international on-line commerce to flourish. The rule of reason approach, which is applicable under US law, is one that in the view of BIAC adapts quite flexibly to a lot of different situations, including the novel aspects of the on-line market. This approach allows the possibility of balancing different interests and considers each vertical restraint on its own merit and so BIAC would recommend this approach.

The Chair then noted that there were three contributions that referred to general studies or reports on the development of the digital economy and e-commerce in particular. These were contributions from the UK, with a report called the Connected Kingdom; from France that also studied the impact of the development of electronic commerce on competition in general, and from Chinese Taipei. He asked those countries to intervene regarding these reports.

The delegate from the UK pointed out that the OFT, which is a competition and consumer authority, is showing great interest in the development of the Internet and in e-commerce. Over the last decade, a number of reports has been published on the subject, which can be found on its website. According to the Boston Consulting Group, the UK is the most Internet-based economy in the G20. In 2012, the Internet contributed about 8.3% to the output of the UK economy and it is projected to continue to grow at a rate of 11% a year, for the next three years up to 2016, compared to the projected growth rate of 5.4% in the US and 6.9% in China.

The UK is also home to the largest per capita e-commerce market in the world. About 60% of the Internet economy is accounted for by consumption and 14% of all UK retail purchases are now done over the Internet (and that again is projected to rise to 23% by 2016). According to estimates, 31 million UK consumers bought goods and services on-line, about half of their total official population.

According to the latest study that is three or four years old, consumers saved about a quarter of a billion pounds by buying on-line. Also, according to the latest figures, business to business purchases over the Internet represent a quarter of total business purchases whilst on-line advertising represent over 35% of all UK advertising expenditure. This is a huge shift from conventional media over the last few years.

The Internet has also created destructions in the economy; closure of major retail stores, notably HMV, which sold CDs and DVDs and the Blockbuster video store. In payment systems, a topic tackled at the last Competition Committee, the rise of PayPal, Google and other innovative models is starting to impinge on the traditional payment systems controlled by the banks.

The OFT's last report showed that consumers still lacked faith in on-line suppliers and they were concerned about the ability to exercise their rights on-line. Therefore, the OFT has been focussing on the Internet economy and e-commerce in order to ensure that consumers continue to build trust in on-line markets.

The issue of e-commerce rates is one of the five priority areas in the OFT annual plan for 2012/13. In the competition field, several cases are pending relating to on-line vertical restraints, including a recent SO issued in the on-line hotel booking case. OFT also looked at certain cases of horizontal on-line information exchange. Regarding vertical restraints, there are some interesting issues emerging in the area of on-line pricing, like the recently launched project on individualised tailored pricing in e-commerce. This means that prices that are quoted to consumers may depend on the type of device that is being used to get the price quotation, on the Internet browser that is being used, and on a variety of other factors like search history and purchasing habits. Consumers that go to a website with an Apple or a PC can get different prices. Also, if a consumer logs off and then logs on again, he may find that the price has changed if the algorithm in the website identifies the consumer as a more or less desperate purchaser. This raises some interesting pricing problems outside the area of vertical restraints.

The delegate from France said that a report was filed on the competition aspects of e-commerce in September 2012. The French competition authority does not judge it necessary to create a specific framework to address vertical restraints in on-line retailing. The authority believes that the existing framework can address these practices in an efficient manner. Certain restraints are imposed at the same time both in the bricks and mortar stores and in e-commerce platforms, and the authority does not want to have specific rules for the two different channels.

The delegate from Chinese Taipei shared with the audience some conclusions they drew from the survey of business-to-consumer (B2C) e-stores. The Ministry of Economic Affairs conducted the survey in November 2012. First, although the revenue of most e-stores continues to increase, 48% of e-stores do not make profits. Second, the number of e-stores that enter the market every year increases on average by 30%. Third, the ratio of businesses choosing the B2C e-shop model is increasing. The ratio of business using more than one platform to sell is also increasing. Finally, convenience store chains like 7/11 have become the best partners of e-commerce for providing logistics and cash flow. Consumers may just pick up their orders and make their payments through these convenience stores.

In response to the fast growth of Internet transactions, the Fair Trade Commission of Chinese Taipei formulated comprehensive administrative regulations on the electronic market place. There is now a policy statement on electronic market places and its purpose is to provide guidance for participants in e-commerce to follow the relevant regulations of the Fair Trade Act and not to obstruct the development possibilities of the Internet technology. The policy statement focuses both on the product market traded in the electronic market place as well as the electronic market place itself. It provides guidance on issues of restriction of competition and unfair competition, such as information sharing, market power, exclusive agreements, etc. In response to the delegate from Chinese Taipei, Professor Baye noted that there are some papers that look

at the broad issue of what is the impact of vertical restraints on prices, like the recent survey by Margaret Slade and Francine Lafontaine. He also explained that economic theory suggests that, by restricting the number of retailers that can sell a certain product via vertical restraints, one limits intra-brand competition that will have the effect of raising the price. Similarly, by definition, by restricting the price from falling below the minimum resale price will also have the effect of raising the price.

Mr Paolo Buccirossi further developed that Francine Lafontaine and Margaret Slade surveyed several empirical papers on vertical restraints and concluded that when the manufacturer imposes the vertical restraint, it will result in lower retail prices and better services in almost all of the cases. However, when the vertical restraint is imposed by some government intervention, then it will result in higher retail price.

The Chair noted that most contributions concluded that there is no need for a specific regulation of e-commerce. In this context, he asked Norway about the rationale regarding a sector-specific regulation of e-commerce concerning the access to Internet platforms for residential property advertisement since 2010.

The delegate from Norway explained that until 2010, all major Norwegians Internet platforms for residential property advertisement had a practice that permitted only real estate agents to advertise properties for sale on web portals. One could sell a car or a bike but not a house on one of these portals. Residential property could only be advertised through a real estate agent. The Norwegian Competition Authority assessed whether this practice was an infringement of specifically the antitrust rules in the Norwegian Competition Act, but had not found a basis for intervening. They were of the firm opinion that this practice of refusal to supply had anticompetitive effects to services relating to sale and purchase of residential property and that general access to these services would lead to increased competitive pressure on the real estate agents. They were of the opinion that an individual decision (*i.e.* that relates to one particular platform) in this regard would not be sufficient to prevent the practice in this market. Real estate agents are the main customers of property advertising services and they could easily move their demand to web platforms that were not subject to this individual intervention. Therefore, they considered that intervention by the competition authority had to apply to all on-line advertisement platforms. The solution was found in Section 14 of the Competition Act, which states that regulation may be imposed on terms of business agreements or actions that restrict or are liable to restrict competition in a given market. Section 14 can be considered as a kind of supplementary tool to the sections that correspond to Articles 101 and 102 in the European competition law. Thus, on that basis, the Norwegian Competition Authority imposed a regulation that provides general access to these services from the beginning of 2010. They did an assessment and they found that the regulation had little impact in the first year as private persons did only 2% of the total advertisement. The delegate noted that it would be interesting to see the long-term effects of this measure.

Norway noted that it was too early to measure the impact on commission rate. 2% of private advertisers are probably too little to have an impact.

Mr Buccirossi had two questions for the EU delegation. The first question was about the ban on on-line sales. His interpretation of the Block Exemption Regulation and of the recent judgment by the European Court of Justice was that there was a new presumption in the application of competition law to vertical restraints that the ban on on-line sales is an infringement by object. This shifts the burden of proof to the firms. He wondered why was there a need for this new presumption and why it was not applied to other forms of retailing such as catalogue sales, door to door sales or supermarkets.

The second question referred to the remarks that on-line prices may be higher than off-line prices and that consumers prefer to buy on-line because they can avoid assistance services provided by off-line shops. He asked whether it was not helpful to assess the manufacturers' rational of imposing a restriction on their retailers first when assessing the competitive effects of those restraints?

To the first question, the delegate from the EU replied that the restriction on on-line sales is not a hardcore restriction. On-line sales means is just a different way of accessing the customer, like using a car to deliver or a telephone to ring customers. So there is nothing new in this restriction, just the application of the same principles to a new way of selling.

Regarding the second question, the delegate from the EU replied that they were not trying to regulate how business should be done but to make sure that the Block exempts as many situations as possible. However, if there is only a low likelihood for efficiencies or if it does not really fit any rational then they see no reason to grant a Block Exemption.

The delegate from the EU requested a clarification about Professor Baye's position about competition concerns if the wholesale price goes up.

Professor Baye noted that this question was related to the question asked by Chinese Taipei. If a minimum resale price is imposed that will raise the retail price. But this is not a sufficient statistic to determine whether or not the ultimate effect of the restriction is to make consumers better off or worse off. One would have to control for product quality, service quality, matching consumers with the items they want, etc. Therefore, if it were suspected that a particular vertical restraint was not designed for efficiency reasons, but to somehow soften competition among brands, the most direct way to assess its impact would be to look at the wholesale price. This would be a simpler screen than requiring the parties to prove efficiencies.

The EC delegate pointed out that this is different from the US and the EU approach where the authorities have first to show negative effects and only then to look for positive effects.

Professor Baye noted that, in order to ask the right question about the retail price, one would need to control for the demand enhancing effects of RPM and not assume that higher retail prices are harmful for the consumer. Higher retail prices are bad for the manufacturer because at a higher retail price it is going to sell fewer units and is going to make less money. So there must be something else happening, like, for instance, softening competition between brands. But whether this is really happening is going to be discernible from the wholesale price. Therefore, he would suggest looking at wholesale prices. He realises it is very difficult for the EC or the US to actually control for quality adjusted prices that are relevant in answering the question of whether consumers are harmed.

2. Vertical restraints in e-commerce: price restraints

The Chair invited the UK delegate to discuss the "most favoured nations clause" (MFN) or best price guarantee in e-commerce.

The delegate from the United Kingdom said that at the OFT they noticed a rise in offers of best price guarantees on the Internet. A best price guarantee is a unilateral guarantee that the on-line retailer would either match the lower price of a rival or refund the consumer the difference between the rival's price and the price on its site. At first sight, the best price guarantee seems to bring benefits for consumers to the extent that it reduces search costs on the Internet. Best price guarantees may also help new entrants to establish a reputation for discounting and fierce price competition, so they can have pro-competitive benefits. However, in some cases they may soften competition. First, they may disincentivise consumers from searching for better prices as they may be attracted by the appeal of the guarantee and they may reduce the incentives for rivals to lower their prices given that the best price guarantee creates a guarantee that these prices will be matched. Second, the best price guarantee may be a mechanism to facilitate collusion to the extent that consumers act as a readymade monitoring device and will tell if other retailers are deviating from an agreed collusive price. Perhaps the most significant potentially anti-competitive

effect would be in terms of barriers to entry when an established on-line retailer with a customer base develops a reputation as a discounter in order to prevent entry.

These are the potential anti-competitive effects that can arise from unilateral best price guarantees. Generally, though, competition authorities consider that best price guarantees lack a certain amount of credibility or the commitment may be undermined when the incumbent may chose not to match the price.

However, in an on-line environment credibility can be generated through the use of what the OFT calls “retail most favoured nation” clauses (retail MFN or "across platforms parity agreements"). It is an agreement between a seller and an electronic trade platform where the seller undertakes not to charge on that platform a price that is higher than the price he charges on other platforms.

The competition problems raised by this practice are essentially the same as the problems raised by the best price guarantee: a softening of competition, and a reduced incentive for on-line retailers to lower their commission rates because they get no benefit in competition terms as a result. There is also a significant potential for facilitating collusion, particularly in a situation where several on-line retailers have an MFN clause with the same supplier. In that situation, effectively they are fixing the price between retailers. Perhaps the most significant potential harm of this is the foreclosure or deterrence effect to potential discounters.

Three issues or questions arise from this. First, the only reason a supplier would agree to such a clause in the first place is if the on-line retailer has significant market power downstream. If it is in some sense a “must have” platform, then it may be in a position to impose this sort of arrangement. It could also be the case that the supplier itself benefits in some way from the downstream arrangement, by getting some sort of reversed payments from the on-line retailers or having a presence downstream that would allow benefits from any softening of competition downstream.

The second issue that arises is whether competition authorities can tackle retail MFN in the same way as they would tackle RPM. However, the harm that arises from retail price MFN can go beyond the harm that arises from traditional RPM. This is because the on-line retailer is controlling the minimum price that is being set in the market and it can manipulate that price by increasing its commission. This is a significant additional element of harm that arises with retail MFN.

Finally, another interesting issue is whether on-line retailers are simply providing advertising services for the supplier or whether they are traditional retailers. Also, do they form a single economic undertaking with the supplier or are they separate? If they are in a position to impose retail price MFN then they must to some degree be distinct from the supplier in economic terms.

The Chair then asked the experts to give their opinion.

Mr Paolo Buccirossi encouraged the audience to read the report prepared by LEAR for the OFT as it deals with many of the issues raised above. He emphasised that it is important to distinguish best pricing policy and MFN. He noted that there is a large literature on best pricing policy. With best pricing policy, other efficiency explanations may apply. For instance, best pricing policy can be used to signal firms which have lower costs and so can afford to charge lower prices to consumers. When a firm adopts a best pricing policy it is in some sense delegating its pricing policy to another company. This implies that firms with high costs do not have the proper incentive to adopt this kind of policy. Therefore, it is a way to distinguish between low cost, low price firms and high cost, high price firms. On the other hand, this explanation does not apply to a cross platform parity agreement because the price is not actually charged by the platform and because the consumers are not interested in the cost of the platform.

3. Vertical restraints in e-commerce: non-price restraints

The Chair then asked the Canadian delegate to introduce the topic of non-price restraints.

The delegate from Canada noted that the Canadian Competition Act is technology neutral and provides the Competition Bureau with the appropriate tools to examine on-line vertical restraints in the same manner as those in the bricks and mortar sales channel. While e-commerce presents unique challenges, such as defining markets and dealing with network effects, pro- and anti-competitive theories behind the use of vertical restraints in on-line sales are generally no different from those used in traditional retail.

The case they would like to present is a recent case taken by the Bureau against the on-line vertical restraints imposed by the Toronto Real Estate Board (TREB). Purchasing a home is probably the most significant financial transaction a consumer will ever make. Toronto is the largest city in Canada and the Toronto Real Estate Board governs its realtors. The TREB has more than 35000 members and it is the largest real estate board in Canada. It controls the Toronto multiple listing service system (MLS system) and it is the largest and most comprehensive source of active and historical residential property listings in the Toronto area. Prospective homebuyers and sellers can only access a sub-set of the information contained in the Toronto MLS system through publicly accessible web sites, such as realtors.ca.

The TREB MLS system contains extensive information about properties such as previous listings, sale prices, which is not accessible to consumers over the Internet, only to the realtors who are members of the TREB. In order to obtain this information, prospective homebuyers and sellers must work with a realtor, for whose services they have to pay a commission. In 2011, the year the Bureau filed its case against the TREB, approximately 90,000 properties that were listed on TREB MLS system were sold representing 40 billion dollars in residential property sales. Given the typical commission rate of 5 percent, consumers paid 2 billion dollars in commission on real estate transactions in 2011. The Bureau alleges that the TREB also restricted how its members can use the Internet to provide information from the Toronto MLS system to their customers, thereby denying these realtors the ability to provide innovative brokerage services over the Internet. While realtors can provide detailed MLS listing information to customers in person, by mail, fax, email, customers cannot access the same information over the Internet.

One of the ways the information could be provided is through a password protected virtual office web site (VOW). This would allow the customers to search a full on-line inventory of listings containing up-to-date information before deciding to go and visit a home. It allows the customer to be more selective and focused and realtors to spend less time trying to find the perfect house and to offer more innovative and enhanced services to their customers. The Bureau believes that the TREB restrictions perpetuate the traditional bricks and mortar business model used by the majority of its members and denies retailers the ability to introduce innovative real estate services. As a result, there are currently no VOWs operating in the Toronto area that enable customers to search a full inventory of listings, including previous listings and sale prices. In the absence of the TREB restrictions, the Bureau believes that innovative and lower cost models, such as VOWs would enter and expand in the Toronto area. This would allow consumers access to new and higher quality services at lower rates. Indeed, following a similar litigation in the United States, Redfin, a US VOW brokerage, reported to have saved consumers 24 million dollars in 2011. The Competition Bureau filed an application to the Canadian Competition Tribunal in May 2011, seeking to prohibit the TREB's restrictions on how its members can provide information to their customers. The decision of the tribunal is still pending[1].

[1] On April 15, 2013, the Competition Tribunal dismissed the Competition Bureau's application (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03559.html). On May 14, 2013, the Competition Bureau filed an appeal with the Federal Court of Appeal seeking to overturn the tribunal's

One of the big challenges of this case was the fact that, under section 79 of the Competition Act, the Bureau had to demonstrate that the anti-competitive behaviour of TREB was directly responsible for causing a substantial lessening of competition in the market. Given the fact that VOWs are restricted from enabling customers to search a full inventory of listings it was very hard to prove this effect. Another challenge was the issue of market power as a trade association since the TREB argued that they did not have market power and none of their members had market power. But the argument was that since the TREB had these restrictions and because they controlled the MLS system, they were able to substantially lessen competition in the market.

This is a good example of an old bricks and mortar business model seeking to protect itself from the disruptive effects of low-cost, specialised on-line competitors through the use of vertical restraints: restrictions on access to critical data. As the digital economy continues to develop, the Bureau expects to face more cases of this type. A dynamic e-commerce sector where on-line competitors are able to enter and expand and bricks and mortar competitors must adjust and become more efficient will benefit all Canadians in the form of lower prices, higher quality products, increased service quality and ultimately greater choice.

4. Other competition issues in E-commerce

The Chair asked Australia to introduce two new issues: the existence of network externalities in on-line sales and that a two-sided market approach may be used for some of the markets.

The delegate from Australia indicated that he would be talking about the eBay/PayPal case. Under Australian law, there is a specific prohibition on exclusive dealing that substantially lessens competition (Section 47 of the Competition and Consumer Act). However, there is also a provision for a notification, where firms that engage in exclusive dealing can gain immunity by notifying the Australian Competition and Consumer Commission (ACCC). Although the ACCC rarely receives notifications that raise concerns, this particular one did. When the ACCC receive such a notification they go through a public process of consultation and if they reach the conclusion that the practice is likely to substantially lessen competition then they issue a notice to revoke the immunity.

In this particular case, eBay lodged a notification and the Commission issued a draft notice to revoke the protection. eBay provides an on-line trading platform that brings together buyers and sellers and is characterised by two-sided network effects. PayPal is a subsidiary of eBay and it offers a secure on-line payment system, which addresses the problem of trust and potential fraudulent transactions in on-line market places. The conduct notified involved the tie between the trading platform and the on-line payment system, such that transactions on eBay would need to be processed using PayPal (with the exception of cash payment on pick up - not a very frequently used payment method). The Commission issued a draft notice to revoke the protection and the argument was that eBay had substantial market power in a market in the supply of on-line market places. Apparently, there was another player called “Austian” but it could not really challenge the market power of eBay that was underpinned by significant network effects on the two sides reinforcing each other. Therefore, it was argued that the conduct involved a leveraging of that substantial market power from the on-line market place into the market in which PayPal operated. The draft decision did not come to a final conclusion on the exact boundaries of the second market. There was a degree of competition from some type of payment instruments such as credit cards but there were also

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ruling in the TREB matter. The Bureau believes that the tribunal's ruling was based on an overly narrow interpretation of section 79 of the Competition Act — the "abuse of dominance" provision. The tribunal ruled that TREB, as an incorporated trade association, does not compete with its own members in the real estate brokerage market and therefore cannot be found to have contravened the abuse of dominance provision (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03567.html).

unique features about PayPal. For example, it offered security features for buyers because they did not have to hand over their financial details to the sellers on the other side of the platform. Also, for many small sellers it offered the advantage of not having to establish a merchant account with a bank. One of PayPal's competitors in this market was called Paymate, an Australian firm.

The notified conduct foreclosed all of the eBay transactions to competitors of PayPal and removed any choice from eBay users. Further, it also made potential entry or expansion of players from adjacent markets more difficult. It was also a concern that buyers and sellers using PayPal on eBay were more likely to use it also on other platforms. Finally, there was the concern that the conduct could discourage innovation to add new features and services. There were many complaints in submissions to the Commission about the poor service and high prices charged by PayPal.

eBay claimed that by imposing the use of PayPal on its users it was overcoming a potential market failure. Specifically, eBay claimed that suppliers did not have sufficient incentives to offer secure payments and that what they called Bad Buyer Experience (BBE) would lead people to leave and not use eBay again. The Commission was not convinced by the arguments that these benefits would be sufficient to offset the substantial lessening of competition and so issued the draft notice to revoke the exemption.

A final decision was never taken because eBay stopped the conduct and withdrew the notice. Subsequently, eBay engaged in a different, related type of conduct. It did not require PayPal to be the only type of available payment system but sellers were required to offer PayPal as one of their payment options. This sounds acceptable in theory but the concern was that it could become a sort of *de facto* restriction because PayPal has a no-surcharge rule. The concern was that once sellers invest in one system they would not need a second system and there were no mechanisms to transmit any price differences to the buyers because of the no-surcharge rule. Again, the Commission never reached a conclusion on this variation of the conduct because eBay stopped the conduct and thus the investigation ended.

The Chair then called on Germany, Austria and Japan to present their cases.

The delegate from Germany explained that the Bundeskartellamt is investigating two on-line platforms, HRS hotel booking and Amazon. They are closely co-operating with the UK and are of the same opinion regarding potential theories of harm, which are entry foreclosure, raising of barriers to entry, the incentive for the platform to increase prices and facilitating collusion. They sent out questionnaires to 2400 retailers of Amazon. Some of these retailers may be in other OECD countries.

The delegate from Austria noted that they had a considerable number of cartel cases dealing with vertical restraints and that they had unannounced inspections at around 30 premises in 2012.

They had one recent case dealing with vertical restraints in on-line sales of "hybrid retailers", *i.e.* a retailer who has both on-line and off-line shops. The starting point of the case was a study that revealed that 47% of the surveyed on-line sellers of electronic products felt that suppliers put pressure on them especially with regards to pricing behaviour. The recent case among others deals with the authorisation/delivery for on-line and off-line sales, potentially due to low prices online. A further question that often arises in this connection is whether the authorisation can be split between on-line and off-line sales. This is especially interesting in cases where the off-line shop is only known locally while the on-line shop is known to all German speaking countries (Germany, Austria and Switzerland) and it has a different name. The manufacturers authorise the retailer to sell off-line but not on-line. The suppliers argued the practice was in line with the EU Block Exemption regulation that allows to impose certain conditions on the usage of a third party platform. According to the suppliers, if there are different names for the off-line and on-line shops, the latter is a kind of third party platform.

The Austrian delegate asked then the other delegates whether they also had cases with "hybrid retailers" where they have seen this separation of authorisation for on- and off-line sales and whether they think that this separation of authorisation should be prohibited *per se* given that it would have the effect of preventing passive sales.

The delegate from the EU noted that as a general rule, there is nothing that would be seen as a restriction of passive sales if a retailer were required to respect certain conditions of sale. One of these conditions could be that there is a similar approach and a similar identity when sales are on-line and off-line. This would exclude the possibility for the retailer to have an off-line high standard high street shop and to sell the same products on-line as a discounter without any of the same services. Therefore, requiring the buyer to show the same type of identity and the same type of conditions both off-line and on-line would not be seen as a hardcore restriction and therefore it would be difficult to classify this as illegal *per se*.

The Chair then invited Japan to present its RPM case.

The delegate from Japan noted that in their contribution they mentioned two RPM cases: one on wool and the other on contact lenses. In Japan, RPM is not *per se* prohibited but RPM without justifiable grounds is judged as illegal. The burden of proof of justifiable grounds is on the company that imposes RPM. In both cases, the Japan Fair Trade Commission (JFTC) found that the practices were illegal and issued an order requiring both companies to terminate their conduct. In both cases there was not a significant difference between on-line sales and off-line sales regarding the competitive effects of RPM. The Chair then asked the Turkish delegation to explain the findings of the Turkish Competition Authority (TCA) that companies could legally reserve Internet sales for themselves.

The delegate from Turkey noted that there were three cases that involve three clothing suppliers that enter into exclusive distribution agreement for the entire Turkish market. The approach of the TCA was nearly identical in all three cases and it considered consumers who shop on-line as a separate customer group. The TCA allowed suppliers to reserve on-line sales solely to themselves as it considered that these provisions were within the limits of the Block Exemption Regulation that allows exclusive sales to exclusive consumer groups and territories. As a result of applying the Block Exemption Regulation, the decisions did not involve detailed competitive analysis of the provisions.

The Chair then invited delegates to ask questions from the experts.

The delegate from the United Kingdom asked whether on-line technologies or digital technologies could help to overcome some of the externalities mentioned before. For example, some sort of Eyeball technology where you can register Eyeballs instead of sales could provide a solution to the free-rider problem. Similarly, having a show room sponsored by manufacturers that gets a set fee for showing people products but does not actually generate any retail revenues could also solve the free-rider problem.

Professor Baye noted that the Internet, distribution channels, firms evolve, and there will be technological evolutions over time. However, his impression is that that there are some products that are more conducive to on-line distribution than other products.

Mr Buccirossi pointed out that firms will try to develop tools to overcome the externality problem in the same way they had done to overcome information asymmetry problems. Therefore, if it is feasible from a technological point of view they will do it.

The delegate from the UK also noted that it can be difficult to try to identify exactly what the wholesale price is because the supplier sometimes sets the on-line price directly and then the on-line retailer might consider that as part of the cost.

Professor Michael Baye agreed that measuring unit cost is not easy as one would want to take into account the opportunity cost, the distribution cost and so forth. However, trying to disentangle the effects on quantities and the service enhancing effects is also very difficult.

The delegate from the EU then pointed out that they would agree with Professor Baye's comments on wholesale prices regarding vertical restraints imposed by manufacturers. However, regarding buying power type restraints, if a dominant buyer forecloses its rivals through exclusive supply contracts, this will have no effect on the wholesale price, it may even lower the wholesale price but will increase the downstream retail price and there will be a serious consumer and competition issue. The experts agreed on this conclusion.

SYNTHÈSE

Par le Secrétariat

Des contributions écrites et des débats, il ressort les points suivants :

(1) L'évolution du commerce électronique a modifié le fonctionnement de la concurrence et le type de problèmes de concurrence qui pouvait se présenter.

La réflexion sur le commerce électronique s'est portée sur quatre aspects : i) les coûts de la recherche ; (ii) l'impact du commerce électronique sur la géographie des transactions ; (iii) les coûts de la distribution et (iv) l'impact du commerce électronique sur l'asymétrie d'information entre consommateurs et fournisseurs.

S'agissant du point (i), l'Internet a abaissé les coûts de la recherche de produits sans toutefois les réduire à néant, car les consommateurs ont à supporter des coûts exogènes de recherche, et que les professionnels recourent à différents moyens pour rendre les prix plus difficiles à comparer pour les consommateurs. Pour le point (ii), l'Internet a, certes, étendu la zone géographique de chalandise des transactions, mais la majeure partie du commerce électronique se déroule encore entre zones limitrophes car les consommateurs privilégient la proximité pour leurs achats, tant pour des raisons culturelles que par souci de sécurité. Pour le point (iii), les coûts de distribution ont, dans l'ensemble, baissé, car l'Internet permet aux fabricants de traiter directement avec les consommateurs et que les sites marchands proposent généralement une offre beaucoup plus large. Enfin, sur le point (iv), l'achat en ligne peut créer une asymétrie d'information car les consommateurs n'ont pas la possibilité d'essayer le produit avant d'acheter ; il est donc plus difficile pour les professionnels de bâtir leur réputation.

L'Internet se traduit donc par une concurrence-prix plus intense, des chalandises géographiquement plus étendues et donne la possibilité aux consommateurs d'acheter des produits qu'ils ne trouveraient pas autrement. Cela devrait en principe accroître le bien-être des consommateurs, mais la prééminence de la concurrence-prix risque parfois de dissuader les revendeurs de réaliser certains investissements qui auraient augmenté le bien-être des consommateurs. De plus, compte tenu des externalités de réseau, il peut être plus difficile pour de nouveaux entrants de se faire une place sur les marchés électroniques : ces marchés tendent par conséquent à être plus concentrés.

(2) Malgré l'impact réel du commerce électronique sur le fonctionnement de la concurrence, la plupart des autorités jugent que le commerce électronique ne justifie en général pas l'application d'un régime réglementaire spécifique.

Il est généralement admis que les arguments d'efficience mis en avant dans la littérature économique sont tout aussi valables dans la vente en ligne que dans la vente traditionnelle. Il en va de même des visées anticoncurrentielles qui motivent les restrictions verticales. Pour cette raison, malgré tous les changements qu'a induits le développement de l'Internet dans l'économie, la plupart des délégués s'accordent à dire qu'il n'y a pas lieu de créer un nouveau cadre économique et réglementaire spécifiquement pour le commerce électronique pour évaluer les

implications des restrictions verticales sur la concurrence. Le cadre existant est généralement jugé valable et susceptible d'être adapté aux circonstances nouvelles.

(3) De l'avis général, la plupart des problèmes de concurrence soulevés par les restrictions verticales dans le commerce traditionnel seront les mêmes dans le commerce électronique, mais leurs implications pourront être différentes.

Les problèmes de concurrence traditionnellement associés aux restrictions verticales sont : (i) le risque de faciliter les collusions ; (ii) le risque d'affaiblir la concurrence.

Ces visées anticoncurrentielles qui motivent certaines entreprises à recourir à des restrictions verticales existent également dans le commerce électronique. Il existe des situations où les restrictions verticales, comme la pratique des prix imposés, tendent à affaiblir la concurrence entre marques, avec à la clé un préjudice pour les consommateurs.

En revanche, pour ce qui est du reproche traditionnellement adressé à la pratique du prix imposé de faciliter les collusions, il n'est pas certain, dans le contexte de la vente en ligne, qu'elle puisse constituer un mécanisme collusif. En effet, la transparence sur les prix est déjà assez grande dans cet environnement : impossible, ici, de recourir aux restrictions verticales pour obtenir plus facilement l'effet collusif associé aux ententes. Il y a donc moins lieu de s'inquiéter des prix imposés dans l'environnement en ligne.

Les fabricants qui imposent des restrictions verticales peuvent aussi avoir des motivations pro-concurrentielles, tout particulièrement dans l'environnement en ligne. Cela peut, en effet, être un moyen de lutter contre certains comportements de parasitisme - par exemple le cas de figure où un site marchand vendant des téléviseurs parasiterait un magasin « en dur ». Certes, le consommateur payera peut-être son téléviseur moins cher, mais on risque aussi de voir le magasin traditionnel cesser de distribuer la marque en question, voire fermer des points de vente. Les restrictions verticales peuvent être une réponse à ce problème, car elles poussent les distributeurs à recourir à d'autres moyens pour stimuler la demande, comme de prendre en charge l'entretien ou de faire de la publicité.

Les restrictions verticales peuvent aussi avoir un impact proconcurrentiel même en dehors de tout problème de service ou de parasitisme. Le fabricant peut vouloir inciter les distributeurs à mettre en avant sa marque. En effet, en ligne, on peut promouvoir un produit particulier en le faisant figurer en tête de liste dans les réponses aux requêtes. Dans ce cas, le prix unique peut permettre à un fabricant de garantir que les distributeurs réaliseront une marge et de s'assurer qu'ils vont promouvoir sa marque plutôt que de la reléguer en page trois des résultats des recherches sur le site marchand.

(4) En revanche, des restrictions verticales d'un type nouveau sont particulièrement susceptibles d'avoir un impact important sur les marchés en ligne et posent des problèmes de concurrence spécifiques.

Il existe une nouvelle pratique en matière de prix pour le marché en ligne : les accords de « parité entre plate-forme » ou la « clause de la nation la plus favorisée » (l'équivalent de la clause NPF dans le contexte de la vente au détail). Il s'agit d'un accord passé entre un vendeur et une plate-forme de commerce électronique par lequel le vendeur s'engage à ne pas pratiquer avec cette plate-forme des prix plus élevés qu'avec d'autres plateformes.

Cette pratique peut poser les mêmes problèmes de concurrence que la « garantie du meilleur prix » par laquelle le distributeur s'engage, soit à aligner son prix, soit à rembourser la différence

si un consommateur trouve moins cher. Ces pratiques ont pour effet d'affaiblir la concurrence et de dissuader les sites de vente en ligne de baisser leurs pourcentages de commissions (car ils n'en tireront aucun avantage par rapport à la concurrence). Ces deux pratiques entraînent aussi un risque de collusion, avec pour conséquence la plus délétère le risque de forclusion ou de dissuasion des distributeurs « discount » ou discompteurs.

Tels sont les effets anticoncurrentiels qui peuvent résulter, tant de la garantie unilatérale du meilleur prix que de la clause NPF. Toutefois, les autorités de concurrence considèrent généralement que la garantie du meilleur prix d'est pas vraiment crédible : l'engagement perd tout sens si le défendeur a la possibilité de choisir de ne pas s'aligner sur le meilleur prix. En revanche, dans l'environnement du commerce en ligne, la clause NPF peut avoir davantage de crédibilité. La question se pose particulièrement lorsque plusieurs sites marchands ont un accord avec le même fournisseur. Dans cette situation, il y a entente sur les prix entre les détaillants.

Dès lors, il faut se demander si les autorités de concurrence peuvent traiter la clause de la nation la plus favorisée de la même manière que les prix imposés. La clause NPF peut toutefois causer un préjudice plus important que la pratique traditionnelle de prix imposés. En effet le site marchand exerce un contrôle sur le prix minimum fixé sur le marché et peut manipuler ce prix en augmentant sa commission. C'est là un reproche à l'encontre de la clause NPF.

(5) Une analyse spécifique serait nécessaire pour évaluer l'impact potentiellement anticoncurrentiel des restrictions verticales.

Il a été établi que les restrictions verticales peuvent souvent entraîner un relèvement des prix de vente. La théorie économique montre d'ailleurs qu'en limitant, au moyen d'une restriction verticale, le nombre de vendeurs qui peuvent proposer un produit donné, on limite la concurrence intra-marque, ce qui tire les prix vers le haut. De même, par définition, interdire de pratiquer des prix inférieurs à un prix plancher revient aussi à relever le prix.

Toutefois, il faudrait également mettre en balance l'effet négatif d'une augmentation du prix sur le bien-être des consommateurs avec les gains d'efficience que peuvent apporter les restrictions verticales. Il faudrait prendre en compte notamment la qualité des produits, la qualité du service, la correspondance entre le consommateur et le produit qu'il cherche.

Il ne faut pas oublier que tout fabricant réalise sa marge sur les prix de gros. Une restriction verticale ne sera intéressante pour lui que si elle lui permet, soit de vendre davantage d'unités soit de réduire ses coûts – grâce à des économies d'échelle ou à des économies sur les coûts de distribution – soit d'une manière ou d'une autre, d'augmenter le prix de gros.

Il faut donc faire porter notre analyse, non sur le prix de détail, mais sur le prix de gros. Par conséquent, si une restriction verticale n'est pas motivée par une démarche d'efficience mais vise à affaiblir la concurrence entre marques, la manière la plus directe d'évaluer son impact serait de s'intéresser au prix de gros. Cela serait plus simple que de demander aux parties de prouver qu'il y a gain d'efficience. Certains délégués considèrent toutefois que, dans la plupart des situations, même les prix de gros seraient difficiles à observer.

NOTE DE RÉFÉRENCE

Par Paolo Buccirossi [*]

1. Introduction

Le commerce électronique offre une plus grande transparence et un meilleur rapport coût-efficacité, souvent considérés comme une évolution positive vers plus de concurrence. On suppose généralement que l'Internet renforce la faculté d'achat des consommateurs, qui peuvent désormais, en toute simplicité, obtenir quantités d'informations, comparer les prix, disposer d'un plus large choix, accéder de manière virtuelle aux vendeurs du monde entier et décider de leurs achats avec l'aide d'intermédiaires qui leur fournissent souvent des informations et des services d'avant-vente et d'après-vente. Si du côté des consommateurs, les coûts de recherche et d'information sont moindres, du côté des entreprises, les coûts d'exploitation diminuent souvent du fait de l'abandon des transactions physiques au profit de transactions électroniques. Fort des effets pro-concurrentiels qui lui sont généralement prêtés, le commerce électronique jouit d'une protection particulière dans l'Union européenne (UE), car il est conforme à l'objectif politique du marché intérieur. Ce type de commerce a également transformé en profondeur les systèmes de commercialisation et de distribution. De nombreux producteurs ont valorisé ce nouveau circuit de distribution souvent associé à une réduction des coûts et à un élargissement de la clientèle.

Les secteurs qui n'ont pas été touchés par ce nouveau mode de distribution sont relativement peu nombreux. Cette minorité mise à part, trois situations semblent prédominer dans le commerce actuel, qui concernent : 1) des produits qui ne sont disponibles que sur l'Internet, comme certains logiciels, jeux ou périodiques vendus uniquement en ligne (modèle exclusif de vente en ligne) ; 2) des produits qui sont commercialisés sous la même forme par les distributeurs physiques et les distributeurs en ligne (vente mixte/format unique) ; et 3) des produits commercialisés sous différentes formes dans les deux systèmes de distribution, par exemple sur support vidéo et en diffusion continue sur l'Internet (vente mixte/formats différents). Cette répartition montre qu'il est courant de voir les réseaux de distribution traditionnels coexister avec les réseaux de vente directe en ligne, tels que définis par Kirsch et Weesner (2005). La présente note analyse les conflits qui peuvent survenir entre ces deux réseaux de distribution concurrents et examine si les restrictions verticales imposées au commerce électronique sont de nature à favoriser les intérêts des consommateurs ou à les priver des avantages que peut leur procurer une plus grande concurrence.

Cette note s'articule autour de plusieurs sections. La section 2 présente brièvement les aspects économiques des restrictions verticales et explique en quoi ils ont façonné l'interprétation du droit de la concurrence. La section 3 décrit les principales caractéristiques du commerce électronique susceptibles d'influencer la concurrence dans le commerce de détail. La section 4 examine les restrictions les plus fréquemment imposées aux détaillants en ligne. Elle s'appuie sur les deux sections précédentes pour déterminer si l'approche générale développée dans les publications économiques et relatives au droit de la concurrence s'applique également à ces restrictions verticales et dans quelle mesure les spécificités du

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commerce électronique peuvent enrichir davantage l'analyse de telles pratiques sous l'angle de la concurrence. La section 5 résume les principales décisions adoptées par certaines autorités nationales de la concurrence et juridictions en Europe et aux États-Unis. La section 6 expose nos conclusions.

2. Présentation des aspects économiques des restrictions verticales

Dans une économie de marché, les accords verticaux sont essentiels. Les entreprises interagissent les unes avec les autres à différents stades de la chaîne d'approvisionnement. Bien souvent, ces échanges ont lieu par le biais d'opérations au comptant régies par des prix linéaires. Toutefois, les relations verticales font souvent l'objet de contrats à long terme, assortis de clauses tarifaires complexes et de plusieurs obligations qui s'imposent aux parties contractantes. Ce type de contrat est courant lorsque la relation verticale s'établit entre un fabricant et ses distributeurs.

Dans l'immense majorité des cas, ces restrictions font partie intégrante de la relation commerciale et ont pour objectif de la rendre viable. Néanmoins, elles ont parfois pour objet ou pour effet de restreindre ou de fausser la concurrence. Les publications économiques et relatives au droit de la concurrence ont identifié plusieurs justifications économiques et motivations anticoncurrentielles sous-jacentes aux restrictions verticales, ainsi que les conditions dans lesquelles elles peuvent se matérialiser. Si certaines questions n'ont toujours pas trouvé de réponse satisfaisante et continuent d'alimenter le débat, les principales implications, au plan de la concurrence, des restrictions verticales font désormais consensus, ce qui a permis aux autorités de la concurrence d'adopter des lignes directrices ou d'autres instruments précisant comment le droit de la concurrence doit être interprété et appliqué au regard de ces pratiques. Nous résumerons ci-après ces publications, afin de déterminer si les conclusions de la recherche économique sur ces questions peuvent être étendues au commerce électronique, en nous intéressant plus particulièrement à la relation qu'entretiennent les fabricants et les distributeurs, ces derniers regroupant à la fois les détaillants et/ou les intermédiaires.

2.1 Deux formes de concurrence

Un accord vertical entre un fabricant et un distributeur peut influer sur le contexte concurrentiel de deux marchés distincts : le marché en amont, au sein duquel le fabricant est en concurrence avec d'autres entreprises similaires et le marché en aval, qui oppose les différents détaillants. On appelle la première forme de concurrence « *concurrence intermarques* » car elle oppose plusieurs fournisseurs dont les produits sont pour l'essentiel identifiés par l'utilisation de marques spécifiques. Une concurrence en aval peut également exister entre les détaillants qui revendent les produits d'un même fabricant, qu'on appellera « *concurrence intramarque* ». Une moindre concurrence intramarque sera généralement perçue comme peu susceptible de nuire aux consommateurs si la concurrence intermarques est forte. Ainsi, comme le précisent les Lignes directrices sur les restrictions verticales[1] de la CE (ci-après dénommées « Lignes directrices de la CE »), « si la concurrence intermarques est rude, il est peu probable qu'une réduction de la concurrence intramarque ait des effets négatifs sur les consommateurs » (paragraphe 102). La concurrence intermarques est réputée avoir une plus grande incidence que la concurrence intramarque sur le bien-être des consommateurs, et cela pour deux raisons : premièrement, les consommateurs tirent l'essentiel de leur bien-être des caractéristiques des produits qu'ils utilisent et la concurrence intramarque leur garantit que les fabricants s'efforceront d'innover leurs produits et de retenir les caractéristiques qui répondent le mieux à leurs attentes. Deuxièmement, la concurrence entre les fabricants porte également sur le prix le plus bas possible ; les consommateurs payant le prix de détail, ils n'ont en apparence aucune raison de limiter la concurrence entre les détaillants, sauf si c'est là le seul moyen d'inciter ces derniers à proposer des services accessoires ou à investir dans des actions promotionnelles dont ils bénéficieront plus que d'une baisse limitée des prix.

[1] Communication de la Commission – Lignes directrices sur les restrictions verticales, 2010, J.O. C 130.

2.2 Typologie des restrictions verticales

Aux fins de l'analyse concurrentielle d'un accord vertical, il est nécessaire de comprendre les objectifs, au regard des gains d'efficience, qu'un tel accord peut viser, ainsi que les effets anticoncurrentiels qu'il est susceptible d'engendrer. Il est en outre indispensable de comprendre quels types de restrictions et quelles conditions de marché sont les plus susceptibles de produire ces gains d'efficience, mais également quand et comment les effets anticoncurrentiels peuvent survenir. Il apparaît donc utile de classer les obligations qu'un accord vertical peut imposer aux parties en différentes catégories, qui pourront être les suivantes :

- le périmètre des opérations autorisées pour chaque détaillant, au regard du territoire ou des clients qui peuvent lui être attribués ;
- les caractéristiques qualitatives des services de vente au détail (par exemple la taille du magasin, les heures d'ouverture, les aires de stationnement) ;
- l'offre de services complémentaires (par exemple l'assistance avant ou après-vente, les services financiers) ;
- le lancement d'actions promotionnelles (par exemple la publicité sur le lieu de vente) ;
- l'offre quantitative des produits mis en vente ;
- les quantités de produits à acheter ;
- le prix appliqué aux consommateurs finaux.

Un classement général des restrictions verticales fera la distinction entre : 1) les restrictions concernant les prix de vente (tarifaires) et 2) les restrictions ne concernant pas les prix de vente (non tarifaires). Les premières concernent tous les accords selon lesquels le détaillant accepte d'appliquer un prix qui : a) n'est pas supérieur au prix indiqué par le fabricant (**prix de revente maximum imposé**) ; b) est égal au prix indiqué (**prix de revente fixe**) ou c) n'est pas inférieur au prix indiqué (**prix de revente minimum imposé**).

Parmi les restrictions verticales non tarifaires, on trouvera principalement :

- **la distribution exclusive**, dans le cadre de laquelle chaque distributeur se voit attribuer un territoire ou un groupe de clients spécifique, vis-à-vis duquel il fait tout ce qui est en son pouvoir pour commercialiser ses produits.
- **la distribution sélective,** qui consiste en un accord restreignant le nombre des distributeurs agréés, sur la base de critères qualitatifs de sélection qui tiennent à la nature des produits et des services complémentaires à fournir aux acheteurs ;
- **le monomarquisme,** un type d'accord qui oblige l'acheteur à s'approvisionner en produits d'une catégorie donnée auprès d'un fournisseur unique ; la même situation peut découler d'une obligation de quotas d'achat, qui contraint ou incite l'acheteur à acquérir (ou à stocker) une quantité minimale prédéterminée de produits, de façon à cantonner, de fait, ses achats à un unique fournisseur.
- **la fourniture exclusive,** un accord par lequel le fournisseur a l'obligation de vendre les produits concernés à un acheteur unique ; comme dans le cas précédent, le même effet peut être obtenu par l'imposition de quotas d'achat ;
- **la vente liée ou groupée,** qui voit un fabricant conditionner l'achat d'un produit (le produit liant) à l'achat d'un second produit (le produit lié) ; lorsque les deux produits sont vendus ensemble dans une proportion fixe, cette pratique est normalement qualifiée de vente groupée.

Si cette classification peut contribuer à conceptualiser les effets économiques que peuvent avoir ces pratiques, elle ne permet pas de se forger une opinion définitive, dans la mesure où des règles formelles simples, permettant de distinguer les restrictions pro-concurrentielles des restrictions anticoncurrentielles, sur la base de cette typologie, restent à trouver. Il est désormais établi que la bonne application des règles de concurrence en la matière doit reposer sur une méthode fondée sur les effets. Dès lors, il semble plus judicieux de préciser les éventuelles justifications économiques et les théories du préjudice relatives à la concurrence qui peuvent généralement s'appliquer, avant de s'efforcer de recenser des éléments factuels observables, qui permettraient aux autorités et aux parties de déterminer si la restriction en cause, mise en œuvre dans les conditions de marché spécifiques au sein desquelles elle intervient, sera vraisemblablement plus préjudiciable qu'avantageuse pour les consommateurs, ou l'inverse. Pour étayer cette approche, nous décrivons ci-après les justifications possibles sur le plan de l'efficience, et les motivations anticoncurrentielles qui peuvent sous-tendre les restrictions verticales, et détaillons succinctement leur mode de fonctionnement.[2]

2.3 Motivations sur le plan de l'efficience

2.3.1 Investissements spécifiques et problème de dépendance

Il arrive parfois que deux parties, par exemple un fournisseur et un détaillant, ne puissent entretenir une relation commerciale mutuellement avantageuse que si l'une d'entre elles consent à réaliser des investissements qui n'auraient guère de valeur, voire aucune, en dehors de cette relation commerciale particulière. Après avoir réalisé ces investissements particuliers, la partie en question se trouve en position de faiblesse lors des négociations : elle devient en effet dépendante de son partenaire commercial, car elle risque de perdre la valeur des investissements qu'elle a réalisés si elle ne se plie pas aux conditions de celui-ci. Ce phénomène explique en grande partie pourquoi les parties signent des contrats à long terme qui précisent de nombreux aspects de leur relation, avant que chacune d'entre elles n'entreprenne les investissements requis (Wiliamson 1985). On nuancera toutefois ce phénomène par deux observations : premièrement, une part importante des transactions qui ont lieu au niveau de la vente en gros nécessitent des investissements spécifiques[3] ; deuxièmement, les mécanismes de réputation ou les normes sociales peuvent, d'une part, contraindre toutes les parties à adopter un comportement non opportuniste, de sorte que dans certains cas, les restrictions contractuelles ne sont pas indispensables. Par ailleurs, lorsque la valeur des investissements spécifiques est élevée et qu'un contrat *ex-ante* ne parvient pas à couvrir tous les scénarios possibles, la seule solution efficace pourrait consister en une intégration verticale.

2.3.2 Externalités verticales et problèmes de coordination verticale

Lorsqu'un fabricant et un détaillant prennent des décisions stratégiques indépendantes et non cordonnées, chacun évalue uniquement les conséquences de ces décisions sur ses propres bénéfices. Pourtant, chaque fois que la décision de l'une des deux parties a une incidence sur les volumes de vente du produit, elle influe également sur les bénéfices de l'autre partenaire commercial. Cet effet est appelé « externalité verticale », dans la mesure où l'entreprise à l'origine de la décision n'en tient pas compte. Par exemple, si un détaillant propose un rabais, les consommateurs finaux achèteront des unités supplémentaires du produit sur lesquels le fabricant percevra une marge. Pour autant, le détaillant ne tiendra pas compte de cet effet et pourra décider de ne pas baisser le prix du produit si cela n'entraîne pas une hausse de ses propres bénéfices, quand bien même cela augmenterait les bénéfices qu'il perçoit conjointement avec le fabricant.

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2 Pour une étude des publications économiques consacrées aux restrictions verticales, voir Rey et Vergé (2008).

3 La bonne connaissance du partenaire commercial et de ses activités habituelle crée une valeur qui est perdue en cas de changement de partenaire.

Le problème de coordination verticale le plus connu est celui de la « *double marginalisation* »[4]. Il se produit lorsque le fabricant et le détaillant jouissent d'un certain pouvoir de marché et prennent tous deux une décision non coordonnée sur les prix. Ce faisant, le fabricant applique une marge sur les coûts de production pour fixer le prix de gros, tandis que le détaillant majore le prix de gros pour déterminer le prix de vente au détail. Dès lors, le prix payé par le consommateur final comporte une double marge et atteint un niveau supérieur à celui qui aurait été décidé par une entreprise intégrée verticalement. Si le fabricant et le détaillant devaient décider de coordonner leurs décisions tarifaires et de fixer un prix de détail qui maximise leurs bénéfices conjoints, ils abaisseraient les prix pratiqués, ce qui augmenterait leurs bénéfices et profiterait également aux consommateurs.

Ce problème de coordination peut avoir une incidence sur toutes les décisions stratégiques que doivent prendre les entreprises (notamment les détaillants). Toutes ces décisions peuvent être perçues comme des investissements de soutien à la demande, qui engendrent également des avantages pour l'entreprise intervenant à un autre niveau de la chaîne d'approvisionnement, et qui peuvent à ce titre être réalisés à un niveau sous-optimal si l'effet vertical reste une « externalité ». Cette coordination peut par exemple concerner la publicité, les services connexes à la vente (Marvel et McCafferty 1984), le stock (Krishnan et Winter 2007), la gamme des produits vendus, etc.

2.3.3 Externalités horizontales et parasitisme

Un problème similaire se pose lorsque les investissements effectués par un distributeur ont une incidence sur les ventes réalisées par d'autres distributeurs. Ainsi, un franchisé qui réalise des investissements qui améliorent l'attractivité de la marque (par exemple McDonald's) fait également le jeu d'autres franchisés, les consommateurs pouvant décider de ce fait de se rendre dans d'autres établissements de la même chaîne. Dans la mesure où cet effet horizontal externe n'est pas pris en compte par le franchisé, son investissement peut s'avérer insuffisant et une certaine forme de coordination entre les distributeurs pourrait être nécessaire pour le rendre optimal.

Parfois, l'effet horizontal externe prend la forme d'un comportement opportuniste des distributeurs concurrents. Par exemple, dans les secteurs marqués par une forte concurrence intramarque non liée aux prix, il peut être vital pour un producteur de stimuler la demande en proposant des services de détail (par exemple des services d'assistance avant-vente ou l'accès à des salles d'exposition). Les détaillants ont toutefois conscience qu'ils ne rentabiliseront pas pleinement les efforts qu'ils ont consentis pour proposer des services avant-vente si les consommateurs vont ensuite s'approvisionner auprès de concurrents qui ne font pas les mêmes investissements et peuvent répercuter les économies ainsi réalisées sous la forme de rabais accordés aux consommateurs. Ce type de parasitisme dégrade le niveau des services avant-vente proposés par les détaillants et peut nuire à la fois aux fournisseurs et aux consommateurs. À nouveau, une certaine coordination peut s'avérer indispensable pour résoudre le problème du parasitisme et inciter tous les acteurs à prendre des décisions efficientes.

Dans le même ordre d'idées, un producteur peut vouloir protéger ses investissements (par exemple par des droits de propriété intellectuelle, des brevets, une marque déposée ou une image de marque) en limitant le champ d'action de ses distributeurs, par l'introduction, par exemple, d'une clause d'exclusivité d'achat dans ses contrats de distribution. Dans les deux cas, les restrictions verticales constituent une solution viable pour éviter le sous-investissement.

[4] Le problème de la coordination tarifaire des produits complémentaires a été examiné par Cournot (1838) ; pour une analyse formelle de cette question, voir Rey et Vergé (2008).

2.3.4 L'utilisation d'informations éparses et hétérogènes

Fournisseurs et distributeurs peuvent détenir des informations hétérogènes. D'un côté, les distributeurs sont mieux informés des conditions de concurrence et des préférences des consommateurs au plan local. De l'autre, les fournisseurs écoulent sensiblement moins de produits que les détaillants et il est probable que ces produits auront, individuellement, une incidence considérable sur leurs bénéfices. C'est pourquoi, ils ont, par rapport aux détaillants, une connaissance plus approfondie de certains produits. Ces deux ensembles d'informations pouvant être nécessaires pour concevoir et mettre en œuvre une stratégie commerciale optimale, un fournisseur peut vouloir exercer un certain contrôle sur le prix de détail, ou tout du moins avoir la possibilité de le fixer en coordination avec ses distributeurs, parce qu'il estime connaître le prix le plus adapté pour maximiser les bénéfices, compte tenu des préférences des consommateurs et du prix des produits concurrents.

Dans ce contexte, le prix de détail peut être inadapté, même du point de vue du fournisseur, car « trop bas », notamment lorsqu'il agit comme un marqueur de la qualité du produit. En outre, certains fournisseurs considèrent qu'un prix de détail trop peu élevé peut exclure le produit du marché, soit parce que les distributeurs préféreront vendre des produits concurrents, voire des produits non concurrents qui leur assurent des marges supérieures, soit parce que la marge du fabricant est alors réduite à un niveau qui ne permet pas d'assurer la viabilité à long terme de la production. Un fabricant et ses détaillants peuvent, au moyen d'un accord vertical, mutualiser toutes les informations utiles et prendre des décisions plus efficaces en ce qui concerne les prix de détail. Dans la mesure où ces décisions restent soumises à la contrainte concurrentielle exercée par d'autres fournisseurs, le risque que les consommateurs soient en définitive lésés sera vraisemblablement faible.

2.4 Effets anticoncurrentiels

Les accords verticaux peuvent influencer la concurrence à la fois sur le marché en amont (c'est-à-dire la concurrence intermarques entre les fabricants) et sur le marché en aval (la concurrence intramarque entre les détaillants d'un même fabricant). Dans les publications économiques, les auteurs ont étudié trois théories du préjudice distinctes dans le domaine de la concurrence à savoir les restrictions verticales qui peuvent : a) verrouiller le marché, b) faciliter la collusion et/ou c) atténuer la concurrence.

2.4.1 Verrouillage du marché

La finalité des restrictions verticales que craignent le plus les autorités de la concurrence est assurément l'effet de verrouillage qu'elles peuvent provoquer, notamment sur les marchés très concentrés. L'entrée sur le marché peut être verrouillée à tous les niveaux de la chaîne d'approvisionnement, de même que la sortie du marché peut être précipitée à chaque maillon de la relation verticale. Certaines restrictions verticales qui s'apparentent à une intégration verticale, telles que les clauses d'exclusivité (imposant le monomarquisme ou la fourniture exclusive), peuvent décourager les nouveaux entrants potentiels, qui anticipent un accès limité aux distributeurs et, par voie de conséquence, un accès difficile aux consommateurs.[5] Ces restrictions peuvent de même être adoptées pour évincer les concurrents du marché en réduisant leurs possibilités de commercialisation, entraînant un tel renchérissement des coûts que leur maintien sur le marché n'est plus rentable.[6]

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5 Une analyse formelle de la manière dont les contrats d'exclusivité peuvent verrouiller le marché est proposée par Comanor et Frech (1985), puis développée par Mathewson et Winter (1998).

6 La théorie du « renchérissement des coûts des concurrents » a été introduite pour la première fois et de manière informelle par Krattenmaker et Salop (1986).

2.4.2 Collusion

Il est généralement admis que certaines restrictions verticales peuvent avoir pour effet de faciliter la collusion, sur les marchés en amont et en aval. En effet, sur les marchés en amont, le non respect des prix de gros par les fournisseurs peut gêner la collusion et, en cas de variation des coûts de détail, les fabricants ne pourront pas déduire précisément les prix de gros à partir des prix de détail. Or les accords sur les prix de revente imposés, en réduisant la dépendance des prix de détail à l'égard des coûts de détail, améliorent la transparence des prix, renforcent la capacité des fabricants à détecter les éventuels écarts, et, par conséquent, facilitent la collusion (Telser 1960 ; Mathewson et Winter 1998 ; Jullien et Rey 2007). Sur les marchés en aval, de telles ententes sur les prix, même si elles n'imposent pas un prix de détail, peuvent servir de référence pour les revendeurs et par conséquent améliorer leur faculté à coordonner leur action pour procéder à des hausses de prix et bénéficier ainsi d'une meilleure rentabilité. Les restrictions non tarifaires, telles que les accords de distribution exclusive, peuvent également aider les distributeurs à maintenir un équilibre collusoire en limitant les possibilités de s'écarter de l'entente convenue.

2.4.3 Atténuation de la concurrence

Si la collusion est l'expression d'un phénomène dynamique qui maintient des conditions de vente ayant pour effet de réduire le bien-être du consommateur par la menace de sanctions du marché, la concurrence peut également être atténuée de manière statique par des pratiques qui réduisent l'intérêt des entreprises à se livrer une âpre concurrence.[7]

Les restrictions verticales peuvent avoir pour effet direct et évident d'atténuer la concurrence intramarque. Un fabricant qui impose des restrictions tarifaires (par exemple un prix de revente) tend à réduire l'âpreté de la concurrence entre les détaillants. De même, en accordant à ses distributeurs un droit d'exclusivité sur un territoire, le fabricant crée en quelque sorte un pouvoir de monopole pour chaque détaillant dans une zone géographique déterminée.

Ces pratiques sont également de nature à atténuer la concurrence intermarques. Rey et Stiglitz (1995) montrent qu'un fabricant, par le biais d'un système de distribution exclusive, peut adopter une politique tarifaire moins agressive, ce qui peut inciter ses concurrents à augmenter leurs prix.[8]

2.5 Effets ambigus sur le bien-être

Plusieurs contributions parues dans les publications économiques ont montré que certaines restrictions verticales, telles que la fourniture exclusive et la vente liée, peuvent être adoptées par les fournisseurs pour exercer une discrimination par les prix (Burstein 1960 ; Chen et Ross 2005). Pour autant, les effets sur le bien-être d'une discrimination par les prix ne sont pas clairs et dépendent des caractéristiques propres au

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7 Précisons que la collusion renvoie à un équilibre de marché dans lequel les vendeurs coordonnent leurs comportements (dans un cadre répété à l'infini) en adoptant des stratégies fondées sur des pratiques antécédentes, tandis qu'une « atténuation de la concurrence » désigne une modification ponctuelle de l'équilibre et n'exige pas des entreprises concernées une surveillance mutuelle ni des sanctions lorsque certaines s'écartent du comportement coordonné. Certains auteurs (par exemple Baker (1995)) appellent ce phénomène « frein à la concurrence ». Les Lignes directrices de la CE font également cette distinction entre collusion et atténuation de la concurrence. La Commission y mentionne en effet que la facilitation de la collusion et l'atténuation de la concurrence font partie des effets anticoncurrentiels que les restrictions verticales sont susceptibles d'avoir (voir paragraphe 100, point b) ou c)).

8 À l'origine, cette idée a été étudiée de manière formelle par Bonanno et Vickers (1988) dans un modèle au sein duquel les producteurs, pour des raisons stratégiques, décident de déléguer leurs stratégies commerciales à des détaillants indépendants. Lin (1990) et Shaffer (1991a ; 1991b) proposeront par la suite des analyses complémentaires.

marché, de l'hétérogénéité des consommateurs, de l'élasticité de leur demande et du pouvoir de marché qui peut être exercé sur chaque segment (Armstrong, 2008).

2.6 Comment distinguer les restrictions verticales efficientes (pro-concurrentielles) des restrictions verticales anticoncurrentielles ?

Il résulte de ce qui précède une constatation fondamentale pour l'analyse concurrentielle des restrictions verticales : la concurrence est un phénomène à multiples facettes et dimensions, parfois contradictoires. Dans un monde idéal, il serait souhaitable de déployer le degré d'innovation le plus élevé, les services de vente les plus efficaces, assortis d'une tarification au coût marginal. Or, cela est tout simplement impossible. Bien souvent, l'application du droit de la concurrence impose de comparer les probables effets anticoncurrentiels d'une pratique sur le marché ou sur un aspect spécifique de la concurrence avec les probables effets pro-concurrentiels de cette même pratique sur un autre marché ou un autre aspect.

Dans ce contexte, des outils opérationnels qui permettent de distinguer les pratiques inoffensives des pratiques malveillantes sont indispensables. L'approche qui prévaut dans plusieurs pays et territoires, par exemple aux États-Unis, consiste à soumettre l'évaluation des accords verticaux à une règle de raison qui impose de mettre en balance, au cas par cas, les effets de l'accord concerné sur le bien-être du consommateur.

Dans l'UE, la Commission européenne a établi, au moyen de divers règlements et lignes directrices, un ensemble de postulats relatifs (à la fois de légalité et d'illégalité). Le postulat général est que, en l'absence de pouvoir de marché significatif en amont ou en aval, les restrictions verticales seront vraisemblablement pro-concurrentielles, car elles visent des gains d'efficience. Le pouvoir de marché étant difficile à mesurer, il est remplacé par la part de marché détenue par chaque partie. Ce postulat justifie la règle générale développée dans le règlement d'exemption par catégorie de la Commission européenne, selon laquelle si chacune des parties détient une part de marché inférieure à 30 %, une restriction verticale est en général réputée satisfaire aux conditions énoncées à l'article 101, paragraphe 3, TFUE, et être par conséquent licite.

Ce postulat général admet toutefois quelques exceptions. Ainsi, certaines pratiques sont qualifiées de restrictions caractérisées. Pour ces dernières, la logique du postulat général est inversée : même si aucune des parties ne semble détenir un pouvoir de marché, l'accord est réputé relever de l'article 101, paragraphe 1, TFUE, et ne pas remplir les conditions de l'article 101, paragraphe 3, TFUE. Dès lors, la restriction verticale est présumée illégale, mais les parties ont la possibilité d'introduire une demande d'exemption au cas par cas.

Lorsque le postulat général ne s'applique pas parce qu'une ou les deux parties détiennent un fort pouvoir de marché (par exemple plus de 30 % de parts de marché), chaque pratique doit être évaluée selon ses caractéristiques propres, par la mise en balance des éléments plaidant ou non en faveur de sa légalité.

Cette approche est raisonnable. Elle offre la meilleure sécurité juridique possible sans priver le système de la souplesse indispensable pour s'adapter à un contexte particulier. Bien entendu, la complexité de l'analyse demeure totale lorsqu'une évaluation individuelle est requise et lorsque ces règles doivent être appliquées à un nouvel environnement tel que l'Internet.

L'évaluation au cas par cas doit être réalisée en confrontant les éventuelles justifications économiques aux théories du préjudice applicables dans le domaine de la concurrence et en évaluant en quoi chacune d'entre elles est corroborée par les informations disponibles. Pour suivre cette approche au plus près, il convient d'élaborer un ensemble de « scénarios » antagonistes décrivant par quels moyens la restriction verticale en cause produirait des effets pro-concurrentiels ou anticoncurrentiels. Ces scénarios mettraient

en lumière plusieurs éléments importants qui rendraient chacune d'entre eux plus ou moins plausible et qui devront être confrontés à la réalité factuelle du cas en question, y compris à l'avis des acteurs du marché.

Les éléments suivants seront probablement déterminants : a) la position des parties et de leurs concurrents sur le marché, b) la nature des produits contractuels et l'utilité des services complémentaires ; c) l'existence de facteurs conduisant naturellement à une concentration (économies d'échelle, externalités de réseau) ; d) la présence de barrières à l'entrée. Cette liste n'est pas exhaustive et d'autres facteurs feront certainement leur apparition dans certains contextes.

On néglige souvent la raison pour laquelle les parties décident de demander ou d'accepter les restrictions verticales spécifiques imposées par l'accord alors même que cette raison peut s'avérer fort utile pour les évaluer. La réponse à cette question ne résout en rien le problème de la légalité car une intention anticoncurrentielle n'est pas nécessaire pour qu'une violation du droit de la concurrence soit constatée. Cela étant, la connaissance des raisons pour lesquelles les parties ont recours à un accord spécifique donnerait assurément certaines indications sur ses effets probables.

À cet égard, les accords verticaux ont ceci de frappant que si les parties ont à l'évidence des intérêts convergents lorsqu'elles signent un contrat qui améliore l'efficience de leur relation, on peut toutefois se demander pourquoi l'une d'entre elles consent à conclure un accord dont l'objectif unique ou principal est de permettre à l'autre partie d'obtenir ou d'exercer un pouvoir de marché. En principe, fournisseurs et détaillants tirent avantage d'un marché concurrentiel connexe. Les fabricants bénéficient généralement d'un marché de détail concurrentiel, synonyme de baisse des prix de détail et de hausse de la demande de leurs produits sur les marchés de gros. Les détaillants profitent quant à eux de la concurrence en amont, synonyme de baisse des prix de gros et de marges plus élevées.

Dès lors, dans une relation verticale, chacune des deux parties a normalement intérêt à limiter le pouvoir de marché de l'autre. Pourtant, cet intérêt ne suffit pas pour garantir qu'un accord vertical ne sera jamais anticoncurrentiel. Les raisons expliquant pourquoi un tel phénomène pourrait se produire abondent dans les publications. Premièrement, l'une des deux parties peut jouir d'une position de négociation telle que la menace de mettre fin à la relation commerciale est crédible et suffisamment grave pour contraindre l'autre partie à accepter l'accord anticoncurrentiel. Deuxièmement, la partie qui obtient ou accroît son pouvoir de marché au moyen de la restriction verticale peut partager certains des bénéfices supplémentaires ainsi réalisés avec l'autre partie. Ce dédommagement peut prendre la forme de versements uniques ou de diverses formes de rabais (voir Aghion et Bolton 1987). Troisièmement, lorsque les effets anticoncurrentiels découlent de plusieurs accords verticaux conclus avec différents partenaires commerciaux, ces derniers peuvent être tentés de ne pas jouer le jeu (comme dans le jeu du dilemme du prisonnier), sachant pourtant qu'aucun d'entre eux ne peut faire cavalier seul afin d'empêcher, pour sa part, l'effet concurrentiel (Rasmusen, Ramseyer et Wiley 1991 ; Segal et Whinston 2000).

L'analyse d'une restriction verticale spécifique comporte rarement une évaluation factuelle pour déterminer si l'une ou l'autre de ces explications s'applique à la situation particulière examinée. Nous estimons que cela serait pourtant une étape essentielle pour distinguer les contextes pro-concurrentiels des situations anticoncurrentielles. De fait, les publications économétriques ont systématiquement montré que, dans la plupart des cas, fabricants et consommateurs ont des intérêts communs et que lorsque les fabricants limitent volontairement la liberté commerciale des distributeurs, c'est dans le but de poursuivre ces intérêts communs. Lafontaine et Slade (2008), après une analyse approfondie des publications économétriques consacrées aux restrictions verticales, concluent comme suit : « force est de constater que lorsque les fabricants choisissent d'imposer de telles restrictions, non seulement cette décision leur profite mais ils permettent également aux consommateurs de bénéficier de produits et de services de meilleure qualité. En revanche, lorsque les restrictions et les limitations contractuelles sont imposées aux fabricants par l'intervention de l'État, souvent en réaction à la pression exercée par les distributeurs qui dénoncent un

déséquilibre du pouvoir de négociation en leur défaveur et au profit des fabricants, cela a généralement pour effet de réduire le bien-être des consommateurs, dans la mesure où les prix augmentent et où les niveaux de service diminuent (p. 409) ».

3. Quelle est l'incidence du commerce électronique sur la concurrence

Dans cette section, nous examinerons en détail les principales caractéristiques du commerce électronique susceptibles d'avoir une incidence sur la concurrence, afin de comprendre comment elles peuvent influencer l'évaluation des restrictions verticales. Il a été avancé que la vente en ligne influence la concurrence sur le marché de détail par : a) une baisse des coûts de recherche et d'information ; b) la modification des coûts de distribution ; c) l'élargissement du périmètre géographique des transactions et d) l'introduction de nouvelles formes d'asymétrie de l'information ou d'un nouveau moyen de surmonter cette asymétrie.[9] Ces différents points seront examinés ci-après.

3.1 Coûts de recherche et d'information

Il est généralement admis que les consommateurs ne supportent quasiment aucun frais lorsqu'ils naviguent sur l'Internet pour recueillir des informations avant de prendre leur décision d'achat. L'Internet génère des quantités considérables d'informations, dont certains sites profitent pour proposer un service supplémentaire aux consommateurs submergés par cette masse de données. Il existe aujourd'hui de nombreux assistants d'achat[10] performants, qui présentent de manière lisible des informations compilées, telles que les prix proposés par différents détaillants en ligne pour le même produit ou service. Ces outils aident les consommateurs à comparer les prix et à trouver la solution la plus adaptée à leurs besoins. Il est démontré que l'utilisation accrue de ces sites, également appelés comparateurs en ligne, réduit les coûts de recherche et d'information. Brown et Goolsbee (2002) présentent diverses preuves économétriques qui montrent que dans le secteur de l'assurance, l'utilisation accrue de l'Internet réduit jusqu'à 5 % le coût moyen des contrats d'assurance-vie temporaire. En revanche, dans les secteurs non couverts par les comparateurs en ligne, cette utilisation intensive de l'Internet n'aboutit à aucune baisse des prix pour les consommateurs.

Néanmoins, un nombre croissant d'études économétriques infirment l'idée selon laquelle les services d'informations sur les prix accessibles en ligne éliminent toujours les coûts de recherche et d'information. Ainsi, Brynjolfsson, Dick et Smith (2010) ont élaboré dans leur étude sur les sites de comparaison des prix un modèle de coefficient aléatoire, qui montre que les coûts de recherche pour accéder à toute une série d'offres générées par les comparateurs de prix sont loin d'être négligeables. De fait, le coût maximal lié à la recherche d'un livre sur l'un des principaux comparateurs en ligne est estimé à 6.45 USD, tandis que l'avantage découlant de la possibilité d'accéder à l'ensemble des informations cumulées est estimé à 6.55 USD pour le consommateur médian. De même, Hong et Shum (2006), à l'aide d'une méthode différente, ont appliqué un modèle de recherche non séquentiel aux prix pratiqués par les librairies en ligne, d'où il ressort que les coûts de recherche estimés sont compris entre 1.30 et 2.90 USD.

L'étude des enchères en ligne fait l'objet de publications abondantes. Bajari et Hortaçsu (2003) évaluent à 3.20 USD le coût implicite de participation à une vente aux enchères sur eBay consacrée aux pièces de monnaie. Hann et Terwiesch (2003) ont pour leur part analysé les offres soumises par les consommateurs sur les sites d'enchères inversées, sur lesquels le vendeur tente d'atteindre le prix fixé par l'acheteur par une succession d'offres. Les coûts frictionnels, à savoir l'inconfort résultant de la participation à la transaction en ligne, dans ce type particulier de commerce électronique, varierait de 3.54

9 Pour une analyse approfondie des publications consacrées à cette question, voir Lieber et Syverson (2012).

10 Assistants logiciels intelligents conçus pour collecter les informations sur l'Internet, en fonction de la requête de l'internaute.

à 6.08 USD, selon la valeur financière de l'article ainsi mis aux enchères. L'étude présente par ailleurs un autre résultat intéressant : les coûts frictionnels sont corrélés négativement à l'expérience des consommateurs, pour les transactions précédemment réalisées sur ce même site. Johnson, Bellman et Lohse (2009) parviennent à une conclusion similaire en montrant le rôle crucial joué par l'apprentissage dans le commerce électronique. Ils démontrent, au moyen d'un modèle de psychologie cognitive, qu'au fur et à mesure que le consommateur se familiarise (ou s'habitue) à un site, le temps passé sur ce site diminue.

Le fait que le coût de recherche et d'information ne soit pas éliminé par les moteurs de recherche et les comparateurs de prix est également prouvé par la persistance d'une grande diversité de prix entre les offres de plusieurs détaillants (Baye, Morgan et Scholten 2006). Une telle disparité s'explique notamment par le fait que les entreprises endogénéisent la baisse des coûts liés à la recherche de telle sorte qu'alors que les moteurs de recherche s'efforcent de créer un environnement sans friction, les détaillants réagissent en adoptant des stratégies de camouflage des prix. Ellison et Ellison (2009) décrivent certaines de ces stratégies, telles que la complexification volontaire des descriptifs de produits, la création de multiples versions d'un même produit ou la mise en œuvre de techniques de diversion, consistant par exemple à proposer des produits de qualité médiocre afin d'obtenir une meilleure visibilité sur les comparateurs de prix, avant de tenter de convaincre les consommateurs de payer plus cher les produits de meilleure qualité réellement recherchés. La persistance d'une grande disparité de prix s'expliquent notamment par : i) l'importance des facteurs non tarifaires, tels que les délais de livraison, les frais de port et la disponibilité des produits, ou encore la réputation du détaillant en ligne (Brynjolfsson et Smith, 2003) ; ii) la présence de coûts de changement, le consommateur se familiarisant au fil du temps avec le site de commerce électronique et son interface (Varian 1999) ; iii) l'adoption de politiques de discrimination par les prix qu'autorisent les nouvelles technologies de personnalisation, qui permettent aux détaillants en ligne d'exploiter des informations personnalisées pour adapter à la fois leurs produits et leurs prix aux besoins individuels (Shapiro et Varian 1998) et iv) la rationalité limitée des consommateurs (Baye et Morgan 2004).

Si toutes ces études démontrent qu'un environnement totalement dénué de frictions est impossible, elles ne remettent pas en cause le fait que les nouvelles technologies permettent aux consommateurs de faire jouer la concurrence à un coût sensiblement inférieur à celui qu'ils supporteraient s'ils devaient se rendre dans les magasins ou comparer les prix par d'autres moyens. Nonobstant les stratégies adoptées par les fournisseurs et les détaillants, la réduction des coûts de recherche et d'information peut avoir une incidence sur les prix, les parts de marché et la rentabilité.

3.2 Coûts de distribution

L'Internet est à l'origine de nombreux bouleversements, s'agissant des coûts de distribution. Il a d'une certaine manière réorganisé les composantes de la structure des coûts des entreprises. L'effet net produit est pour l'essentiel positif, ce qui explique que l'on s'accorde en général à associer la diffusion du commerce électronique à une diminution des coûts de distribution.

Premièrement, il convient d'observer la manière dont l'Internet a modifié la relation entre les producteurs et les consommateurs. Certains marchés ont subi un processus brutal de désintermédiation, qui a conduit à la réduction ou au démantèlement complet d'un ou plusieurs maillons de la chaîne d'approvisionnement. Ces dernières années, le secteur du voyage, qui a vu le rôle des agences de voyage reculer considérablement en raison des possibilités de réservation en ligne, a été l'exemple le plus frappant de cette évolution.

D'un autre côté, l'Internet a développé l'intermédiation, par exemple dans le secteur automobile. Aux États-Unis, l'intermédiation physique est, sur le marché de la distribution automobile, une obligation légale. Autrement dit, toutes les ventes de voitures doivent passer par un concessionnaire physique. Prenant en compte cette obligation, les technologies en ligne ont permis le développement de systèmes qui aident

les consommateurs à déterminer le véhicule de leur choix, avant de les orienter vers le concessionnaire le plus adapté.

L'Internet a également révolutionné la prise en charge des commandes. Grâce à une communication plus rapide tout au long de la chaîne d'approvisionnement, les entreprises en aval transforment promptement la demande en commandes passées à leurs fournisseurs, réduisant ainsi considérablement leurs stocks. De fait, le ratio stock/ventes s'est inscrit dans une tendance baissière entre 1992 et 2012, avec un pic à 1.74 en avril 1995, avant de tomber à 1.32[11] en octobre 2011.

De nombreuses entreprises ont adapté leurs modèles économiques pour tirer le meilleur parti des possibilités offertes par l'Internet. Les entreprises ont tendance à privilégier le consommateur au détriment du produit, de façon à pouvoir répondre directement à ses besoins, ce qui a eu pour effet de diffuser très largement les stratégies d'attraction, notamment sur les marchés où les incertitudes liées à la demande sont fortes. D'autres pratiques de réduction des coûts ont pu être élaborées du fait d'une communication plus rapide entre les différents maillons de la chaîne d'approvisionnement. Par exemple, les grossistes peuvent traiter directement, dans le cadre d'un système d'expédition directe, l'envoi des produits aux consommateurs finaux. La commande émise par le détaillant est ainsi entièrement prise en charge par le grossiste, ce qui évite l'étape supplémentaire de l'acheminement du produit du grossiste au détaillant. Ce système réduit considérablement les coûts de distribution et accélère l'ensemble du processus.

Comme cela a souvent été dit, l'un des principaux avantages des pratiques susmentionnées est de permettre aux détaillants de proposer une offre bien plus large. Les détaillants traditionnels ne conservent un produit en rayon que s'il génère un certain chiffre d'affaires, ce qui signifie que de nombreux produits à faible volume de vente ont peu de chance d'être référencés dans les magasins, alors qu'ils seront disponibles en ligne. De même, certains marchés de niche qui ne sont plus commercialisés par les commerçants traditionnels peuvent désormais survivre grâce au plus large choix offert par l'Internet. Selon Brynjolfsson, Hu et Smith (2003), depuis l'arrivée de l'Internet, la variété est le principal facteur à l'origine des gains de bien-être pour le consommateur. Selon leurs estimations, l'essor des librairies en ligne a multiplié le bien-être des consommateurs par un facteur de 7 à 10, et une librairie en ligne (comme Amazon.com) propose en moyenne 57 fois plus de titres qu'une grande librairie indépendante traditionnelle.

Il convient toutefois de garder à l'esprit que malgré les avantages procurés par l'Internet sur le plan des coûts de distribution, plusieurs inconvénients subsistent. Par exemple, les frais de livraison sont désormais un élément prédominant des coûts commerciaux des entreprises. En d'autres termes, même les détaillants présents exclusivement sur l'Internet, qui sont réputés avoir réduit le plus leurs coûts de distribution, sont généralement confrontés à des coûts de livraison bien plus élevés que les points de vente traditionnels.

3.3 Une meilleure couverture géographique

Le commerce électronique est censé s'adresser aux consommateurs du monde entier, à condition d'avoir accès à un appareil connecté à l'Internet, y compris dans les lieux les plus reculés de la planète. Comme le dit la formule consacrée, tout est « à portée de clic », et le commerce électronique semble avoir fait tomber toutes les barrières géographiques. Ce phénomène s'explique non seulement par un meilleur réseau de communication, mais également par l'effondrement des coûts encourus par les entreprises qui sont désormais en mesure d'approvisionner des marchés géographiques plus vastes.

11 http://www.census.gov/mtis/. Données au 24/01/2013.

Aux premiers temps de l'Internet, certains experts ont prédit que le bouleversement déclenché par la toile réduirait l'importance de la part des villes dans le commerce. Forman, Goldfarb, et Greenstein (2005) ont tenté d'apporter une réponse économétrique à cette croyance répandue. Ils ont ainsi relevé un taux de consultation de l'Internet plus élevé en zone rurale que dans les villes, notamment en ce qui concerne les technologies d'entreprise. Confirmant ce constat, Kolko (1999) observe que les personnes vivant dans des villes plus isolées ont davantage tendance à s'y connecter que les habitants de zones métropolitaines. Ces observations nous enseignent que l'Internet aide les habitants des zones rurales à surmonter le problème de la distance qui les sépare des commerces traditionnels (Sinai et Waldfogel, 2004).

D'abondantes publications montrent néanmoins que les internautes (les consommateurs qui effectuent des achats et les entreprises qui réalisent des opérations en ligne) sont loin d'exploiter pleinement les potentialités presque illimitées de l'Internet. La distance géographique reste un aspect important, et Hortaçsu, Martínez-Jerez, et Douglas (2009) montrent comment et pourquoi les facteurs spatiaux continuent de jouer un rôle central. En analysant les données de deux grands sites d'enchères en ligne, ils démontrent que l'essentiel des transactions a lieu dans un contexte où l'acheteur et le vendeur résident tous deux dans la même zone métropolitaine. Les raisons de tels résultats sont probablement à rechercher du côté des facteurs culturels. De fait, les plus forts coefficients observés pour les données liées aux transactions effectuées dans la même ville concernent les articles de sport ou les billets de manifestations sportives. En revanche, les coefficients les plus bas correspondent à des biens plus rares et de plus grande valeur. Autre argument avancé par les auteurs, la proximité géographique de l'acheteur et du vendeur faciliterait le respect du contrat.

Après avoir analysé les données relatives aux produits numériques dont l'achat est exclusivement dicté par le goût des consommateurs (par exemple la musique, les jeux, les films), Blum et Goldfarb (2006) sont parvenus à la conclusion que les consommateurs américains ont tendance à fréquenter les sites des pays voisins, et que pour chaque augmentation de 1 % de la distance, la fréquentation du site recule de 3.25 %. Cette conclusion, selon les auteurs, ne peut s'expliquer uniquement par les coûts commerciaux. Par conséquent, l'explication la plus logique est que les goûts des consommateurs se caractérisent par une forte composante locale et que les populations de pays proches ont généralement des coûts similaires. Au final, pour les auteurs, plus la mondialisation tend à faire converger les goûts des consommateurs, plus l'effet de l'éloignement sur le commerce en ligne sera limité.

Lieber et Syverson (2012) ont par ailleurs analysé le lien entre le lieu où les consommateurs effectuent leurs achats en ligne et la localisation des distributeurs en ligne. Une hausse de 10 % des achats en ligne des consommateurs locaux entraîne une augmentation de 2 % du nombre de distributeurs en ligne dans leur périmètre géographique.

3.4 Asymétrie de l'information

L'achat en ligne crée des asymétries de l'information qui n'existent pas lorsque les consommateurs se rendent en personne dans un magasin pour effectuer leurs achats, après avoir inspecté et essayé le produit. Les asymétries de l'information sont également dues au fait que la valeur de la marque des détaillants en ligne est généralement moindre que celle des magasins traditionnels, essentiellement parce qu'il faut du temps pour bâtir une réputation et que l'activité de tous les détaillants électroniques est relativement récente.

Cet écart entre les informations détenues par l'acheteur et le vendeur peut provoquer des dysfonctionnements du marché, qui ensemble créent le problème de l'antisélection. Cette situation est souvent illustrée par l'exemple du « marché des voitures d'occasion »[12], autrement d'un marché sur lequel

[12] Il s'agit d'une référence évidente à l'article d'Akerlof « The market for lemons » (1970), qui a fait date, et aux abondantes publications qui s'en sont inspirées.

coexistent deux types de commerçants : ceux proposant des produits de bonne qualité et ceux proposant des produits de mauvaise qualité, et sur lequel le consommateur, à l'autre bout de la chaîne, tente de repérer les premiers. Dans un contexte d'information idéale, aucun dysfonctionnement n'aurait lieu. En revanche, en cas d'asymétrie de l'information, des coûts d'inefficience apparaissent, provoquant une hausse de la proportion de produits de mauvaise qualité sur le marché et une diminution du prix d'équilibre. Par conséquent, les vendeurs de produits de qualité ont tout intérêt à mettre en avant la qualité de leurs produits afin d'aider les consommateurs à les différencier de ceux des vendeurs de produits de piètre qualité.

Ces dernières années, les distributeurs en ligne ont mis au point des marqueurs spécifiques pour résoudre le problème des produits de mauvaise qualité. Par exemple, il est courant de voir les commerçants en ligne proposer des modalités intéressantes d'expédition et de retour des marchandises, pour prouver à quel point ils sont soucieux de la qualité de leur offre. Pourtant, un autre élément pourrait dissuader le consommateur d'effectuer ses achats en ligne plutôt que dans un magasin traditionnel, à savoir le laps de temps qui s'écoule entre le moment de l'achat et le moment de la consommation, délai qui peut s'avérer plus ou moins coûteux selon les préférences du consommateur et le type de bien acheté. L'expérience montre, en outre, que les consommateurs ont tendance à accorder une plus grande attention à la sécurité lorsqu'ils effectuent des transactions en ligne, ce qui renchérit encore le coût de l'asymétrie de l'information.

En règle générale, les vendeurs tentent de reproduire l'expérience d'achat que les consommateurs auraient dans un magasin traditionnel en leur fournissant des informations détaillées sur les biens ou services qu'ils commercialisent. Des études économétriques corroborent cette idée. Ainsi, Garicano et Kaplan (2002), dans leurs travaux sur la vente aux enchères de voitures d'occasion, n'ont pu établir que l'Internet augmentait les coûts d'antisélection. Ils ont avancé l'argument selon lequel le site d'enchères (Autodaq) a pris des mesures visant à réduire les asymétries d'information provoquées par les caractéristiques inobservables des véhicules. Le site présente ainsi des informations détaillées sur l'état et les options de chaque voiture ; les vendeurs ont en outre accès à un service de contrôle technique assuré par un tiers. Un mécanisme similaire a été utilisé sur le marché des cartes de base-ball de collection. Selon Jin et Kato (2008), les asymétries d'information sur ce marché spécifique ont été résolues à l'aide d'un système de certification par des tiers.

Au fil des années, d'autres méthodes ont vu le jour pour éliminer les incertitudes liées au commerce électronique. La plus efficace à ce jour semble consister à se bâtir une réputation. Sur le marché de la librairie en ligne, par exemple, les grands détaillants semblent jouir d'un avantage significatif par rapport aux acteurs plus modestes, moins connus. Les détaillants électroniques qui parviennent à se forger une image forte de qualité sont moins exposés à la concurrence sur les prix, car les consommateurs hostiles au risque sont disposés à payer plus cher dès lors que l'incertitude liée à la qualité du produit est presque nulle, comme en attestent Smith et Brynjolfsson (2001).

Le système fondé sur la réputation adopté par eBay a été abondamment étudié. Le mécanisme d'évaluation élaboré par ce site permet aux vendeurs de se forger une réputation. Resnick et al. (2006) ont mené une expérience de terrain très efficace pour mesurer l'incidence des évaluations sur le prix d'une enchère victorieuse sur eBay. Le même vendeur, proposant des produits homogènes, a utilisé deux comptes différents : le premier bénéficiait d'excellentes évaluations, le second a quant a lui été créé sous une nouvelle identité et n'a aucun historique d'évaluations. Comme on pouvait s'y attendre, le vendeur a reçu des offres supérieures (d'environ 8 %) sur le compte bien noté à celles postées sur le nouveau compte. D'autres études ont montré les risques liés au mécanisme d'évaluation. Cabral et Hortaçsu (2010) ont par exemple démontré les effets ambigus de ce dispositif : une seule évaluation négative attribuée à un vendeur sur eBay entraîne une chute du taux de ventes d'une ampleur autrement plus importante que l'effet positif produit par une évaluation positive.

L'Internet, a par ailleurs ouvert la voie à de nouveaux services spécifiques, qui n'ont pas d'équivalent dans le monde réel. Les blogs en ligne, les didacticiels vidéo, ainsi que les forums d'utilisateurs regorgent d'informations techniques extrêmement détaillées sur le produit/service recherché par le consommateur.

3.5 Conclusions sur l'incidence du commerce électronique sur la concurrence dans la vente de détail

Il est généralement admis que l'Internet a accéléré l'érosion des frontières géographiques, permis la création de nombreuses jeunes entreprises innovantes qui ont su tirer parti de la baisse des coûts commerciaux induite par la vente en ligne, et joué en outre un rôle majeur dans la mise au point de technologies qui améliorent la communication et le partage d'informations. Ensemble, ces facteurs ont une incidence considérable sur des aspects très variés de la concurrence dans la vente de détail.

Premièrement, les systèmes de distribution traditionnels sont désormais confrontés à une situation où les consommateurs peuvent faire jouer davantage la concurrence et comparer les prix. Ce phénomène pourrait inciter certains détaillants à réorienter leurs efforts commerciaux vers des stratégies qui leur permettent de rivaliser sur les prix plutôt que sur d'autres aspects de leur offre, tels que la qualité, l'étendue de leur gamme et les services accessoires.

Deuxièmement, les détaillants électroniques disposent d'un avantage significatif pour ce qui est de l'éventail de produits qu'ils peuvent proposer. Les magasins, en raison des coûts de distribution et de possession de stocks qu'ils supportent, ne peuvent proposer une telle variété de produits.

Troisièmement, les marchés géographiques sont aujourd'hui moins clairement confinés à leur dimension locale. Si cette évolution renforce la liberté de choix des consommateurs et peut permettre d'atteindre l'objectif politique d'intégration des marchés, elle peut également inciter les commerçants traditionnels à tenir moins compte des goûts et préférences de leur clientèle locale.

Il est vraisemblable que l'ensemble de ces facteurs profite aux consommateurs. Cependant, à tout le moins dans certains secteurs, fabricants et distributeurs se sont efforcés au fil des années de mettre en place des systèmes de distribution dans le cadre desquels ils peuvent offrir aux consommateurs des services qui leur permettent de mieux évaluer les produits qu'ils achètent et d'améliorer leur bien-être, ce qui au final profite à l'ensemble des acteurs. La diffusion de la vente en ligne fait peser plusieurs menaces sur ces systèmes et il convient de comprendre comment, en imposant certaines limites à la distribution en ligne, il est possible d'améliorer le bien-être à la fois des entreprises et des consommateurs.

En définitive, force est de constater que le commerce électronique a créé des risques concurrentiels propres à ce circuit de distribution. La disponibilité immédiate d'informations sur un produit, quel qu'il soit, et la transparence des prix peuvent faciliter la collusion. En outre, la nécessité pour les entreprises de se forger une solide réputation et les coûts irrécupérables très élevés qu'exige la création d'un commerce en ligne prospère génèrent des effets de réseau, qui conduisent à leur tour à une forte concentration et peuvent favoriser la formation d'une position dominante et d'un pouvoir de marché.

4. Restrictions verticales les plus fréquemment rencontrées dans le commerce électronique

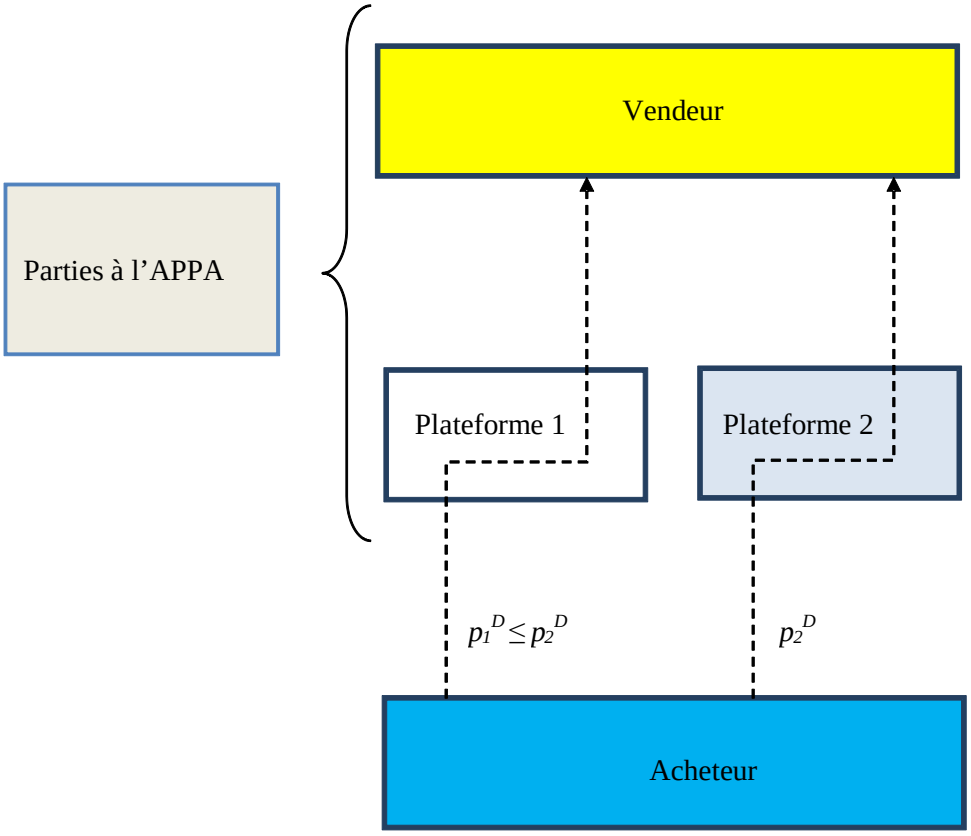
Cette section examine les restrictions verticales les plus fréquemment imposées aux détaillants en ligne et évalue dans quelle mesure les justifications de gains d'efficience et les craintes de comportements anticoncurrentiels décrites dans la section 2 peuvent s'appliquer à ces pratiques, compte tenu également de l'incidence du commerce électronique sur la concurrence décrite dans la section 3. Par souci de clarté, une distinction y est faite entre les restrictions tarifaires et les restrictions non tarifaires.

4.1 Restrictions verticales tarifaires dans le commerce électronique

4.1.1 Accord de parité inter-plateformes

Un type d'accord tarifaire apparemment de plus en plus répandu, notamment dans le secteur de la vente en ligne, est intégré aux dispositions contractuelles conclues entre un vendeur et une plateforme de commerce électronique. En vertu de cet accord, le vendeur s'engage à pratiquer sur ladite plateforme un prix qui n'est pas supérieur à celui appliqué sur d'autres plateformes, y compris par les nouveaux entrants. Ces accords n'ont pas fait l'objet d'une étude formelle dans les publications économiques. Plusieurs réflexions préliminaires sur leurs effets anticoncurrentiels sont rassemblées dans un récent rapport préparé par Lear pour l'OFT, l'autorité de la concurrence britannique (Lear, 2012). Pour reprendre les termes de cette analyse, nous qualifierons ces dispositions d'« accords de parité inter-plateformes » (APPA). Le graphique 1 présente de manière schématique un APPA conclu entre un vendeur et le propriétaire de la plateforme 1. Aux termes de cet accord, les deux parties conviennent que le prix appliqué par le vendeur à l'acheteur lorsque l'achat s'effectue sur la plateforme 1 (p_1^D) ne sera pas supérieur au prix que le vendeur appliquerait au même acheteur pour le même produit si la transaction avait lieu sur toute autre plateforme concurrente, par exemple la plateforme 2 (p_2^D).

Figure 1. Graphique 1 : Accord de parité inter-plateformes



Cet accord est considéré comme l'une des formes que peut prendre la clause de la nation la plus favorisée (NPF).[13] Ce type de clause figure normalement dans les contrats à long terme conclus entre deux entreprises pour la fourniture de biens intermédiaires ou de matières premières. En vertu de ces contrats, le fournisseur s'engage à appliquer à l'acheteur les meilleures des conditions tarifaires pratiquées quels que soient les acheteurs. Si la clause NPF et l'APPA présentent certaines similitudes, il convient cependant de faire une distinction entre les deux et il serait donc erroné de tirer des publications consacrées à la clause NPF des conséquences précises concernant les politiques à mener.[14] La différence essentielle entre les deux types d'accord est qu'aux termes de la clause NPF, les parties limitent le prix de leurs propres transactions, alors qu'avec un APPA, elles s'accordent sur une obligation tarifaire qui ne concerne pas leurs transactions mais plutôt celles que l'une d'entre elles (le vendeur) conclura avec un tiers qui n'est pas partie à l'accord (l'acheteur). En ce sens, l'APPA s'apparente à un prix de revente imposé. Néanmoins, il s'en distingue par le fait que l'accord ne fixe pas de prix ni de limite au prix appliqué à l'acheteur, de même que le vendeur demeure libre de fixer son prix comme il l'entend, sous réserve que le même article ne soit pas proposé sur d'autres plateformes à un prix plus intéressant.

La principale justification, sur le plan de l'efficience, qui serait applicable aux APPA tient à l'objectif du propriétaire de la plateforme de protéger l'investissement qu'il a consenti pour la développer, notamment si le succès de ladite plateforme repose sur différents services accessoires susceptibles de réduire l'asymétrie de l'information que l'on observe dans la vente en ligne. Supposons qu'une plateforme en ligne propose (gratuitement) plusieurs services d'avant-vente et une grande variété de produits. Si les acheteurs se servent de cette plateforme de qualité dont les coûts sont élevés pour s'informer avant d'effectuer leurs achats sur une plate-forme de moindre qualité/à moindres coûts, la première des deux ne pourra pas rentabiliser ses investissements. De même, si la plateforme a investi pour se forger au fil du temps une solide réputation grâce aux services qu'elle propose (par exemple en choisissant de référencer tel ou tel vendeur, en notant la fiabilité des vendeurs ou en proposant des évaluations de qualité), elle n'aura certainement aucune envie de voir les détaillants en bénéficier du fait qu'ils auront attiré des acheteurs grâce à elle et de déplorer que ces derniers réalisent ensuite leurs achats sur la plateforme de moindre qualité/à moindre coût.

Cet effet peut être particulièrement notable pour les plateformes de commerce car elles présentent toutes les caractéristiques des marchés bifaces.[15] De fait, les plateformes doivent attirer simultanément les

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13 Voir par exemple la présentation de M. Nelson Jung, de l'OFT, lors de l'atelier organisé par le ministère de la Justice américain et le FTC à Washington le 10 septembre 2012, accessible à l'adresse http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CD8QFjAC&url=http%3A%2F%2Fwww.justice.gov%2Fatr%2Fpublic%2Fworkshops%2Fmfn%2Fpresentations%2F286773.pdf&ei=QvIPUaPCIcX5sgbjpoHwDQ&usg=AFQjCNHV3Ue0gg0c9LEQy782IcWxHxEX6A&bvm=bv.41867550,d.Yms&cad=rja.

14 Par exemple, la clause NPF est considérée comme un moyen efficace pour résoudre le problème posé par un vendeur de biens durables en situation de monopole, connu sous le nom de « conjecture de Coase » (voir Butz, 1990). Il s'agit de créer des mécanismes d'indexation des prix capables d'atténuer les problèmes découlant de contrats incomplets (Goldberg et Erickson 1987) ou de signaler certaines caractéristiques inobservables de la qualité du produit du vendeur (Levy 2004). En outre, il a été suggéré que la clause NPF pourrait être adoptée afin d'améliorer la position de négociation du vendeur (Neilson et Winter 1993 ; Cooper et Fries 1991). Ces explications ne semblent pas applicables aux APPA. En effet, dans le cadre d'un APPA, le prix stipulé dans le contrat contenant la clause NPF a valeur d'engagement pour les prix fixés lors des transactions suivantes, alors que lorsque les parties signent un APPA, elles ne fixent pas le prix qui est limité par l'accord.

15 Pour une définition des marchés bifaces et de leurs implications économiques, voir Rochet et Tirole (2003) ; Rochet et Tirole (2006) ; Armstrong (2006). Rysman (2009) a récemment consacré une étude à l'économie de ces marchés.

vendeurs et les acheteurs. En conséquence, la perte d'une partie des acheteurs peut avoir une incidence considérable sur la viabilité de la plateforme, car elle peut en diminuer l'attractivité pour les vendeurs, ce qui réduit la valeur de la plateforme aux yeux des acheteurs, et ainsi de suite. Si l'APPA impose une contrainte sur le prix appliqué par le vendeur à l'acheteur et que par conséquent la plateforme ne règle ni ne perçoit le prix prévu par l'accord, il existe pour elle une externalité potentielle. Le prix payé par un acheteur à un vendeur lorsqu'il acquiert un bien ou un service par l'intermédiaire de la plateforme influe sur la volonté des acheteurs de s'approvisionner auprès de cette plateforme et, par conséquent, sur son attractivité. Dès lors que les décisions tarifaires du vendeur induisent des effets adverses (externes) qui sont assumés par la plateforme, celle-ci tentera de trouver des moyens de les influencer, et pourra donc demander aux vendeurs d'accepter de conclure un APPA.

L'APPA peut également fausser la concurrence, en particulier sur le marché où les plateformes sont en rivalité. Premièrement, il peut en verrouiller l'entrée. En effet, une nouvelle plateforme peut décider de prendre pied sur le marché en appliquant aux vendeurs une commission de transaction plus faible, ce qui leur permettrait de baisser leurs prix et d'attirer à elle de nouveaux acheteurs. Si en revanche la plateforme déjà en place a conclu avec ses vendeurs un APPA qui couvre également les nouveaux entrants, ces vendeurs ne pourront pas proposer de prix plus attractifs sur la nouvelle plateforme, ce qui réduit la capacité de cette dernière à attirer des acheteurs et des vendeurs, et par conséquent, peut la dissuader de s'implanter sur le marché.

Deuxièmement, un APPA peut atténuer la concurrence entre les plateformes et augmenter ainsi les commissions payées par les vendeurs, et, par voie de conséquence, les prix appliqués par les vendeurs aux acheteurs. De fait, comme on l'a vu, les plateformes se livrent également concurrence sur le terrain des commissions qu'elles appliquent aux vendeurs. Si la commission versée par un vendeur pour l'utilisation de la plateforme 2 est moins élevée, il réduira ses prix en conséquence de la baisse de ses coûts marginaux. En revanche, s'il n'a pas la possibilité d'appliquer la moindre différence de prix entre les plateformes 1 et 2, il répartira la baisse de prix entre ces deux plateformes. Par conséquent, la plate-forme 2 ne bénéficie pas pleinement de cette baisse de prix, alors que la plateforme 1 profite de l'initiative tarifaire prise par la plateforme 2. En conséquence, ni l'une ni l'autre n'ayant véritablement intérêt à abaisser la commission appliquée au vendeur, elles sont toutes deux, du même coup, davantage incitées à l'augmenter. Dès lors, un équilibre moins concurrentiel s'instaurera sur le marché sur lequel les deux plateformes évoluent.

Pour finir, l'APPA peut faciliter la collusion entre les plateformes. Si les plates-formes s'entendent sur les commissions à appliquer aux vendeurs, l'avantage qu'il y aurait à s'écarter de l'accord en diminuant la commission payée par les vendeurs, serait fortement limité par les accords de parité, car une telle réduction serait également répercutée sur les acheteurs qui utilisent d'autres plateformes. En outre, un APPA améliore la capacité des plateformes à se surveiller les unes les autres, car, dès lors que l'une d'entre elles s'écarterait de l'accord, les vendeurs se plaindraient très probablement de l'augmentation de la commission qui leur serait appliquée sur d'autres plateformes, s'ils n'ont pas la possibilité de différencier leurs prix d'une plateforme à l'autre.

4.1.2 Autres restrictions tarifaires

Les accords verticaux entre les fournisseurs et les distributeurs en ligne peuvent prévoir d'autres restrictions sur la politique tarifaire de ces derniers. Lorsque ces restrictions prennent la forme d'un prix de vente imposé, leurs effets concurrentiels peuvent être quantifiés, comme dans le commerce traditionnel.

On considère généralement que les prix de vente maximum ou recommandés soulèvent peu d'inquiétudes sur le plan de la concurrence. En principe, ils pourraient servir de références susceptibles de faciliter des pratiques de coordination entre les détaillants. Néanmoins, dans la mesure où elles n'empêchent pas les détaillants de baisser leurs prix, ni ne semblent fournir aux participants de nouveaux

moyens de surveiller leurs politiques tarifaires réciproques, ces restrictions tarifaires ne devraient pas contribuer à une plus grande stabilité des pratiques collusoires. D'un autre côté, les prix maximum de revente imposés peuvent contribuer à résoudre le problème de la double marge, tandis que les prix de revente recommandés peuvent aider le fournisseur à diffuser des informations commerciales essentielles auprès de ses revendeurs. Il n'est pas établi de manière irréfutable que des accords comportant des clauses de prix de revente sont fréquents dans le secteur du commerce électronique.

Une autre restriction, plus souvent imposée dans la vente en ligne, oblige le détaillant en ligne qui exploite également un point de vente physique à ne pas différencier ses prix entre ses deux circuits de distribution. Toutefois, cette condition fait généralement partie des restrictions imposées dans le cadre d'un système de distribution sélective et sera à ce titre examinée ci-après.

4.2 Restrictions verticales non tarifaires dans le commerce électronique

4.2.1 Distribution exclusive

La volonté de conserver les territoires ou les groupes de consommateurs qui leur ont été attribués en exclusivité peut conduire certains distributeurs à effectuer des investissements dans les services accessoires qui seraient sans cela réalisés à un niveau sous-optimal. Dans l'UE, cet effet pro-concurrentiel est mis en balance avec le risque que chaque distributeur se voient attribuer un pouvoir de marché sur les territoires ou clients qui lui sont alloués. Les accords de distribution exclusive sont dont généralement acceptés si la restriction ne concerne que les *ventes actives* et par conséquent n'interdit pas aux distributeurs de réaliser des *ventes passives* en dehors des territoires et de la clientèle qui ont été attribués.

L'une des principales caractéristiques du commerce électronique est qu'au moins une partie de la transaction effectuée en ligne (la visite de la boutique, la collecte d'informations, le contrôle du produit, etc.) est dématérialisée, de sorte que la dimension géographique de l'activité de vente de détail s'en trouve totalement bouleversée. L'élargissement de la couverture géographique qui en résulte semble être l'un des avantages les plus importants de l'Internet, en raison de l'accroissement considérable des possibilités ainsi offertes aux consommateurs. Pourtant, dans la mesure où un système de distribution exclusive est indispensable pour s'assurer que les distributeurs proposent aux acheteurs les services recherchés par ces derniers, le commerce électronique pourrait menacer le bon fonctionnement de ce système. Le nouvel équilibre qui reste à trouver nécessite d'une part de permettre aux fournisseurs et aux détaillants d'adapter les contraintes d'exclusivité au cadre de l'environnement numérique, et, d'autre part, de préserver la liberté des consommateurs d'effectuer leurs achats où ils le souhaitent. Par conséquent, la distinction entre la vente *active* et la vente *passive* doit être réexaminée et rendue applicable au commerce électronique. Dans l'UE, les pratiques suivantes sont considérées comme des restrictions caractérisées à la vente passive en ligne :

- le cloisonnement du marché : il s'agit d' accords empêchant les consommateurs situés dans un autre territoire de consulter un site Internet ou réorientant les consommateurs vers le site du détaillant en ligne auquel le territoire exclusif en question a été attribué, ou imposant au détaillant de mettre fin à une transaction en ligne dès lors que les données de la carte bancaire du client indiquent qu'il se trouve en dehors de son territoire exclusif ;

- les quotas de vente : il s'agit d'accords limitant la part des ventes en ligne par rapport aux ventes hors ligne ;

- le régime de double tarification : il s'agit d'accords qui fixent des prix de gros plus élevés pour les biens destinés à la vente en ligne, par rapport à ceux des biens destinés à la vente hors ligne.

Ce régime de double tarification peut parfois s'appuyer sur des justifications objectives. Par exemple, le fabricant peut devoir supporter des coûts bien plus élevés pour les produits vendus en ligne par rapport à ceux vendus hors ligne, parce que les détaillants hors ligne proposent également des services après-vente, contrairement aux détaillants en ligne, ce qui conduit à un nombre plus élevé de réclamations et de demandes de au titre de la garantie.

Les accords verticaux relevant d'un système de distribution exclusive peuvent également comporter des restrictions sur le type d'opérations publicitaires que le détaillant en ligne est autorisé à réaliser. Dans ce cas également, le critère susceptible d'être adopté pour distinguer le caractère licite ou non de la restriction consiste à déterminer si une forme de publicité peut être considérée comme une forme de vente active ou passive. En règle générale, la publicité ciblée, notamment les bannières affichées sur les sites Internet de tiers en fonction du territoire attribué ou les publicités présentées aux internautes résidant dans une zone particulière, est considérée comme une forme de vente active. En revanche, lorsque les publicités ne ciblent pas des clients ou des territoires en particulier et que le détaillant réalise des investissements publicitaires qui seraient financièrement intéressants même s'ils ne devaient pas toucher les clients de territoires exclusifs d'autres distributeurs, une telle initiative est considérée comme une forme de vente passive. Pour finir, les fabricants peuvent restreindre l'utilisation des marques commerciales et d'autres droits de propriété intellectuelle pour la publicité en ligne. Par exemple, un fabricant peut restreindre l'utilisation de sa marque en tant que mot-clé dans le cadre d'un référencement payant sur les moteurs de recherche. Toutefois, une interdiction totale de l'utilisation de la marque sous forme de mot-clé pourrait être assimilée à une interdiction de la vente passive.

4.2.2 Distribution sélective et interdiction générale de la vente en ligne

La restriction la plus courante imposée par le fabricant aux détaillants consiste à limiter l'étendue de leur offre en ligne lorsque la vente s'effectue par le biais d'un réseau de distribution sélective. Ce système de distribution est un outil efficace utilisé par les fabricants pour se forger une image de marque, notamment pour les produits de luxe, d'expérience et de confiance.

Une bonne image de marque est une caractéristique inhérente des produits de luxe. Les fournisseurs doivent amener les acheteurs potentiels à associer la bonne image à leurs produits, et donc veiller à ce que le point de vente propose un environnement d'achat à la hauteur de l'image et de la réputation du produit. Les investissements consentis par chaque point de vente pour promouvoir sa propre image, ainsi que celle des produits qui y sont vendus, profitent également aux autres points de vente proposant les mêmes produits. De même, si un détaillant ne respecte pas les normes de qualité convenues, l'incidence négative sur l'appréciation des acheteurs rejaillira sur les autres détaillants proposant la même marque. Pour préserver la valeur de la marque, les fournisseurs doivent également avoir la possibilité de ne sélectionner que les distributeurs présentant les qualités requises et d'imposer des restrictions grâce auxquelles les détaillants restent incités à entreprendre les investissements nécessaires pour lancer des actions promotionnelles et proposer des services de soutien à la vente. En outre, le prix facturé pour un produit de luxe est souvent une composante essentielle de son image de marque. Par conséquent, les fournisseurs ont tout intérêt à éviter que leurs produits ne soient vendus à un prix relativement bas qui menacerait leur image d'exclusivité et de distinction.

Les produits d'expérience sont ceux dont les consommateurs ne peuvent constater la qualité et la valeur qu'au moment de leur utilisation. Les produits de santé et de beauté sont fréquemment cités comme exemples de produits d'expérience, mais cette catégorie s'étend également à d'autres biens, tels que les produits alimentaires et les livres. Lorsque même l'acte de consommation d'un bien n'apporte pas suffisamment d'informations pour en apprécier la valeur, on parle de produit de confiance. Dans ce cas, les consommateurs doivent s'appuyer sur l'avis d'experts. Parmi les exemples de produits de confiance, citons les services professionnels, la réparation automobile ou encore les compléments alimentaires.

La vente de produits d'expérience et de confiance suppose que les consommateurs soient en mesure d'acquérir les informations nécessaires pour prendre leurs décisions et est par conséquent grandement facilitée par l'offre de services complémentaires qui permettent aux acheteurs d'essayer le bien ou d'obtenir des recommandations d'experts avant de se décider à l'acquérir. Là encore, dans un système de distribution sélective, les distributeurs agréés ont tout intérêt à proposer ces services.

Parfois, les gains d'efficience potentiels procurés par la distribution sélective doivent être mis en balance avec certains risques pour la concurrence. Le principal risque inhérent à un système de distribution sélective est qu'il peut avoir pour effet de réduire la concurrence intramarque. Toutefois, ce risque, comme nous l'avons déjà dit, est mineur si la concurrence intermarques est suffisamment forte. Aussi, lorsque l'accord vertical semble peu à même d'influencer la concurrence en amont entre les différentes marques, on considère généralement que ses avantages sont plus nombreux que les risques pour la concurrence.

Un tout autre problème concurrentiel se pose lorsqu'un système de distribution sélective risque d'exclure certains types de distributeurs, notamment en cas d'effets cumulés des réseaux parallèles de distribution sélective sur un même marché. C'est probablement là le principal problème qui se pose concernant le commerce électronique.

Comme on l'a vu à la section 3, la vente en ligne présente certaines caractéristiques qui peuvent être contraires aux objectifs d'une structure de distribution sélective. En effet, le commerce électronique tend à intensifier la concurrence sur les prix et pose certains problèmes d'asymétrie de l'information qui peuvent aggraver les difficultés que la distribution sélective est censée surmonter. Dès lors, pour certains produits, l'Internet peut se révéler un marché inadapté, ce qui peut en principe expliquer la volonté d'un fournisseur d'interdire totalement la vente en ligne. Comme on le verra, cette restriction suscite dans l'UE des réactions très négatives. L'interdiction totale de la vente en ligne dans un système de distribution sélective est considérée comme une restriction caractérisée, qui équivaut à une infraction par objet de l'article 101, paragraphe 1, TFUE, sauf si elle est justifiée par des « raisons objectives ». Une telle position peut paraître trop stricte. En effet, on pourrait se demander en quoi la décision de vendre certains produits (par exemple de la pâte dentifrice) par le biais d'un circuit de distribution unique (comme les pharmacies), à l'exclusion de tout autre (comme les supermarchés) diffère réellement de la décision d'interdire la vente des mêmes produits sur l'Internet. Étant donné qu'un système de distribution qui exclut les supermarchés n'est en règle générale pas censé restreindre indument la concurrence, on peut se demander pourquoi ce postulat général serait valable lorsque le circuit de distribution exclu est celui de la vente en ligne.

Compte tenu de la réaction négative suscitée par une interdiction pure et simple de la vente en ligne, les accords de distribution sélective imposent généralement des limitations moins sévères à la vente.

En ce qui concerne les produits de luxe, les restrictions suivantes sont les plus courantes : (a) seul un détaillant disposant d'un point de vente physique agréé peut également proposer la vente en ligne ; (b) le prix appliqué sur l'Internet doit être identique à celui appliqué dans le magasin physique ; (c) les restrictions quantitatives sur la vente en ligne qui fixent une part maximale des ventes en ligne par rapport aux ventes totales du détaillant. Ces restrictions s'attaquent directement à la question du parasitisme mais également au problème de la motivation du détaillant, dans la mesure où, lorsqu'il possède à la fois un point de vente physique et un magasin virtuel (comme dans le cas de la restriction *a*), il internalisera à la fois les coûts de la vente au détail et les bénéfices de la vente en ligne. La clause de tarification uniforme (dans le cas de la restriction *b*) est essentielle pour éviter certains arbitrages et pour veiller à ce que les rabais consentis ne portent pas atteinte à l'image de marque. Néanmoins les différentes motivations ne peuvent être harmonisées que si la limitation de la vente en ligne est mise en œuvre (comme dans le cas de la restriction *c*). Autrement dit, il est primordial d'éviter les détaillants « tricheurs » qui, s'ils possèdent effectivement un point de vente physique qui leur permet de satisfaire aux conditions imposées par le réseau de distribution sélective, réalisent l'essentiel de leurs ventes en ligne pour réduire leurs coûts de

vente au détail. Néanmoins, d'après les Lignes directrices de la CE, le fournisseur ne peut contraindre le distributeur à limiter la part de ses ventes réalisées en ligne ; il peut en revanche exiger qu'un volume absolu de ventes soit réalisé hors ligne.

S'agissant des produits d'expérience et de confiance, d'autres restrictions peuvent cibler directement la nécessité pour les consommateurs d'accéder aux informations indispensables pour apprécier la valeur du produit et pour s'assurer qu'ils s'apprêtent à acquérir le produit qui correspond le mieux à leurs besoins. Par exemple, la vente en ligne de produits de santé peut être limitée aux boutiques en ligne qui donnent aux consommateurs la possibilité de consulter un personnel médical spécialisé avant d'effectuer leurs achats.

Comme on l'a vu à la section 3, les détaillants en ligne ont élaboré leurs propres méthodes pour éliminer l'asymétrie de l'information présente dans la vente en ligne, de façon à permettre aux consommateurs d'essayer le produit avant de l'acheter ou d'obtenir l'avis d'autres consommateurs ou d'experts (Weathers, Sharma et Wood 2007). Ces méthodes sont particulièrement efficaces pour les produits disponibles dans un format électronique spécifique. Par exemple, sur l'Internet, les consommateurs peuvent feuilleter les livres et écouter des extraits de chanson avant de décider de les acheter. Ils peuvent également télécharger un extrait de livre électronique sur leur liseuse avant de se décider. Si ces systèmes, qui mettent à la disposition des clients potentiels les informations qu'ils recherchent, fonctionnent correctement, les éventuelles restrictions à leur vente en ligne se justifient moins.

5. Jurisprudence

Cette section présente un résumé des affaires les plus pertinentes s'agissant des restrictions verticales, dans le contexte actuel du commerce électronique, dans différents pays ou territoires. La plupart d'entre elles étant relativement récentes, on peut aisément prédire que la jurisprudence ne manquera pas de s'enrichir, même si certaines autorités ont pris des mesures pour améliorer la transparence et la prévisibilité des décisions de justice qui devraient, à leur tour, réduire le nombre des jugements rendus sur cette question.

Les affaires ont été regroupées en deux sous-catégories. La première propose deux exemples d'APPA correspondant à un type de restrictions sur les prix qui semble prédominer dans le commerce électronique. La deuxième comprend plusieurs jugements et décisions d'autorités relatives à des systèmes de distribution sélective limitant ou interdisant l'usage de l'Internet en tant que circuit de distribution. Nous verrons que les tribunaux et les autorités de la concurrence appliquent à travers le monde des approches différentes et qu'il est parfois même possible de relever des divergences entre plusieurs décisions rendues dans un même pays. L'une des spécificités de cette partie de la jurisprudence est en outre de porter essentiellement sur les produits de consommation haut de gamme. Il ressort de l'analyse des différentes affaires que ce sont les producteurs de produits de luxe, d'expérience et de confiance qui ont rencontré le plus de difficultés depuis l'avènement de l'ère numérique.

5.1 Accord de parité inter-plateformes

Les APPA sont au cœur de deux récentes affaires relevant du droit de la concurrence. La première concerne la vente de livres électroniques et s'est en partie soldée par deux procédures de règlement. La seconde porte sur le marché des agences de voyage en ligne et est toujours en instance. Ces deux affaires sont résumées ci-après.

- **Affaires relatives aux livres électroniques**[16]

  Les affaires relatives aux livres électroniques comptent probablement parmi les plus intéressantes du point de vue de l'action des autorités de la concurrence applicable aux restrictions verticales dans la vente en ligne. Elles ont très largement été médiatisées en raison de la grande renommée des parties impliquées, à savoir iBookstore, la boutique de livres électroniques d'Apple, et cinq grands éditeurs internationaux (le français Hachette, les britanniques HarperCollins Publishers et Penguin Group, l'américain Simon & Schuster, et l'allemand Macmillan).

  L'affaire fait suite à des enquêtes parallèles menées par la Commission européenne et le ministère de la Justice des États-Unis.

  En mars 2011, la Commission européenne a effectué des contrôles inopinés dans les locaux de plusieurs grands éditeurs, dans plusieurs États membres. Ces contrôles ont été suivis de procédures formelles sur les pratiques tarifaires applicables aux livres électroniques, ouvertes sur la foi de soupçons que ces éditeurs, avec l'aide d'Apple, avaient conclu des accords illicites qui avaient pour objet ou pour effet de restreindre la concurrence au sein de l'UE.

  Aux États-Unis, le ministère de la Justice a accusé cinq des principaux éditeurs internationaux (Hachette Book Group, HarperCollins Publishers, Simon & Schuster, Macmillan et Penguin Group) et Apple de s'être entendus sur les prix des livres électroniques. Cette entende présumée aurait eu pour but de limiter la concurrence intramarque entre les détaillants de livres électroniques, dans le but d'augmenter les prix. De telles pratiques ont été considérées comme contraires à l'article 1 du Sherman Act.

  Avant l'arrivée d'Apple sur le marché des livres électroniques, les éditeurs avaient pour habitude de conclure des contrats de gros avec leurs détaillants. Les éditeurs, aux termes desdits contrats, appliquaient un prix de gros pour chaque livre électronique, et les détaillants conservaient toute liberté pour fixer le prix au détail. Dans certains cas, les détaillants fixaient un prix de revente inférieur au prix de gros, dans le cadre d'une stratégie commerciale visant à stimuler la vente de produits connexes (par exemple la promotion par Amazon de Kindle, sa liseuse électronique). La crainte des éditeurs était que de telles remises ne portent atteinte à leur modèle économique traditionnel. Selon certaines allégations, ils se sont alors associés à Apple pour limiter la concurrence sur les prix de détail des livres électroniques. D'après le ministère de la Justice américain, Apple et les éditeurs se sont entendus pour modifier le modèle économique régissant la relation entre les éditeurs et les détaillants.

  De fait, peu après l'arrivée d'Apple sur le marché, les éditeurs ont cherché à renégocier leurs accords de distribution, pour imposer des contrats d'agence à l'ensemble de leurs détaillants (par exemple Amazon et Barnes & Noble). Ce faisant, ils ont réussi à limiter la faculté des détaillants à baisser les prix et à offrir des rabais sur leurs catalogues de titres, au bénéfice de l'iBookstore d'Apple.

  Apple a négocié un tout autre type de contrat d'agence avec les éditeurs. Comme dans les autres cas, les éditeurs contrôlaient directement les prix de détail sur l'iBookstore, et Apple percevait sa commission de 30 % en plus du chiffre d'affaires généré par la vente des livres. En outre, les éditeurs ont conclu avec Apple ce qu'ils ont appelé la clause de la nation la plus favorisée, (NPF) consistant à s'assurer qu'aucun autre détaillant ne vendrait un titre de livre électronique à un prix inférieur à celui pratiqué par Apple. Cette clause constitue en réalité un accord de parité inter-plateformes (APPA).

[16] United States / Apple Inc., et al., Civil Action n. 12-cv-2826 (DLC) (SDNY) ; Affaire COMP/C-2/39.847

La Commission européenne et le ministère de la Justice américain ont tous deux estimé que ces pratiques étaient de nature à enfreindre le droit de la concurrence, puisqu'elles avaient pour objet ou pour effet d'atténuer la concurrence.

À ce jour, Hachette, HarperCollins et Simon & Schuster sont parvenus à un règlement avec le ministère de la Justice américain. Le projet de règlement impose aux éditeurs de résilier leurs contrats avec Apple et d'adhérer à un programme de conformité stricte au droit de la concurrence leur interdisant toute nouvelle entente ou échange d'informations sensibles avec leurs concurrents pendant cinq ans. Les trois éditeurs n'ont pas interdiction de conclure des contrats d'agence. En revanche, de tels contrats ne devront comporter aucune contrainte sur la faculté des détaillants à fixer leurs prix, ni aucun APPA. Aucun règlement n'a pour l'instant été conclu avec Macmillan, Penguin et Apple.

De même, dans l'UE, la Commission européenne, par une décision de décembre 2012, a accepté les engagements juridiquement contraignants proposés par Apple et quatre des cinq éditeurs concernés (à savoir Simon & Schuster, Harper Collins, Hachette et Macmillan), qui prévoient la résiliation des contrats d'agence existants comportant des restrictions tarifaires. À l'instar des engagements contractés vis-à-vis du ministère de la Justice américain, les éditeurs ont l'interdiction de conclure pendant cinq ans tout accord comportant un APPA. Le groupe Penguin n'a soumis aucune proposition d'engagements.

- **Agences de voyage en ligne**

En 2010, l'autorité de la concurrence britannique, l'Office of Fair Trading (OFT), a reçu une plainte d'une petite agence de voyages en ligne, qui se voyait interdire par certaines chaînes hôtelières la possibilité de pratiquer des rabais sur ses tarifs. L'OFT a donc ouvert une enquête dans le secteur de la réservation en ligne d'hôtels. Cette enquête sectorielle avait pour principal objectif de mettre en lumière les relations entre les hôtels et les agences de voyage en ligne.

En 2012, l'OFT a émis une communication des griefs à l'encontre de Booking.com, Expedia et Intercontinental Hotels Group (IHG). Les principales sociétés de réservation en ligne auraient conclu des accords avec IHG afin de limiter la faculté d'autres agences à proposer des rabais sur les séjours hôteliers.

À ce jour, les sociétés suivantes sont concernées par la procédure : Booking.com, leader mondial de la réservation en ligne d'hôtels (et Priceline.com, sa société mère américaine, active sur le marché de la vente de voyages en ligne) ; Expedia, un important site proposant des services de réservation de voyages ; et Intercontinental Hotels Group (IHG), leader mondial des établissements hôteliers, propriétaire de grandes chaînes telles que Crown Plaza, Holiday Inn et InterContinental.

Les trois sociétés sont accusées d'avoir enfreint le droit de la concurrence au moyen de pratiques illicites mises en œuvre d'octobre 2007 à septembre 2010. Les présumés accords (qui peuvent relever de la définition d'un APPA) sont réputés anticoncurrentiels car ils avaient pour objectif de limiter la concurrence sur les prix entre les agences de voyage en ligne. Par ailleurs, d'après les informations qui lui ont été communiquées, l'OFT redoute que lesdits accords ne renforcent les barrières à l'entrée et au développement des agences de voyage en ligne qui chercheraient à accroître leurs parts de marché en proposant des rabais aux consommateurs.[17]

Bien que cette affaire concerne plusieurs grands acteurs du marché des agences de voyage en ligne, il reste encore à savoir si la théorie du préjudice envisagée par l'OFT implique que les

[17] Au moment de la rédaction de la présente note, l'affaire est pendante et l'OFT prévoit de la clore avant juin 2014.

parties disposent d'un pouvoir de marché significatif. L'OFT, dans un communiqué de presse publié en juillet 2012[18], indique « avoir limité le champ de son enquête à un petit nombre de grandes sociétés, afin de parvenir à un résultat prompt et efficace. Néanmoins, l'enquête aura probablement de plus larges implications, dans la mesure où les pratiques alléguées sont potentiellement très répandues dans le secteur ». Une telle affirmation laisse entendre que cette pratique peut être considérée comme illicite, même lorsqu'elle est adoptée par des acteurs plus modestes.

Les affaires relatives aux livres électroniques et aux agences de voyage en ligne concernent un type d'accord sur les prix relativement nouveau et qui n'a pas été étudié de manière approfondie dans les publications économiques. Par ailleurs, comme l'a souligné l'OFT, cette pratique est susceptible d'affecter de nombreuses ventes en ligne, chaque fois que l'Internet offre la possibilité de développer des plateformes qui servent d'intermédiaires.

Selon les rares informations actuellement disponibles, il semble que les autorités de la concurrence s'inquiètent principalement du risque que les APPA puissent limiter les possibilités de concurrence sur les prix et permettre à la fois aux propriétaires de plateformes et aux vendeurs de coordonner leurs politiques tarifaires. On notera avec intérêt que dans l'affaire relative aux livres électroniques, la politique des vendeurs semble avoir été adoptée en réaction à la menace supposée que faisait peser le nouveau format électronique sur les formes traditionnelles de commerce. De fait, cette pratique n'avait aucune incidence sur la vente en ligne des livres traditionnels, et ne concernait que les livres électroniques. Une diffusion rapide des livres électroniques, moyennant, notamment, un rabais significatif, pourrait être de nature à exercer une pression sur le prix des livres traditionnels, mais également à fragiliser les librairies traditionnelles, ce qui rendrait plus difficile encore la capacité des éditeurs à fixer des prix de gros pour les livres traditionnels.

Dans l'affaire relative aux agences de voyage en ligne, la concurrence entre le nouveau format et les formes traditionnelles de vente ne semble pas poser de problème. De fait, la vente traditionnelle hors ligne est d'ores et déjà largement supplantée par les services en ligne et les hôtels ne tirent en apparence aucun avantage à défendre l'ancien système. Dans cette affaire, il semble plus plausible que l'APPA visait à servir les intérêts des propriétaires de plateformes soit en facilitant la coordination des prix entre les intermédiaires, soit en créant des barrières à l'entrée. Bien entendu, l'accord sur les prix pourrait également avoir été conclu à des fins d'efficience puisqu'il cherche à protéger les investissements spécifiques réalisés par les plateformes.

Les deux affaires posent une autre question, à savoir comment identifier une véritable relation d'agence dans cadre de la vente en ligne. Selon les Lignes directrices de la CE sur les restrictions verticales, un accord « sera considéré comme un contrat d'agence si l'agent ne supporte aucun risque, ou n'en supporte qu'une partie négligeable, en rapport avec les contrats qu'il conclut et/ou négocie pour le compte du commettant, avec les investissements propres aux marché pour ce domaine d'activité ou avec les autres activités que le commettant lui demande d'exercer sur le même marché de produits » (paragraphe 15). Dans les deux affaires que nous venons d'évoquer, il semble que les plateformes électroniques, qui en principe, pourraient être qualifiées d'agents des vendeurs (éditeurs ou hôtels), ont réalisé d'importants investissements propres à leur marché en raison desquels il serait probablement impossible de conclure à l'existence d'une véritable relation d'agence. De surcroît, dans l'affaire relative aux agences de voyage en ligne, il est établi que l'APPA a été en réalité demandé par la plateforme électronique et il semble déraisonnable de penser qu'un agent pourrait dicter une composante essentielle de la politique tarifaire du commettant.

[18] Disponible à l'adresse http://www.oft.gov.uk/news-and-updates/press/2012/65-12#.URDklGerh8Y.

Les APPA ne sont pas propres au commerce électronique. Des accords similaires peuvent également être trouvés concernant d'autres « plateformes » telles que les centres commerciaux ou les fournisseurs de cartes de crédit. Néanmoins, l'Internet, avec le développement des places de marché électroniques, offre un cadre susceptible de multiplier les dispositifs de ce type. À l'heure actuelle, on ne connaît pas encore toutes les implications, au regard de la concurrence, de cette pratique et il est vraisemblable que de nouvelle affaires surviendront. Nous espérons toutefois que notre note permettra de relancer la recherche théorique et économétrique sur ces questions.

5.2 Distribution sélective et interdiction totale de la vente en ligne

Les autorités de la concurrence et les tribunaux ont déjà eu à se prononcer sur de nombreuses restrictions verticales imposées dans la vente en ligne par des fournisseurs ayant adopté un système de distribution sélective. Ces affaires concernent essentiellement des biens que l'on peut qualifier de produits de luxe, d'expérience et de confiance. Plusieurs décisions ou arrêts de tribunaux ont trait à la commercialisation des parfums ou des produits cosmétiques haut de gamme. La France occupe, sans surprise, une place de choix à cet égard.

- **Yves Saint Laurent Parfums**[19]

  En 2001, la Commission européenne a approuvé le système de distribution sélective d'Yves Saint Laurent Parfums (YSLP), car il satisfaisait aux conditions énoncées dans le règlement d'exemption par catégorie applicable aux accords verticaux (le règlement 2790/99 était alors en vigueur). En vertu de ce système agréé, la vente en ligne était autorisée, mais pour les seuls détaillants exploitant déjà un point de vente physique.

  La distribution sélective est une pratique courante sur le marché des produits cosmétiques de luxe, où évolue YSLP, car elle est réputée contribuer à préserver l'image de marque, élément primordial dans ce secteur, comme indiqué précédemment.

  De 1991 à 1997, le système de distribution sélective d'YSLP a bénéficié d'une exemption individuelle. Cette exemption, accordée par la Commission[20], a par la suite été confirmée par le Tribunal de première instance dans l'affaire Leclerc[21]. La décision de la Commission reposait sur le fait que, si les systèmes de distribution sélective ont une incidence sur la concurrence, dans le cas d'YSLP, les caractéristiques matérielles et immatérielles du produit doivent être prises en compte. Dans sa décision, la Commission a considéré que : « *Il est constant que certains produits, qui ne sont pas des produits ou des services simples, ont des propriétés telles qu'ils ne peuvent être offerts utilement au public sans l'intervention de distributeurs spécialisés* ».[22]

  La Commission a estimé qu'un système de distribution sélective pouvait être réputé avantageux pour les consommateurs si :

  – il est indispensable pour préserver la qualité des produits et garantir leur utilisation correcte ;
  – il impose des critères de qualité objectifs liés aux compétences techniques du revendeur ;
  – les conditions sont énoncées de manière uniforme et ne sont pas appliquées de manière discriminatoire.

19 Communiqué de presse de la Commission du 17 mai 2001 (en anglais) « Commission approves selective distribution system for Yves Saint Laurent perfume », IP/01/713.

20 16 décembre 1991, décision de la Commission 92/33/CEE, IV/33.242 – Yves Saint Laurent Parfums, (Décision YSLP).

21 Affaire T-19/92 *Groupement d'achat Edouard Leclerc / Commission des Communautés européennes*. Rec. 1996, p. II-01851

22 Décision YSLP, Section II.

La Commission a considéré que le système d'YSLP satisfaisait à ces conditions et pouvait donc bénéficier d'une exemption individuelle.

En 2010, après l'entrée en vigueur d'un nouveau règlement d'exemption par catégorie[23], YSLP avait déjà soumis son système de distribution à l'approbation de la Commission qui devait cette fois l'évaluer sous un angle nouveau. Le nouveau règlement ne couvre pas une interdiction de la vente en ligne, même dans le cadre d'un système de distribution sélective. Pour autant, YSLP autorisait les détaillants à avoir une activité en ligne sur la base de plusieurs critères sélectifs. Ainsi, les détaillants disposant déjà d'un point de vente physique étaient autorisés à distribuer les produits stipulés au contrat également par Internet. Dès lors, le système était réputé couvert par le règlement d'exemption par catégorie.[24]

- **Pierre Fabre Dermo-Cosmétique** [25]

En 2009, la Cour de justice de l'Union européenne (CJUE) a été saisie d'une question préjudicielle afin de déterminer si une interdiction de la vente en ligne devait être considérée comme une restriction de la concurrence au sens de l'article 101, paragraphe 1, TFUE, et si elle pouvait relever du règlement d'exemption par catégorie ou bénéficier d'une exemption individuelle au titre de l'article 101, paragraphe 3, TFUE.

Pierre Fabre Dermo-Cosmétique est un fabricant de produits cosmétiques et de produits d'hygiène personnelle. Le groupe commercialise ses produits par l'intermédiaire d'un réseau de distribution sélective. Les distributeurs sont sélectionnés sur la base de deux critères : la qualité du point de vente physique et la présence obligatoire d'un docteur en pharmacie pour assurer le conseil à la vente. Ce dernier critère a été perçu comme limitant indirectement la possibilité pour un distributeur de vendre les produits en ligne.

Le Conseil de la concurrence a jugé que cet accord était anticoncurrentiel en vertu des droits français et européen de la concurrence et ne relevait pas de l'exemption par catégorie ni d'une exemption individuelle. Il a donc ordonné la modification des contrats de distribution de façon à permettre aux détaillants de vendre en ligne les produits concernés. Pierre Fabre a fait valoir que l'interdiction de la vente en ligne était justifiée par des impératifs de protection de la santé (à savoir le risque dermatologique lié à l'utilisation des produits sans le conseil avisé d'un pharmacien) et par la nécessité d'éviter les contrefaçons. Néanmoins, dans sa décision[26], le Conseil a rejeté ces justifications, les jugeant infondées, arguant que les produits parapharmaceutiques n'avaient pas qualité de médicaments, et que la sélection de distributeurs spécialisés suffisait pour garantir la qualité du produit.

Pierre Fabre a introduit un recours devant la Cour d'appel de Paris, qui à son tour a renvoyé à titre préjudiciel la question de droit sous-jacente à la CJUE pour interprétation. La CJUE a dit pour droit que la restriction imposée par Pierre Fabre, constituant de fait une interdiction de l'utilisation de l'Internet comme circuit de distribution, équivalait à une restriction par objet, au sens de l'article 101, paragraphe 1, TFUE, dépourvue de toute justification objective. En

23 Règlement n°2790/1999 de la Commission (CE) concernant l'application de l'article 81, paragraphe 3, du traité à des catégories d'accords verticaux et de pratiques concertées, 1999, J.O. L 336.

24 *Lignes directrices de la CE*, par. 51.

25 Affaire C- 439/09, *Pierre Fabre Dermo-Cosmétique SAS / Président de l'Autorité de la concurrence et Ministre de l'Économie, de l'Industrie et de l'Emploi.*, Rec. 2011, J.O. C 355/04.

26 Conseil de la concurrence, 29 octobre 2008, Décision n° 08-D-25, relative à des pratiques mises en œuvre dans le secteur de la distribution de produits cosmétiques et d'hygiène corporelle vendus sur conseils pharmaceutiques, *Pierre Fabre Dermo-Cosmétique.*

conséquence, l'exemption par catégorie ne s'appliquait pas, et il revenait à la société de démontrer que lesdites restrictions relevaient d'une exemption individuelle au sens de l'article 101, paragraphe 3, TFUE.

Le 31 janvier 2013, la Cour d'appel de Paris a rejeté le recours[27]. Dans son arrêt, la Cour a confirmé qu'une interdiction de fait frappant la vente en ligne de produits cosmétiques ne doit pas être considérée comme une infraction « par objet » de l'article 101, paragraphe 1. Elle reconnaît que Pierre Fabre détient 20 % de parts de marché et est exposée à une vive concurrence intermarques dans le cadre de laquelle la qualité des produits et l'innovation jouent un rôle majeur. Toutefois, elle estime qu'empêcher les consommateurs d'acheter les produits en ligne limiterait leur faculté à effectuer leurs achats à partir de zones géographiques reculées et à comparer les prix, et, par conséquent, entraînerait une diminution de la concurrence intramarque. La Cour a également rejeté la demande d'exemption individuelle, considérant que Pierre Fabre n'avait pas satisfait au critère requis pour prouver l'existence des gains d'efficience allégués et qu'en outre, une interdiction totale de la vente en ligne n'était pas indispensable pour parvenir à ces gains d'efficience.

- **Bijourama / Festina**[28]

Un détaillant présent exclusivement sur l'Internet, spécialisé dans la vente de montres, de bijoux et d'argenterie (Bijourama) a tenté sans succès d'adhérer au système de distribution sélective mis en place pour le marché des montres par Festina France. Bijourama a déposé plainte auprès du Conseil de la concurrence, affirmant que Festina lui avait refusé l'accès à son réseau de distribution sélective au motif que Bijourama ne générerait que des ventes en ligne.

Le refus de Festina d'agréer Bijourama ne pouvait se justifier par les dispositions des contrats sélectifs, aucune clause ne limitant la vente en ligne. De fait, certains détaillants agréés étaient autorisés à réaliser une partie de leurs ventes en ligne.

Le Conseil de la concurrence a accepté les engagements pris par Festina de modifier et de compléter les contrats de distribution en y ajoutant des dispositions sur la vente en ligne, ces contrats conservant toutefois une clause n'autorisant la vente en ligne qu'aux détaillants détenant un point de vente physique. Cette clause contractuelle interdit, de fait, les détaillants réalisant exclusivement leurs ventes en ligne.

L'autorité française a consacré un chapitre de sa décision[29] à l'examen du droit européen pertinent alors en vigueur[30], soulignant le fait qu'un producteur dont la part de marché ne dépasse pas 30 % peut fixer des critères concernant le mode de sélection de ses distributeurs et que ces critères peuvent prévoir des restrictions verticales (voire une limitation des ventes en ligne), à condition que celles-ci soient transparentes et appliquées uniformément à l'ensemble du système. Selon le Conseil de la concurrence, les engagements proposés par Festina prenaient en compte les préoccupations en matière de concurrence, eu égard à sa part de marché limitée (inférieure à 30 %). Bijourama, est toutefois restée exclue du réseau de distribution de Festina.

27 Cour d'appel de Paris, 31 janvier 2013, RG n° 2008/23812, *Pierre Fabre Dermo-Cosmétique*.

28 Conseil de la concurrence, 24 juillet 2006, Décision n°06-D-24, *Festina France*. Confirmée par la Cour d'appel de Paris dans *Bijourama / Festina*, 16 octobre 2007.

29 Conseil de la concurrence, 24 juillet 2006, Décision n°06-D-24, *Festina France*, section B.

30 En particulier, règlement n°2790/1999 de la Commission (CE) concernant l'application de l'article 81, paragraphe 3, du traité à des catégories d'accords verticaux et de pratiques concertées, 1999, J.O. L 336, et Lignes directrices de la CE.

Le Conseil de la concurrence a confirmé peu après cette approche dans une décision relative à plusieurs systèmes de distribution sélective de produits cosmétiques et de produits d'hygiène personnelle haut de gamme.[31]

- **PMC Distribution / Pacific Création**[32]

  Pacific Creation crée et distribue des parfums, dont les parfums Lolita Lempicka, commercialisés en France par le biais d'un réseau de distribution sélective. La partie adverse, PMC Distribution, gère un site Internet (www.club-prive.fr), sur lequel elle propose des produits à des prix très attractifs. Le producteur a été informé qu'en septembre et octobre 2006 PMC Distribution a organisé sur son site des ventes à prix réduits des parfums Lolita Lempicka, sans faire partie du réseau de distribution agréé et sans y être autorisé par Pacific Creation.

  Le Tribunal, invoquant une concurrence déloyale et une publicité mensongère, a considéré que Pacific Creation était en droit d'être remboursé du préjudice causé. La Cour d'appel a confirmé l'arrêt du Tribunal sur la légalité du système de distribution sélective. Elle a estimé que les parfums et produits cosmétiques de luxe forment des marchés dans lesquels un système de distribution sélective ne constitue pas une restriction appréciable de la concurrence, dans la mesure où : 1) la nature du produit nécessite un système de distribution sélective, afin d'en préserver la qualité et d'en assurer l'utilisation correcte ; 2) les distributeurs sont sélectionnés sur la base de critères de qualité objectifs, appliqués uniformément à tous les distributeurs potentiels de manière non discriminatoire et 3) les critères retenus n'outrepassent pas les limites de ce qui est nécessaire.

- **Makro / Beauté Prestige**[33]

  La Cour d'appel de Liège a été amenée à se prononcer sur la légalité d'une interdiction de vente en ligne imposée par Makro à son réseau de distribution sélective sur le marché des parfums et des produits cosmétiques de luxe. L'affaire a été renvoyée devant la Cour de cassation belge qui a jugé que les restrictions sur les ventes en ligne sont illégales sauf si elles ont une justification objective. En l'espèce, d'après la Cour de cassation, les restrictions imposées par Makro se justifiaient par la nature des produits commercialisés, qui nécessitent un conseil personnalisé, ce qui implique des méthodes de vente qui ne peuvent pas être reproduites sur l'Internet.

La jurisprudence sur les parfums et les produits cosmétiques de luxe corrobore l'argument selon lequel, dès lors qu'un système de distribution sélective se justifie pour des produits de luxe ou d'expérience, les fournisseurs peuvent imposer des restrictions sur la vente en ligne qui visent à protéger la demande, en valorisant les investissements réalisés par le fabricant ou par les détaillants. L'une des manières d'atteindre cet objectif consiste à autoriser, pour la vente en ligne, uniquement les détaillants qui gèrent également un magasin physique. L'idée est que ces détaillants auront intérêt à préserver la valeur des investissements qu'ils ont consacrés à leur point de vente physique et qu'ils assumeront, au moins partiellement, les effets négatifs que des pratiques inappropriées de commerce électronique pourraient avoir sur ces investissements. Pour une convergence réelle des intérêts, les ventes réalisées par le magasin physique doivent être appréciables, ce qui justifie par ailleurs l'imposition de quotas sur les ventes en ligne.

Les restrictions interdisent toute activité exclusive en ligne. Néanmoins, une interdiction totale de la vente en ligne ou l'application de conditions discriminatoires qui empêcheraient leur développement reste présumée illicite et il incombe aux parties de prouver que des justifications « objectives » imposent la mise en œuvre de telles mesures. Cette approche semble très extrême. Un postulat général (mais réfragable)

31 Conseil de la concurrence, 8 mars 2007, Décision n° 07-D-07¸ *Bioderma et al.*

32 Cour d'appel de Paris, 16 avril 2008, RG n° 07/04360, *PMC Distribution / Pacific Création*.

33 Cour de cassation de Belgique, 10 octobre 2002, N° C.01.0300.F, *Makro / Beauté Prestige International AO*.

selon lequel une interdiction de la vente en ligne vise en soi un objectif anticoncurrentiel, quelle que soit, par exemple, la position du fabricant sur le marché, paraît excessif. Bien entendu, ce postulat dépend en grande partie du niveau de preuve qui sera exigé pour démontrer l'existence de justifications « objectives », mais également de la capacité du fabricant à montrer que des mesures d'une autre nature et moins restrictives n'auraient pas permis d'atteindre l'objectif visé. L'arrêt Makro laisse entendre que certaines juridictions se satisferont d'arguments qualitatifs simples et ne demanderont pas une analyse approfondie de la faisabilité et des effets concurrentiels d'autres formes de restrictions. Or, cette attitude diffère de celle adoptée par certaines autorités de la concurrence et d'autres juridictions en Europe, notamment dans l'affaire Pierre Fabre. Cette constatation résulte également de l'examen de plusieurs autres affaires qui ne concernent pas la vente de produits cosmétiques. Deux décisions méritent en particulier d'être mentionnées. La première a été prise par l'autorité de la concurrence française et concerne la vente de produits hi-fi et de home cinema ; la seconde a été adoptée par l'autorité de la concurrence allemande et portait sur la distribution de lentilles de contact.

- **Distribution sélective de matériel hi-fi et de home cinema**[34]

  Des procédures ont été ouvertes en France en 2002 contre plusieurs producteurs de matériel hi-fi et de home cinema par le Conseil de la concurrence, après un signalement du ministère de l'Économie faisant suite à une enquête de la DGCCRF (Direction générale de la concurrence, de la consommation et de la répression des fraudes) dans ce secteur.

  Les entreprises, accusées d'imposer des restrictions verticales anticoncurrentielles à leurs distributeurs, étaient des acteurs majeurs sur le marché français des équipements hi-fi et de home cinema, à savoir Bose, Focal JM Lab, Triangle Industries et Bang & Olufsen France.

  L'enquête menée par le Conseil a confirmé les constatations de la Commission. Triangle et Focal JM Lab imposaient tous deux une interdiction de vente en ligne à leurs distributeurs. Cette restriction a été considérée comme une limitation injustifiée du commerce, au motif qu'elle n'était ni proportionnelle à l'objectif visé ni équivalente aux limitations imposées aux détaillants hors ligne. De même, les conditions imposées par Bose à la vente en ligne ont été jugées plus restrictives que ce qui était nécessaire pour préserver l'image de la marque.

  Ces sociétés ont proposé des engagements visant à modifier leurs contrats de distribution sélective et autorisant leurs distributeurs agréés à vendre leurs produits en ligne, à des conditions non restrictives. En 2006, le Conseil a accepté les engagements de Bose et de Triangle. D'après le Conseil, la nouvelle organisation aurait stimulé à la fois la concurrence intramarque et la concurrence intermarques, pour le plus grand bénéfice des consommateurs. Autrement dit, les projets d'avenant aux contrats de distribution sélective auraient conduit à un juste équilibre entre, d'une part, la nécessité de préserver l'image de marque et, d'autre part, la possibilité, pour les distributeurs d'accéder à un plus grand nombre de consommateurs.

  La procédure engagée contre Bang & Olufsen a fait l'objet d'un traitement séparé et s'est finalement conclue en décembre 2012 par l'imposition d'une amende par l'Autorité de la concurrence (qui a remplacé le Conseil de la concurrence en 2009) à la filiale française (Bang & Olufsen France) de la société mère danoise Bang & Olufsen A/S. La pratique réputée anticoncurrentielle, semblable à celle adoptée par les autres sociétés, constituait de fait une interdiction des ventes en ligne.

  L'autorité française s'est inspirée de l'arrêt de la Cour de justice de l'Union européenne dans une affaire similaire, l'affaire Pierre Fabre. Cet arrêt indique clairement qu'une interdiction générale

[34] Conseil de la concurrence, 5 octobre 2006, Décision n°06-D-28, *Bose et al.* ; Autorité de la concurrence, 12 décembre 2012, Décision n°12-D-23, *Bang et Olufsen.*

de la vente en ligne dans un contrat de distribution sélective équivaut à une restriction de la concurrence par objet, sauf si cette clause est objectivement justifiée.

D'après l'Autorité, les actions unilatérales de Bang & Olufsen ont limité la liberté de ses distributeurs, entravant la concurrence intramarque, aux dépens de bien-être des consommateurs.

L'Autorité a infligé une amende de 900 000 EUR à Bang & Olufsen France et Bang & Olufsen A/S. Elle a également imposé à Bang & Olufsen France de modifier, sous trois mois, ses contrats de distribution sélective en vigueur, de façon à y indiquer clairement que ses distributeurs agréés sont autorisés à avoir une activité de vente en ligne.

- **CIBA Vision**[35]

Le *Bundeskartellamt* a infligé une amende de 11.5 millions EUR à CIBA Vision Vertriebs GmbH (CIBA), le leader allemand de la fourniture de gros de lentilles de contact, pour avoir imposé des restrictions tarifaires et limité la vente en ligne et de gros de ses produits, en violation de l'article 81 du traité CE (désormais article 101, TFUE).

Il a été constaté qu'entre 2005 et 2008, CIBA a pris des mesures particulières pour surveiller les prix de ses détaillants en ligne, appelées mesures de « gestion des prix ». Lorsque les prix étaient de 10 à 15 % inférieurs aux prix de revente recommandé, le personnel de CIBA contactait les distributeurs pour les inciter à relever leurs prix. En outre, certaines lentilles de contact CIBA étaient interdites à la vente en ligne, tout comme l'était leur commercialisation via eBay.

Si les prix de vente recommandés ne sont pas en tant que tels considérés comme illicites, le *Bundeskartellamt* a estimé que les procédures établies, qui visaient à exercer une pression sur les détaillants, indiquaient clairement qu'une conduite concertée était en place entre CIBA et ses distributeurs.

Par ailleurs, CIBA était également accusée d'avoir restreint la vente en ligne en y limitant la gamme de produits et en imposant une interdiction de la vente via eBay, ce qui a été considéré comme une pratique anticoncurrentielle. Plus particulièrement, les limitations à la vente en ligne, au titre du règlement d'exemption par catégorie de 1999, ont été intégrées à la liste noire des pratiques illicites. Qui plus est, une exemption individuelle n'a pu être appliquée, le *Bundeskartellamt* ayant rejeté les justifications présentées par CIBA, qui avait mis en avant la nécessité de la présence physique d'un opticien au moment de la vente, pour protéger la santé des consommateurs. Le *Bundeskartellamt* a considéré que des solutions moins restrictives auraient permis d'atteindre le même objectif, telles que la présentation obligatoire, au moment de l'achat, de la preuve de la délivrance d'une ordonnance prescrivant des lentilles de contact.

En outre, la nature des produits CIBA n'imposait pas la mise en place un régime particulier pour leur lancement, alors que, d'après le *Bundeskartellamt*, une interdiction temporaire de la vente en ligne aurait été justifiée si l'opticien avait dû réaliser des investissements, ce qui n'a pas été le cas.

Ces deux décisions montrent que lest autorités européennes de la concurrence entendent donner une interprétation très stricte à l'exigence de justifications « objectives ». Dans les deux affaires, la préoccupation essentielle a été celle de la compétition intramarque, le niveau de la concurrence intermarques n'ayant guère retenu leur attention. En outre, le commerce électronique a lui-même été considéré, à sa façon, comme un circuit de distribution qui intensifie la concurrence, quelle que soit la nature du produit et les principales stratégies concurrentielles adoptées par les fabricants. En conséquence, une interdiction de fait de la vente en ligne est réputée illicite, sauf en l'absence de solutions moins

35 Communiqué de presse du Bundeskartellamt, 25 septembre 2009, « La Bundeskartellamt inflige une amende à CIBA Vision ».

restrictives permettant d'atteindre des objectifs n'ayant pas de rapport avec les stratégies commerciales du fournisseur.

Cette position semble conforme à l'avis de la Cour de justice de l'Union européenne dans l'affaire Pierre Fabre et avec le récent arrêt de la Cour d'appel de Paris. La Cour de justice « n'a pas retenu, au regard des libertés de circulation, les arguments relatifs à la nécessité de fournir un conseil personnalisé au client et d'assurer la protection de celui-ci pour le prémunir contre une utilisation incorrecte de produits, dans le cadre de la vente de médicaments qui ne sont pas soumis à prescription médicale et de lentilles de contact, pour justifier une interdiction de vente par Internet » (point 44). Elle a également ajouté que « l'objectif de préserver l'image de prestige ne saurait constituer un objectif légitime pour restreindre la concurrence et ne peut ainsi pas justifier qu'une clause contractuelle poursuivant un tel objectif ne relève pas de l'article 101, paragraphe 1, TFUE » (point 46). Dès lors, il semble que les justifications « objectives » auxquelles fait référence la Cour se limitent aux seules situations dans lesquelles la vente en ligne est totalement inadéquate, eu égard à la nature du produit, compte tenu, par exemple, de leur dangerosité potentielle pour les consommateurs (par exemple les médicaments sur ordonnance). De même, cette position exclut que les objectifs commerciaux et économiques puissent constituer des justifications « objectives ». La Cour confirme la possibilité pour une restriction verticale interdisant la vente en ligne de bénéficier d'une exemption individuelle lorsque les conditions énoncées à l'article 101, paragraphe 3, TFUE sont réunies. Néanmoins, les affaires française et allemande susmentionnées révèlent qu'il est très ardu de démontrer qu'il n'existe aucune solution moins restrictive pour atteindre les objectifs de gain d'efficience, lorsque ceux-ci concernent l'image de marque ou la fourniture de services accessoires.

On pourra également s'interroger sur la nature des justifications « objectives » censées expliquer la différence de traitement entre les détaillants en ligne et les détaillants traditionnels, s'agissant des conditions de fourniture. Cette question a été examinée par un tribunal néerlandais dans une affaire relative à la distribution d'appareils électriques.

- **Groen Trend / Atag Etna**[36]

  Le tribunal de district de Zutphen a jugé que le règlement d'exemption par catégorie couvre la mise en place par un producteur de conditions d'approvisionnement différentes pour les détaillants en ligne par rapport à celles qu'il applique aux détaillants exploitant des circuits de distribution traditionnels s'il existe un différentiel de valeur ajoutée entre ces deux types de circuits.

  Groen Trend est un détaillant en ligne de gros électroménager, qui s'approvisionne directement ou par l'intermédiaire de tiers auprès de producteurs au Pays-Bas. *Schouten* commercialise ses produits (principalement des appareils électroménagers) par le biais de détaillants et approvisionne également *Groen Trend*. *AEP* est un producteur et un importateur de produits électroménagers qu'il commercialise sous les marques *Atag*, *Etna* et *Pilgrim*. *Groen Trend* et *Schouten* étaient tous deux revendeurs de produits *AEP* depuis plus de cinq ans.

  En 2005, *AEP* a changé de politique et décidé d'augmenter les prix de ses produits destinés à la vente en ligne. En outre, les clients en ligne se voyaient proposer une durée de garantie plus courte (à savoir deux ans) par rapport à celle des points de vente physiques (cinq ans).

  Les deux revendeurs susmentionnés ont engagé une action contre le fournisseur pour restrictions anticoncurrentielles. La Cour a néanmoins statué qu'une telle différence de traitement devait être réputée légitime car reflétant un différentiel de « valeur ajoutée » entre les deux circuits de distribution.

[36] Tribunal de district de Zutphen (Rechtbank Zutphen), 30 décembre 2005, affaire 74100, KG ZA 05-309, *Groen Trend B.V. et Schouten Keukens B.V. / Atag Etna Pelgrim Home Products B.V*

Un système de distribution sélective doit satisfaire à l'exigence générale selon laquelle les conditions d'approvisionnement ne doivent pas être appliquées de manière discriminatoire. Cela ne veut toutefois pas dire que ces conditions doivent être identiques pour les détaillants en ligne et hors ligne. En réalité, ces conditions peuvent différer à condition que la différence de traitement soit objectivement justifiée. Il est généralement admis que cette justification peut résulter des différences de coût qui pèsent sur un fabricant pour gérer les deux circuits de distribution. L'affaire *Groen Trend* est intéressante en ce qu'elle examine si les deux circuits diffèrent sous l'angle de la valeur qu'ils peuvent générer pour le fabricant. En conséquence, dans la mesure où le circuit traditionnel génère davantage de valeur, le fournisseur a un intérêt légitime à appliquer de meilleures conditions aux magasins traditionnels de façon à encourager les ventes réalisées par ce circuit. Si cette approche peut s'avérer intéressante, son principe doit être analysé avec précaution, car il importe de comprendre si le surcroît de valeur garanti par les distributeurs hors ligne ne résulte pas d'un pouvoir de marché qui serait érodé par le développement du commerce électronique. Dans cette affaire, il apparaît que les différences entre les deux systèmes de distribution ne sauraient être considérées, aux fins de l'application du droit de la concurrence, comme la justification objective d'une politique discriminatoire.

Les deux affaires ci-après décrivent l'approche adoptée par les juridictions américaines en ce qui concerne les restrictions verticales dans le commerce électronique.

- **MD Products / Callaway Golf Sales**[37]

  MD Products est un détaillant de produits de golf, qui possède deux magasins physiques et réalise également des ventes par l'intermédiaire de son site Internet, d'autres plates-formes ou de journaux. MD products a vendu pendant plus de deux ans des produits Callaway Golf à prix réduits, via l'ensemble de ses circuits de distribution. En 2001, Callaway a introduit une nouvelle politique pour résoudre le problème posé par certains détaillants qui utilisaient ses produits à prix réduits pour attirer les clients, avant de les orienter, par une tactique de diversion, vers une marque moins chère, présentée comme comparable à Callaway. Par cette nouvelle politique, Callaway entendait ne conserver que les détaillants commercialisant ses produits sans proposer de remise, afin de préserver la valeur de sa marque.

  Callaway a donc cessé d'approvisionner MD products et lui a retiré son agrément de vente, puisque ce revendeur appliquait des prix de détail inférieurs aux prix prédéterminés. La nouvelle politique interdisait également à MD products de faire de la publicité sur le site Internet de Callaway et de vendre les produits de cette marque sur ses propres sites ou sur des sites tiers.

  MD products a saisi le tribunal de première instance du district Ouest de la Caroline du Nord, alléguant que la politique de Callaway équivalait à une restriction sur les prix contraire à l'article 1 du Sherman Act, mais également au droit de la concurrence en vigueur en Caroline du Nord. MD products a également soutenu que Callaway s'ingérait dans ses affaires en l'empêchant de conclure des contrats avec des tiers.

  Ces deux plaintes ont été rejetées par le tribunal qui a confirmé que l'interdiction faite par Callaway à certains détaillants de vendre ses produits en ligne, que ce soit à partir de leur site Internet ou de plateformes tierces, n'exerçait pas de contrainte significative sur la concurrence et qu'un fabricant qui met en place un système de distribution sélective est en droit de sélectionner, sur la base de certains critères, les détaillants qui seront autoriser à générer des ventes en ligne.

37 *MD Products, Inc. / Callaway Golf Sales Co*., 459 F.Supp.2d 434 (2006).

- **Jacobs / Tempur-Pedic**[38]

  Cette affaire fait suite à une action engagée par deux consommateurs (Benny et Wanda Jacobs) qui, après avoir acheté un matelas en mousse Tempur-Pedic auprès de l'un des détaillants hors ligne de la marque, ont réclamé des dommages-intérêts à la société, invoquant le préjudice qu'ils auraient subi, selon eux, en raison des accords de distribution anticoncurrentiels conclues par celles-ci.

  Tempur-Pedic North America, Inc. est un fabricant de matelas en mousse, qui sont commercialisés par le biais de distributeurs (exclusivement physiques) agréés et de son site Internet. Les époux Jacobs ont affirmé que la société impose à ses distributeurs agréés un contrat prévoyant un prix de vente minimum imposé, et, dans le même temps, se réserve la possibilité de réaliser des ventes en ligne, via son propre site Internet. Ils considèrent qu'ensemble, ces pratiques constituent une entente horizontale sur les prix contraire à l'article 1 du Sherman Act.

  La Cour d'appel du 11e circuit a estimé que le plaignant n'avait pas prouvé l'existence d'une atteinte réelle ou potentielle à la concurrence sur le marché en question. Elle a considéré que les époux Jacobs n'avaient pas correctement défini le marché de produits en cause et, surtout, n'avaient pas produit les preuves d'une atteinte à la concurrence causée par l'exercice d'un pouvoir préjudiciable de Tempur-Pedic sur ledit marché.

  S'agissant de l'appréciation du prétendu prix de vente imposé, la Cour a considéré qu'il incombait au plaignant de prouver l'existence d'un tel accord, au sens de l'article 1 du Sherman Act. Selon elle, l'existence de prix similaires appliqués par les détaillants et sur le site Tempur-Pedic ne constitue pas une preuve suffisante de l'existence d'un tel accord ni du fait que les prix pratiqués étaient la conséquence d'une entente horizontale sur les prix.

  En définitive, la Cour d'appel du 11e circuit a confirmé que le fabricant était en droit de se réserver la distribution en ligne et que, en principe, ce double système de distribution n'entraînait pas de relation horizontale illégale entre des détaillants indépendants et le fabricant, en sa qualité de détaillant en ligne.

Aux États-Unis, les autorités de la concurrence et les tribunaux se montrent traditionnellement plus permissifs à l'égard des restrictions verticales. Cette attitude est confirmée par l'analyse des restrictions pesant sur le commerce électronique. Une interdiction totale de la vente en ligne est généralement soumise à une règle de raison selon laquelle cette interdiction est réputée compatible avec le droit de la concurrence, sauf s'il existe des éléments probants démontrant qu'elle aura des effets anticoncurrentiels qui ne seront pas compensés par les gains d'efficience induits par la résolution des problèmes de parasitisme ou des problèmes liés à la protection de la valeur de la marque. Cette analyse est conforme au principe général établi dans la jurisprudence relative à la vente par correspondance, selon lequel les producteurs ont normalement toute latitude pour se réserver, de manière unilatérale, certains circuits de distribution ou pour les réserver à des distributeurs désignés.

5.3 Conclusions sur la jurisprudence

Les décisions adoptées par les autorités de la concurrence et les tribunaux, résumées ci-dessus, montrent que les restrictions verticales dans la vente en ligne sont appréciées au regard des règles généralement utilisées pour l'analyse des restrictions verticales, telles qu'établies dans la jurisprudence et dans les normes juridiques non contraignantes. Par conséquent, le développement du commerce électronique n'a pas nécessité d'élaborer de nouveaux concepts ni de règles *ad hoc*. Cela signifie également que la position adoptée par les autorités de la concurrence sur ces restrictions est conforme à la

[38] *Jacobs / Tempur-Pedic Int'l, Inc*., 626 F.3d 1327 (2010).

vision habituelle du juste équilibre qui doit être trouvé entre la liberté des parties de choisir les systèmes de distribution qu'elles considèrent les mieux adaptés et la nécessité de protéger une certaine forme de distribution ou de concurrence qui, de l'avis des autorités, est de nature à accroître le bien-être des consommateurs. À cet égard, les juridictions et autorités de la concurrence européennes semblent plus enclines que leurs homologues américains à limiter plus strictement les possibilités offertes aux fournisseurs et à passer au crible les accords verticaux dans le détail. Si les deux types de juridictions convergent sur la durée, le périmètre de ce qui est qualifié dans l'UE de « restrictions caractérisées » reste plus large qu'aux États-Unis et la jurisprudence susmentionnée confirme que cela vaut également pour l'appréciation de l'organisation de la vente en ligne.

Nonobstant cette conclusion réconfortante, la jurisprudence met également en exergue des questions nouvelles ou qui méritent une analyse plus approfondie.

Premièrement, la création de plateformes électroniques qui agissent en tant qu'intermédiaires a incité les entreprises qui les utilisent à y vendre leurs produits et les propriétaires des plateformes à conclure des accords qui influent sur la politique tarifaire des vendeurs. Le recours à des APPA dans le cadre de la vente en ligne peut être plus répandu que l'on pourrait le conclure au vu du nombre limité de litiges. Ces types d'accords n'ont pas encore été étudiés formellement dans les publications économiques et aucune indication précise ne saurait être tirée, sur le plan des politiques publiques à appliquer, de l'analyse de pratiques apparemment similaires. Les autorités européennes et le ministère de la Justice américain ont plutôt tendance à voir d'un mauvais œil ces mécanismes tarifaires. Pour autant aucune conclusion définitive ne saurait être tirée des décisions rendues jusque-là à cet égard. L'enquête de l'OFT apportera probablement des éclaircissements concernant les agences de voyage en ligne, de même, on peut l'espérer, que des travaux de recherche plus approfondis sur cette question.

Deuxièmement, au moins dans l'UE, le postulat général semble être que le commerce électronique est un moyen efficace d'intensifier la concurrence et d'améliorer le bien-être des consommateurs et de la société en général. Cette conviction est étayée par certains travaux parus dans les publications économiques et l'essor récent de la vente en ligne montre que les consommateurs et les entreprises en tirent des avantages substantiels. Néanmoins, il est possible que dans certains secteurs, l'Internet intensifie une certaine forme de concurrence, à savoir la concurrence sur les prix tout en réduisant l'intensité d'autres formes de concurrence reposant sur la qualité (réelle ou supposée) des produits et de la fourniture de services accessoires. Rien ne permet de penser que les premiers des effets sur la concurrence cités ci-dessus l'emporteront toujours sur les autres, pour les entreprises comme pour les consommateurs. En outre, interdire l'utilisation de l'Internet n'aura probablement d'incidence, ou d'incidence principale, que sur la concurrence intramarque et il est désormais largement admis qu'une telle interdiction ne nuira probablement guère aux consommateurs si la concurrence entre les marques est vive. Dès lors, la position de l'Union européenne et de la CJUE selon laquelle la décision d'un fournisseur d'interdire la vente en ligne de ses produits équivaut à une restriction caractérisée, qui peut être exemptée de l'interdiction énoncée à l'article 101 si et seulement s'il existe des justifications objectives (au sens strict du terme), pourrait être trop sévère.

Le point de vue des institutions de l'UE pourrait être interprété à l'aune des autres objectifs du traité qui ne sont pas strictement liés à la concurrence. Il est révélateur que la Cour de justice, dans l'arrêt Pierre Fabre, désigne les libertés de circulation comme un objectif ayant motivé sa position relative à une interdiction de vente en ligne. De ce point de vue, l'intérêt que représente le commerce électronique résulte davantage du fait qu'il promeut l'intégration géographique des marchés nationaux que de son effet pro-concurrentiel.

Un autre élément à prendre en considération est la faculté du commerce électronique à élargir la gamme des produits proposés aux consommateurs, par l'introduction de nouveaux formats électroniques,

comme dans l'affaire relative aux livres électroniques. Dans un tel contexte, l'Internet ne se borne pas à stimuler la concurrence sur les prix, mais élargit également le choix des consommateurs et les perspectives de développement de nouvelles activités. Dès lors, il semble que les autorités soient fondées à considérer avec plus de scepticisme les gains d'efficience visés, censés découler de restrictions limitant le développement du nouveau circuit de distribution et du nouveau format.

6. Conclusions

L'Internet n'est pas la première mutation à laquelle est confronté le secteur de la distribution et de la vente de détail et les autorités de la concurrence ont fait face au fil des ans à de nombreux bouleversements commerciaux. Bien avant l'avènement du commerce électronique, elles ont rendu compte de perturbations du marché, causées par des innovations comme l'apparition des chaînes de supermarchés, des centres commerciaux, des magasins à bas coûts ou encore de la vente par correspondance.

Cela étant, pourquoi le commerce électronique suscite-t-il bien plus l'attention que les précédentes mutations qu'ont connues les systèmes de distribution ? La raison la plus évidente tient à l'omniprésence de l'Internet, qui permet à tout un chacun d'accéder au monde numérique, à tout moment et en tous lieux. Deuxièmement, parce que l'introduction de l'Internet en tant que circuit de distribution a eu une incidence sur la majorité des produits et services déjà commercialisés et a également provoqué l'émergence de nouveaux biens et services mais aussi l'apparition d'une nouvelle demande des consommateurs. Pour finir, parce que l'Internet est réputé avoir d'importants effets pro-concurrentiels qui peuvent améliorer le bien-être du consommateur et plus généralement de la société.

Par conséquent, l'Internet est à l'origine d'un ensemble d'innovations qui ne doivent pas être sous-estimées lors de l'élaboration d'une politique de la concurrence appropriée. D'un côté, il a donné naissance à des possibilités qui ont intensifié la concurrence : il est généralement admis qu'il a permis d'accroître le pouvoir des consommateurs, en élargissant le marché géographique, en multipliant l'offre de solutions, en facilitant la décision d'achat, grâce aux intermédiaires, mais également en permettant aux consommateurs de comparer les prix et de faire jouer la concurrence. D'un autre côté, le commerce électronique se prête à des pratiques favorisant la concentration. On pourrait croire à tort que la vente en ligne a réduit les barrières à l'entrée. Or un tel jugement ne tiendrait pas compte du fait que les coûts d'entrée dans la vente de détail en ligne sont pour l'essentiel irrécupérables et que tous les sites Internet ne rencontrent pas le succès, ce qui implique que d'autres facteurs doivent également être pris en compte. Par exemple, dans le commerce électronique, bien souvent, le premier arrivé jouit d'un avantage assez significatif sur ses concurrents. En outre, la concentration est favorisée par l'effet de réseau « virtuel » qui peut amener l'un des acteurs à exercer à lui seul une position dominante sur le marché.

Ces caractéristiques nouvelles mises à part, il ressort de l'analyse présentée ici que l'approche développée par les autorités de la concurrence et les tribunaux au fil des ans reste généralement valable dans ce nouveau cadre économique et technologique. Les principaux aspects économiques qui doivent être pris en compte pour apprécier les effets sur la concurrence des restrictions verticales appliquées dans le commerce électronique sont ceux qui ont été mis en évidence dans les publications économiques et relatives au droit de la concurrence consacrées à la vente traditionnelle. En résumé, les autorités de la concurrence doivent prendre en compte le risque que certaines contraintes imposées aux parties d'un système de distribution puissent réduire la concurrence, soit en favorisant une forme de coordination des prix, soit en limitant l'entrée sur le marché, et mettre ce risque en balance avec les effets pro-concurrentiels que les mêmes contraintes produisent lorsqu'elles visent à protéger les investissements que le fournisseur ou les distributeurs réalisent pour améliorer la qualité de leurs produits ou pour proposer des services accessoires qui vont stimuler la demande. Pour procéder à cette mise en balance, il importe de garder à l'esprit que la concurrence intramarque peut avoir une incidence indirecte sur le bien-être des consommateurs lorsque la concurrence intermarques est vive et que les fabricants se livrent essentiellement concurrence sur les caractéristiques qualitatives de leurs produits et sur d'autres critères que le prix. Il est

tout aussi important de ne pas oublier que le risque de verrouillage du marché est limité lorsqu'aucune des parties à l'accord de distribution ne jouit d'une position dominante et que l'accord ne fait part partie intégrante d'un réseau de restrictions verticales similaires couvrant une large partie du marché.

Tout l'enjeu pour le droit de la concurrence est d'adapter le cadre théorique établi au nouvel environnement. Or, pour relever ce défi, nul n'est besoin de créer de nouvelles règles, tout comme il semble déraisonnable de concevoir de nouveaux postulats généraux confirmant ou infirmant le rôle de stimulation de la concurrence joué par l'Internet. Il se peut, en effet, que l'Internet soit un outil efficace pour intensifier la concurrence sur les prix et s'avère même, dans certains cas, une source d'innovation à part entière. Cependant, de ces deux effets, celui qui aura le plus de chance de se matérialiser et qui sera le plus apprécié des entreprises et des consommateurs sera fonction des caractéristiques propres à chaque secteur d'activité. Or la conception de nouveaux postulats généraux occulte ces différences et empêche de ce fait de faire preuve de la souplesse qui est nécessaire pour adapter la mise en œuvre des règles de concurrence aux circonstances propres à chaque affaire.

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COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

Le Président, Frédéric Jenny, ouvre la table ronde consacrée aux restrictions verticales dans la vente en ligne, et annonce que la discussion et les contributions s'organiseront autour de quatre grands thèmes. Premièrement, une introduction générale sur l'impact du commerce électronique sur la concurrence, suivie d'une réflexion sur l'opportunité d'un régime règlementaire spécifique au commerce électronique. Deuxièmement, une revue de quelques-unes des restrictions verticales que l'on trouve dans le commerce électronique, en particulier les restrictions portant sur les prix. Troisièmement, une discussion sur les restrictions verticales hors-prix rencontrées dans la vente en ligne. Quatrièmement, il sera question d'autres problèmes de concurrence qui se posent dans le contexte du commerce électronique.

Le Président note également que 15 contributions ont été soumises pour cette table ronde sur les restrictions verticales dans le commerce électronique. Il présente les deux experts, M. Baye, qui avait déjà participé à l'audition sur l'économie numérique, et M. Buccirossi, de LEAR Consulting, qui officiait auparavant au sein de l'autorité de concurrence italienne.

1. Introduction générale sur l'impact du commerce électronique sur la concurrence, et réflexion sur l'opportunité d'un régime réglementaire spécifique au commerce électronique

Le Président commence par inviter M. Buccirossi à introduire brièvement la discussion. M. Baye prendra ensuite la parole.

M. Buccirossi présente d'abord brièvement les aspects économiques des restrictions verticales et l'approche juridique de la question.

Dans la majorité des cas, explique-t-il, les restrictions verticales sont motivées par des considérations d'efficience. Leur but est principalement de surmonter des problèmes liés à certaines externalités. La première forme d'externalité se produit lorsqu'une entreprise doit réaliser un investissement spécifique dans le cadre d'une relation avec une autre partie, et que cette partie peut bénéficier d'une part importante de cet investissement. Par conséquent, si l'entreprise opte pour un contrat de longue durée, c'est pour tenter de pousser l'autre partie à faire preuve de discipline. La deuxième forme d'externalité est une externalité verticale. Deux entreprises opérant à deux niveaux différents de la chaîne d'approvisionnement prennent des décisions qui auront un impact sur leurs bénéfices à toutes deux, mais chacune ne considère que de son propre intérêt. L'exemple le plus connu de ce cas de figure est le phénomène de la double marge. La troisième forme d'externalité est une externalité horizontale : c'est le cas de l'acteur de la vente de détail qui hésite à réaliser des investissements pour développer la demande si d'autres revendeurs peuvent tirer profit de ses investissements sans en supporter les coûts.

Des externalités peuvent aussi se produire si producteurs et détaillants ont accès à des types d'information différents. Les producteurs tendent à avoir une vision globale de la demande des produits, alors que les détaillants sont généralement mieux informés sur le marché et l'état de la concurrence au niveau local. Il peut donc être intéressant pour les producteurs et pour les revendeurs de réunir les informations dont ils disposent pour mieux décider de leurs stratégies.

Les restrictions verticales peuvent aussi être motivées par des visées anticoncurrentielles. Elles peuvent par exemple faire obstacle à l'entrée sur le marché d'autres fabricants ou d'autres distributeurs ou les acculer à sortir du marché en les empêchant d'atteindre les consommateurs finals.

Deux problèmes de concurrence sont généralement associés aux restrictions verticales : (i) elles risquent de faciliter les collusions (ii) elles risquent d'affaiblir la concurrence. Dans le premier cas (i), les entreprises peuvent s'efforcer de parvenir à un équilibre qui pérennise la collusion en maintenant des prix plus élevés et une moins bonne qualité de service, en surveillant le comportement des autres entreprises et en sanctionnant celles qui dérogeraient au pacte collusoire. Dans le second cas (ii), la situation est différente : les entreprises sont moins motivées à court terme à suivre des stratégies offensives, et la surveillance et la sanction ne sont pas de mise.

La théorie économique nous fournit donc un cadre pour l'analyse concurrentielle des restrictions verticales, sans toutefois permettre d'établir des règles nettes et univoques d'évaluation. Ce cadre nécessite de faire la part des choses entre le risque que représentent les restrictions verticales pour la concurrence et les gains d'efficience qu'elles permettent pour les marchés amont et aval.

Francine Lafontaine et Margaret Slade ont publié une étude qui passe en revue un corpus assez conséquent de recherches empiriques sur la question. Leur conclusion est que les restrictions verticales, lorsqu'elles sont imposées par les producteurs, ont tendance à augmenter les bénéfices de ces derniers, mais ont également l'avantage de rehausser le niveau de qualité des produits et des services dont bénéficient les consommateurs.

En revanche, quand des restrictions sont imposées aux producteurs par intervention des pouvoirs publics, il en résulte généralement une réduction du bien-être pour les consommateurs : les prix montent et la qualité du service diminue. En effet, les intérêts des producteurs et ceux des consommateurs en ce qui concerne le système de distribution et son organisation sont en général convergents : les uns et les autres souhaitent que le système offre aux consommateurs des prix de détail les plus bas possible et des services annexes qui améliorent leur bien-être. C'est en tout cas vrai le plus souvent, même s'il existe des exceptions.

S'agissant de l'approche juridique des restrictions verticales, dans certains pays ou territoires comme les États-Unis, les restrictions verticales sont régies par la règle de raison, qui s'applique au cas par cas. Cette règle de raison s'appliquerait à toutes les formes de restrictions verticales, y compris à la pratique des prix imposés. Dans l'UE et dans les États Membres européens, le règlement d'exemption par catégorie a introduit plusieurs présomptions réfragables ou simples. C'est en fait une règle comprenant de nombreuses présomptions simples. La première est que les restrictions verticales sont autorisées si les parties ne disposent pas d'une puissance de marché importante (en prenant comme mesure la part de marché des deux parties). Mais certaines restrictions verticales sont dites caractérisées : elles sont présumées constituer des restrictions par objet. Dans ce cas, l'autorité de concurrence n'a pas besoin de prouver qu'elles ont un impact anticoncurrentiel. Dans le cas d'une exemption individuelle en application de l'article 101(3), il est toujours possible de considérer que la restriction verticale est motivée par la recherche de l'efficience. Ces approches autorisent donc toutes les deux l'application du cadre économique que nous avons décrit. Dans un cas comme dans l'autre, il doit exister un certain degré de puissance de marché pour que les restrictions verticales aient des effets anticoncurrentiels, dans un cas comme dans l'autre il faut trouver le bon compromis entre la recherche d'efficience et le risque d'effet anticoncurrentiel, ainsi que différents compromis entre la certitude juridique et le risque d'une décision inadaptée.

Il existe aussi un consensus général concernant l'application du droit de la concurrence aux restrictions verticales : on peut considérer que la concurrence entre marques est en principe plus importante pour le bien-être des consommateurs que la concurrence intra-marque. Ainsi, les lignes directrices de la CE

stipulent que, dès lors que la concurrence entre marques est forte, il est peu probable qu'une diminution de la concurrence intra-marques ait des incidences négatives pour les consommateurs. En effet, grâce à la concurrence entre marques, les intérêts des producteurs et ceux des consommateurs sont plus susceptibles de converger en ce qui concerne la manière dont le système de distribution doit s'organiser.

Pour savoir si le développement du commerce électronique a un effet sur le cadre économique et l'approche juridique de l'application du droit de la concurrence aux restrictions verticales, il faut comprendre quel impact a le commerce électronique sur la concurrence et sur le bien-être social des consommateurs.

Quatre aspects sont abordés dans la littérature : (i) l'impact du commerce électronique sur les coûts de recherche ; (ii) sur la zone de chalandise géographique des transactions ; (iii) sur les coûts de distribution ; (iv) sur l'existence d'asymétries d'information entre consommateurs et producteurs. À chacun de ces aspects, la littérature économique apporte une réponse claire, assortie d'un « oui, mais ».

S'agissant des (i) coûts de recherche, il est évident que l'Internet permet aux consommateurs de prospecter plus facilement et de comparer les prix entre fournisseurs, d'où une diminution des coûts de recherche. Les économistes pensaient, avec un optimisme excessif, que ces coûts de recherche disparaîtraient entièrement, mais les faits leur ont donné tort, premièrement parce que les consommateurs doivent supporter des coûts de recherche exogènes, et deuxièmement parce que les commerçants trouvent des tactiques pour rendre plus difficile la comparaison des prix pour les consommateurs, ce qui aboutit à créer des coûts de recherche endogènes. Du fait de l'ensemble de ces coûts, il subsiste une forte dispersion dans les prix, même sur l'Internet.

Pour ce qui est de (ii) la portée géographique des transactions que permet l'Internet, on prédisait aussi que les consommateurs profiteraient beaucoup plus de l'abaissement des barrières géographiques et accéderaient à une offre très élargie, et que de leur côté les entreprises pourraient atteindre des marchés beaucoup plus éloignés. Pour cet aspect aussi, un corpus de recherche assez convaincant montre que, pour diverses raisons, la distance reste un facteur important. Par exemple, acheteurs et vendeurs ont tendance à préférer traiter sur de plus faibles distances, entre personnes qui partagent une même culture et ont des goûts proches ; il est aussi plus facile de faire respecter les accords au sein d'un même territoire de compétence. Par conséquent, même si la possibilité existe d'acheter dans d'autres pays et d'autres territoires de compétence, l'essentiel du commerce électronique se fait toujours entre zones limitrophes.

Pour (iii), les coûts de distribution, deux phénomènes se produisent. Premièrement, l'Internet a permis aux producteurs et aux consommateurs de traiter directement. Dans certains cas, cela a abouti à éliminer certains intermédiaires, mais cela a parfois aussi permis l'émergence de nouveaux intermédiaires et la création de plateformes électroniques. Deuxièmement, comme les coûts de revient des stocks sont plus faibles, les distributeurs en ligne peuvent proposer un choix beaucoup plus large de produits, ce qui leur permet aussi d'intéresser des consommateurs de niche. Dans le même temps, les coûts d'expédition constituent désormais une part importante du prix payé par le consommateur lorsqu'il achète en ligne.

Enfin pour (iv) l'asymétrie d'information, acheter en ligne peut créer une asymétrie d'information qui n'existerait pas hors ligne. Par exemple, les consommateurs ne peuvent pas tester un produit avant d'acheter : il est donc plus difficile pour les distributeurs de bâtir leur réputation. Les consommateurs ont aussi généralement l'impression que l'achat en ligne offre moins de sécurité. Cela étant, le développement de l'Internet a permis de nouveaux moyens de surmonter ces asymétries d'information : les consommateurs peuvent prendre connaissance des avis d'autres acheteurs ; les sites marchands peuvent quant à eux trouver des stratégies qui permettent aux consommateurs d'essayer les produits et de les renvoyer s'ils ne leur conviennent pas.

Ces caractéristiques du commerce électronique ont sur la concurrence des conséquences multiples. Premièrement l'Internet a intensifié la concurrence-prix ; cela ne signifie pas nécessairement que la concurrence soit plus forte, car d'autres formes de concurrence peuvent entraîner des effets contraires. Deuxièmement, les marchés géographiques se sont étendus, cela est indéniable, et l'Internet est un facteur positif d'intégration des marchés. Il permet aussi aux consommateurs d'acheter des produits auxquels ils n'auraient pas accès dans le monde physique car ce sont des produits qui intéressent très peu d'acheteurs et qu'il n'est pas pratique pour les distributeurs de conserver en stock.

Tout cela devrait en principe se traduire par une augmentation du bien-être des consommateurs. Mais dans le même temps, l'importance de la concurrence-prix peut dans certains cas aboutir à ce que les distributeurs aient moins de capacité et moins de motivation à réaliser certains investissements qui auraient augmenté le bien-être des consommateurs. De plus, sur l'Internet, les marchés tendent à être concentrés, du fait d'externalités de réseau qui rendent plus difficile l'entrée sur le marché de nouveaux acteurs.

Pour autant, ces éléments ne signifient pas qu'une nouvelle approche économique soit nécessaire pour analyser les implications concurrentielles des restrictions verticales. La justification de l'efficience, largement traitée dans la littérature économique, s'applique à la vente tant en ligne qu'en magasin, tout comme les visées anticoncurrentielles qui peuvent motiver l'adoption de restrictions verticales. Le cadre général reste donc valide, et peut être adapté à cet environnement nouveau sans être changé de fond en comble. De même, les intérêts des producteurs et ceux des consommateurs concernant le développement de l'Internet comme nouveau mode de distribution sont toujours en phase.

Cependant, deux éléments nouveaux doivent être soulignés. Le premier est que l'Internet est un nouveau moyen, non seulement de distribuer des produits, mais aussi d'en créer de nouveaux. Avec le livre numérique, on est en présence d'une nouvelle manière de vendre des livres traditionnels, mais en plus, l'Internet a amené une nouvelle manière de consommer des livres. De cela découle une différence importante : il se peut, dans ce cas, que les intérêts des producteurs et ceux des consommateurs ne coïncident plus en ce qui concerne la production et la distribution de ce nouveau produit. Deuxième nouveauté, on voit apparaître un nouveau mécanisme d'établissement des prix, les « accords de parité entre plateformes ». Par ce type d'accord, passé entre un vendeur et une plateforme de commerce électronique, le vendeur s'engage à ne pas pratiquer avec la plateforme un prix plus élevé qu'avec les autres plateformes.

Ce type d'accord peut être motivé par la recherche de l'efficience : le propriétaire de la plate-forme cherche à préserver l'investissement réalisé pour développer la plate-forme et à offrir des services accessoires que les consommateurs apprécient. Cela est particulièrement important pour les marchés bifaces : faute de ces accords, ils perdront non seulement des consommateurs mais aussi, à terme, des vendeurs, car ceux-ci quitteront la plate-forme. Il existe aussi bien-sûr des risques pour la concurrence. Le premier est que ce type d'accord n'empêche de nouvelles plateformes de se faire une place sur le marché en proposant aux vendeurs de réduire leurs commissions en espérant que les vendeurs répercuteront ce sacrifice sous forme de prix plus avantageux pour les consommateurs. Ces accords de parité entre plateformes risquent aussi d'affaiblir la concurrence entre plateformes, car celles-ci ont davantage intérêt à prélever des commissions plus élevées aux vendeurs. De même, ces accords risquent aussi de faciliter les pratiques collusoires parce que les vendeurs auront intérêt à communiquer aux propriétaires de plateformes des informations sur les conditions que leur appliquent les autres plateformes. Il s'agit là d'une vraie nouveauté et plusieurs autorités de concurrence enquêtent sur cette pratique. Le Bundeskartellamt a ouvert une instruction sur cette pratique appliquée par Amazon pour la vente de livres.

L'Internet n'est pas la première nouveauté à survenir dans le secteur de la distribution et de la vente au détail, il y en a eu d'autres par le passé ; les autorités de concurrence ont toujours réussi à s'adapter aux situations nouvelles et à appliquer aux nouveaux scénarios le cadre économique et l'approche juridique préexistants. Si le débat se focalise plus sur l'Internet que sur les autres changements, c'est qu'il s'agit d'un

outil particulièrement puissant, en passe de bouleverser tout le fonctionnement de l'économie, mais aussi parce qu'il peut être un moyen d'atteindre d'autres objectifs de politique publique, comme l'intégration des marchés ; c'est peut-être pour cette raison que certaines institutions sont aussi soucieuses d'aider le développement et la diffusion du commerce électronique. Le cadre économique et les outils traditionnels de la lutte anti-trust restent en général pertinents, mais il y a quelques éléments nouveaux que nous ne comprenons pas encore parfaitement et qui demanderont des recherches plus poussées.

Le Président invite le second expert, M. Baye, à prendre la parole.

M. Baye annonce d'abord qu'il va partir des éléments posés par M. Buccirossi pour tenter d'établir comment l'arrivée de l'Internet a influé sur les restrictions verticales et comment la motivation des producteurs vis à vis des restrictions verticales a pu en être affectée. Selon lui, la pratique du « prix minimum affiché » n'est autre qu'une forme de prix imposé. Lorsqu'une entreprise n'est présente que sur l'Internet, les prix publiés sur son site font également office de publicités, puisqu'une recherche Internet fera automatiquement ressortir les prix les plus bas. Autre exemple de restriction verticale sur la vente en ligne, les « prix Colgate », pratique par laquelle un producteur interdit la vente de ses produits aux sites de vente en ligne, ou exige des distributeurs qu'ils réalisent au moins 60 % de ses ventes en magasin pour pouvoir vendre ses produits en ligne. Si un détaillant ne respecte pas cette règle, le producteur, en vertu des lois fédérales des États-Unis comme de la « doctrine Colgate », devrait simplement mettre un terme unilatéralement à la relation commerciale sans communiquer avec lui. Cela reviendrait à éliminer la possibilité d'une forme efficiente de communication, ce qui est assez peu réaliste.

Il note qu'il existe différents types de législations selon les territoires : aux États-Unis, le prix minimum imposé est une doctrine qui obéit à la règle de raison au niveau fédéral, mais dans de nombreux états du pays, la pratique du prix minimum imposé est prohibée en tant que telle. Comme l'Internet fait fi des frontières géographiques, et qu'une entreprise qui opère dans un état peut avoir une présence dans d'autres états ou d'autres pays, les lois d'un état ou d'un pays donné peuvent avoir un impact certain sur les décisions de producteurs domiciliés ailleurs. Les politiques antitrust d'un territoire de compétence peuvent par conséquent avoir d'énormes externalités (positives et négatives).

Autre exemple de restrictions verticales particulièrement pertinentes sur les marchés en ligne, la déclinaison des produits en différentes versions, ou « versioning ». Cette pratique consiste, par exemple pour un fabricant de vêtements, à produire deux qualités différentes de chemises, une pour la vente Internet et une autre, présentant de subtiles différences, pour la vente en magasin. Il n'est pas rare, par exemple, de voir des fabricants mettre moins de boutons dans les chemises destinées à la vente Internet ou supprimer la poche. Il existe aussi des accords exclusifs avec une catégorie particulière de revendeurs : un producteur peut n'autoriser la distribution de ses produits qu'en magasin, et non par le canal Internet. La restriction verticale la plus forte consiste pour le producteur à former une concentration verticale englobant le segment de la distribution, empêchant ainsi de facto tout autre distributeur de proposer ses produits.

Mais toutes choses étant égales par ailleurs, les producteurs ont intérêt à ce que les prix de détail soient le plus bas possible. L'analyse ne doit donc pas se focaliser sur le prix de détail ; ce qu'il faut comprendre, c'est quelle serait la raison initiale qui motiverait un producteur à imposer une restriction verticale. Plus le prix de revente au détail est élevé, moins il y a de ventes et donc moins il y a de commandes pour le producteur : à prix de gros égal, le producteur gagne moins.

Il en va de même pour l'élargissement de la zone de chalandise à d'autres marchés géographiques. Un producteur qui, grâce à l'Internet, a accès à davantage de clients dans plusieurs marchés géographiques réalise davantage de ventes unitaires et donc gagne plus, à prix de gros égal. Par conséquent, les producteurs ont intérêt, non seulement à ce que le prix de détail soit le plus bas possible, mais aussi à toucher d'autres marchés géographiques et à multiplier les canaux de distribution, non à les limiter.

Il importe donc de rappeler que le producteur réalise sa marge sur le prix de gros : son bénéfice se calcule comme la différence prix de gros unitaire moins coûts de production et de distribution unitaires, multiplié par le nombre d'unités vendus. Par conséquent, arithmétiquement, une restriction verticale n'est avantageuse pour le producteur que si elle lui permet, soit de vendre davantage d'unités, soit de diminuer ses coûts de revient – par exemple grâce à des économies d'échelle ou à une réduction des coûts de distribution – soit encore d'augmenter le prix de gros.

Les restrictions verticales qui entraînent une augmentation du prix de gros ont pour objet de bénéficier directement au producteur en limitant la concurrence avec les autres marques. Les deux autres raisons qui peuvent inciter un producteur à imposer une restriction verticale sont soit neutres soit favorables pour les consommateurs. Il est important de garder cela à l'esprit.

Si l'on prend l'exemple du consommateur qui veut acheter un téléviseur : chacun sait que le client, après avoir choisi le modèle Samsung qui lui convient dans un magasin physique, peut comparer les prix en ligne (parfois à l'aide d'une application spécialisée sur son ordiphone alors qu'il se trouve encore dans le magasin) et s'apercevoir qu'il peut se procurer le même modèle pour 600 dollars moins cher en commandant sur Internet chez un autre revendeur. Du point de vue du fabricant, Samsung, peu importe où le consommateur achète le produit puisque le prix de gros est le même. Le seul problème qui peut se poser pour lui est que cette pratique risque à terme de dissuader les magasins en dur de continuer à référencer ses téléviseurs et que les consommateurs qui se rendent dans ces points de vente ne pourront voir que des téléviseurs Sony, lesquels pourront même se vendre plus chers qu'auparavant. Autre risque, celui de ne plus pouvoir avoir un accès physique au consommateur. Par la suite, si un consommateur veut acheter un système stéréo ou un téléviseur, il sera dans l'impossibilité de découvrir les produits de visu pour déterminer lequel lui convient le mieux. Il y a une perte pour le consommateur. C'est là un problème auxquelles les marques essaient de remédier au moyen de restrictions verticales.

Les restrictions verticales peuvent avoir d'autres motivations proconcurrentielles, par exemple pour contrecarrer les tactiques de parasitisme touchant au service comme dans cet exemple. Elles peuvent aussi inciter les revendeurs à engager des dépenses, par exemple de publicité, pour stimuler la demande.

Les restrictions verticales peuvent aussi être proconcurrentielles, même en dehors des questions des services annexes et de parasitisme. Un producteur a intérêt à ce que les revendeurs aient envie de promouvoir sa marque par rapport à la concurrence. Dans les magasins en dur, même dans les contextes où il n'y a pas de service rendu par le vendeur et où le problème du parasitisme ne se pose pas, on peut mettre un produit en avant en le positionnant à portée de main et de regard en rayon. Le commerçant réservera ce traitement aux produits sur lesquels il réalise les plus fortes marges. En commerce électronique, ce qui est déterminant c'est l'endroit où le produit apparaît sur la page, ou son rang dans la liste des résultats. Dans la mesure où la plate-forme de commerce électronique ou le magasin en ligne peut décider où le prix et le produit seront affichés, il y a fort à parier que la motivation des vendeurs à mettre le produit en avant ou à le promouvoir dépendra de la marge qu'ils réalisent dessus.

Dans ce cas de figure, les restrictions verticales de type prix minimum imposé peuvent permettre de garantir un certain niveau de marge pour les revendeurs. Cela leur donne intérêt à promouvoir la marque, plutôt que de reléguer les produits sur un rayon inférieur s'il s'agit d'un magasin en dur ou en page trois de la page de résultats s'il s'agit du site web d'un acteur de la distribution en ligne.

Parmi les logiques anticoncurrentielles qui peuvent motiver les restrictions verticales sur le commerce électronique, citons le cas de figure suivant : lorsque de nouveaux canaux de distribution apparaissent, les distributeurs qui ont des magasins en dur ont intérêt à empêcher le producteur de travailler avec une boutique en ligne. Pour les produits qui n'ont pas besoin de service, il n'existe pas de risque évident de parasitisme, donc pas de raison évidente pour que le produit doive être vendu par les canaux traditionnels

plutôt qu'en magasin. Si le distributeur a suffisamment de puissance de marché, il peut menacer le producteur de déréférencer le produit et peut *de facto* le forcer à imposer des restrictions verticales. L'important ici est que ce type de restriction verticale porte préjudice au producteur et qu'il est l'effet d'une coercition de la part du distributeur. La seule raison pour le producteur d'imposer ces restrictions est qu'elles sont pour lui préférables à l'autre option, qui est de renoncer 60 ou 70 % de ventes si le distributeur le boycotte. Autrement dit, le distributeur a suffisamment de puissance de marché pour contraindre le producteur à agir contre ses propres intérêts. Cela étant, dans de nombreux cas, la contrainte n'est qu'apparente. Si le distributeur prétend qu'un autre vend le même produit en ligne avec des marges inférieures et menace de déréférencer le producteur, on peut conclure, un peu hâtivement, à la coercition. Mais il se peut aussi que tout cela ne soit qu'une manifestation de la théorie générale de l'*agency*, qui reconnaît le hiatus entre le rôle du producteur et celui du commerce de détail (vendre le produit aux consommateurs). Par conséquent, si le producteur a le choix d'imposer ou non une restriction verticale pour mieux servir ses propres intérêts, il peut peser le pour et le contre et déterminer si oui ou non, le problème de parasitisme est tel que sa production globale sera plus importante s'il autorise que le produit soit vendu en ligne.

Le principal critère à retenir c'est l'existence ou non de faits montrant que le producteur est pénalisé par les restrictions verticales. Si oui, cela signifie que la production va diminuer, et donc probablement que les consommateurs aussi seront pénalisés.

Quant au reproche traditionnel adressé aux prix imposés, taxés de mécanisme collusoire, rien n'indique qu'ils seraient opérants dans un environnement en ligne. La transparence sur les prix y est déjà très forte : les restrictions verticales ne sauraient être utilisées comme moyen de renforcer l'effet collusoire d'une entente. Il n'y a donc guère lieu de s'inquiéter de la pratique des prix imposés dans le commerce électronique.

M. Baye convient avec M. Buccirossi que l'analyse juridique et la théorie économique utilisées pour analyser les restrictions verticales dans les marchés traditionnels restent valables sur les marchés en ligne, mais qu'il existe de subtiles différences. Par exemple, sur les marchés en ligne, on observe une importante dispersion des prix.

Dès lors, il devient très difficile d'évaluer l'impact d'une intervention sur le prix. Plus important, deux séries de prix vont coexister dans un marché qui se subdivise entre vente en ligne et vente en magasin. Donc, si nous revenons à notre exemple de consommateur qui achète un téléviseur, on a vu que le prix en ligne est plus avantageux que le prix en magasin, mais aussi que le canal de distribution en ligne peut finir par cannibaliser les ventes des canaux traditionnels car le service supplémentaire offert dans les magasins physiques n'est pas pour eux un atout suffisant face à la concurrence. Autre risque, celui qu'il ne reste qu'un ou deux magasins en dur dans les petites agglomérations, ce qui risque d'autoriser les points de vente restants à augmenter leurs prix. Les consommateurs qui n'ont pas accès à l'Internet et ceux qui ne souhaitent pas acheter en ligne avant d'avoir examiné les produits physiquement pourraient finalement pâtir de la concurrence du commerce en ligne.

La probabilité que ces différentes pratiques aient un impact néfaste varie selon les types de produits et selon le degré de pénétration de l'Internet dans le pays.

D'après les chiffres actuels, la part de marché du commerce électronique est limitée dans la plupart des pays ; elle varie considérablement d'un pays à l'autre. Par conséquent les scénarios décrits seront plus ou moins pertinents selon les pays.

Plus important, chaque produit est plus ou moins adapté aux différentes formes de distribution. Les canaux en ligne conviennent très bien à la vente de produits numériques par exemple, alors que pour

d'autres produits comme le parfum par exemple, la présence physique de l'acheteur et le service autour du produit sont plus importants ; les canaux de distribution traditionnels sont donc plus adaptés.

Il ressort de données du Royaume-Uni et des États-Unis que, dans le secteur de l'électronique, la part du commerce électronique dans les ventes est plus importante que celle du commerce traditionnel. Cela s'explique par le fait que les premiers produits présentés dans les sites de comparateurs de prix comme mySimon, Shopper.com et Kelkoo.com. Le commerce électronique est moins prépondérant dans d'autres secteurs, comme l'équipement de la maison.

Si une intervention visant à stimuler la concurrence sur un produit en ligne a pour effet d'augmenter les prix dans les magasins en dur du fait du plus petit nombre de points de vente, se pose alors la question de savoir quels consommateurs sont les plus importants : ceux qui veulent acheter en ligne ou ceux qui préfèrent acheter en magasin ? La réponse sera très différente d'un territoire de compétence à un autre et d'un produit à un autre. Ici encore, il n'existe pas une manière unique d'analyser le marché.

Après l'introduction de M. Baye, le Président invite des autorités de concurrence à débattre sur les aspects généraux des restrictions verticales dans le commerce électronique. La première autorité de concurrence, la Commission européenne (CE), rappelle les principes du règlement d'exemption des restrictions verticales par catégorie et explique la manière dont il s'applique à la vente en ligne.

Le délégué de l'UE commence par quelques questions à M. Baye. Il l'interroge en particulier sur le cas où deux marques ont des marges différentes et où il semblerait que le prix imposé entraînerait à un relèvement de la marge la plus faible. Il demande alors ce qui se passerait si la raison pour laquelle l'une des marques était plus chère était justement que ses prix étaient imposés, et s'il faudrait alors souhaiter des prix imposés pour l'autre marque également. Cela ne constitue-t-il pas justement, demande-t-il, le risque d'effet anticoncurrentiel des prix imposés, qui impose une externalité à la marque rivale : si la marque Y se met à pratiquer les prix imposés, la marque X est obligée d'en faire autant, avec un effet négatif pour les consommateurs.

M. Baye en convient : il existe des théories selon lesquelles les prix imposés et les restrictions verticales peuvent en fait affaiblir la concurrence entre marques. Il ne prétend nullement que ces effets ne peuvent jamais se produire, mais que l'impact d'une forme particulière de restrictions verticales doit être analysé sur le prix de gros et non sur le prix de détail.

Beaucoup de raisons peuvent expliquer que les marges soient plus élevées pour une marque que pour une autre, et la concurrence entre marques sera influencée par l'intérêt qu'a le distributeur de mettre en avant un produit plutôt qu'un autre. La collusion et d'autres facteurs peuvent s'appuyer sur des restrictions verticales et affaiblir la concurrence entre marques, d'où un renchérissement du prix de gros. Dans le scénario hypothétique que nous avons décrit, toutes choses étant égales, les prix imposés ne pourraient avoir un effet anticoncurrentiel que s'ils renchérissaient le prix de gros. C'est ce qu'illustre l'exemple proposé par la CE. Les restrictions verticales ne sont pas toujours proconcurrentielles ; et il ressort clairement de la littérature économique qu'elles peuvent avoir des effets tant proconcurrentiels qu'anticoncurrentiels.

Le délégué de l'UE demande alors s'il ne s'agirait pas là d'un exemple classique de régime de prix imposés préjudiciable : les prix imposés sur une marque signifient que les prix de détail sont plus élevés et que cette marque rapporte davantage au distributeur, lequel a donc intérêt à la privilégier, ce qui pousse une autre marque à relever ses prix en fixant elle aussi un prix imposé. Il suggère aussi que les restrictions verticales n'ont pas pour seul inconvénient d'entraîner un verrouillage anticoncurrentiel et des pratiques collusoires, mais aussi de faciliter la discrimination sur les prix de la part des producteurs.

M. Baye commence par répondre à la deuxième question. Il souligne que la littérature économique considère que la discrimination par les prix peut être tantôt pro-, tantôt anticoncurrentielle, selon les circonstances. Elle peut, par exemple, être très utile lorsque les coûts fixes sont très lourds, ou lorsque dans certaines régions, il ne serait pas possible pour un producteur de couvrir ses coûts de revient avec un prix unique. La discrimination par les prix peut permettre donc au producteur d'extraire une rente plus importante afin de couvrir ses coûts.

M. Paolo Buccirossi note que la discrimination par les prix est pénalisante pour certains consommateurs et favorable pour d'autres : ses conséquences en termes de bien-être sont donc ambiguës.

Le délégué de l'UE souligne que dans le cas de la discrimination par les prix du premier degré, dans laquelle le producteur peut capter la totalité du surplus du consommateur – cas de figure plus facilement concevable dans l'environnement en ligne – la discrimination par les prix est incontestablement préjudiciable au consommateur. De même, dans le cas de la discrimination par les prix du troisième degré, si elle ne conduit pas à une forte augmentation de la production, l'impact sera certainement négatif pour les consommateurs. La discrimination par les prix ne peut être favorable à la fois aux bénéfices des producteurs et au bien-être des consommateurs que lorsqu'elle permet une forte augmentation des volumes. Par conséquent, dans les restrictions verticales, il y a de bonnes raisons d'être attentif à la discrimination par les prix parce que les intérêts du producteur et ceux du consommateur ne sont pas alignés.

M. Paolo Buccirossi convient que l'observation de la production permet mieux d'évaluer l'impact de la discrimination par les prix sur le bien-être des consommateurs que l'observation des prix et que les autorités de concurrence attachent parfois trop d'importance aux prix, au détriment des volumes produits. Par conséquent, pour déterminer si la discrimination par les prix a un impact favorable sur le bien-être, il faut analyser si grâce à elle, de nouveaux consommateurs ont les moyens d'acheter le produit alors qu'ils ne le pouvaient pas auparavant.

Le Président demande alors au représentant de la CE d'expliquer de quelle manière les lignes directrices de la CE s'appliquent au commerce en ligne.

Le délégué de l'UE note que les règles de concurrence de l'UE sont appliquées de la même manière au commerce électronique et au commerce traditionnel pour plusieurs raisons : les effets anti- et proconcurrentiels observés sont plus ou moins les mêmes, et la flexibilité des règles le permet. De plus, il est très difficile de séparer le commerce en ligne et le commerce traditionnel car un grand nombre de transactions commerciales commencent sur l'Internet pour se conclure en magasin, ou vice versa : la distinction entre les deux canaux de distribution n'est pas toujours claire.

Les règles de l'UE déploient une approche globalement axée les effets : le règlement d'exemption par catégorie accorde une tolérance à la plupart des restrictions verticales (contrats d'exclusivité, distribution sélective, franchises) en dessous de 30 % de parts de marché. Au dessus de 30 %, il y a une évaluation au cas par cas, et une liste limitative de restrictions que la Commission considère comme ayant des effets négatifs et une probabilité faible ou nulle d'effets positifs. Dans ce type de situation, il sera normalement impossible que les restrictions bénéficient d'une exemption en application de l'article 101(3).

S'agissant des restrictions qualifiées, le délégué de l'UE souhaite discuter i) de la limitation des ventes passives et ii) de la pratique des prix imposés.

- La limitation des ventes passives peut être une forme de restrictions verticales visant non simplement à fermer les marchés mais aussi à les segmenter, à affaiblir la concurrence et à permettre une discrimination par les prix qui pénalise les consommateurs. Ainsi, le marketing

n'est en fait rien d'autre que l'art de la discrimination par les prix : il s'agit de segmenter le marché et pour en tirer davantage de bénéfices. Les lignes directrices de 1999 de l'UE ont été complétées en 2010 afin d'expliquer clairement la notion de vente passive dans l'univers en ligne. Par exemple, interdire à un revendeur d'avoir un site web équivaut à une restriction des ventes passives car cela revient à lui interdire d'élargir son territoire de chalandise. Il en va de même de la pratique du double prix, c'est-à-dire du cas où le produit est vendu plus cher s'il est destiné à être revendu en ligne : cela équivaut à la situation du revendeur qui doit payer plus cher les produits destinés à l'exportation, ce qui limite sa possibilité d'atteindre une zone de chalandise plus importante et de toucher plus de clients. Cela vaut aussi de l'obligation faite à certains sites d'exclure ou de réacheminer certains clients, c'est à dire de leur interdire d'acheter si leur adresse IP est située en dehors du territoire d'exclusivité des commerçants : cette interdiction est assimilable à une interdiction de la vente passive. Il ne s'agit pas de nouvelles formes de restrictions qualifiées ; le législateur a simplement souhaité clarifier les règles existantes.

- S'agissant de la pratique des prix imposés : dans l'UE, comme dans la plupart des territoires de compétence dans le monde, la pratique du prix maximum imposé n'a jamais été considérée comme une restriction qualifiée ; elle entre dans le champ d'application du règlement d'exemption par catégorie, parce que les effets attendus en sont plus souvent positifs que négatifs. Par exemple, la pratique du prix de revente maximum peut servir à éviter les doubles marges, phénomène relevé par les experts comme posant un problème de concurrence. Mais ce n'est pas nécessairement le cas pour le prix imposé ou pour le prix minimum imposé. Parmi les nombreuses affaires de prix imposé ou de prix minimum imposé examinées par la CE et par le Réseau européen de la concurrence (REC) ces dix dernières années, on n'a jamais mis en évidence de gains d'efficience, mais le plus souvent seulement des augmentations de prix.

Le délégué de la CE passe alors à la question de savoir s'il y a lieu de porter un regard différent sur la pratique de prix de revente imposés à cause de l'existence de la vente en ligne, et en particulier s'il est à redouter que la vente en ligne, à force de parasitisme, ne cannibalise la vente en magasin. Il exprime la crainte de voir disparaître tous les points de revente physique, évoquant l'exemple du téléviseur Samsung. Le problème du parasitisme repose principalement sur l'hypothèse selon laquelle les prix seraient plus bas sur l'Internet que dans les magasins en dur. Or, la Commission s'est penchée sur la question et a constaté que, contre toute attente, ce n'est généralement pas le cas. On trouve, certes, des prix notablement plus bas sur l'Internet mais cela dépend largement du produit. Les prix, ont-ils constaté, sont peut-être en moyenne 5 % plus bas sur l'Internet, mais hors coûts de livraison. Les écarts varient également d'un pays à l'autre. Mais quand bien même il y aurait parasitisme, on peut douter que la pratique des prix imposés soit un bon outil pour lutter. Même avec un prix imposé, un revendeur aura tendance à investir dans les services après-vente, dont les autres ne pourront pas profiter. Au contraire, la solution pourrait être de contraindre les vendeurs en ligne d'apporter des services similaires à ceux dont ils profitent. Enfin, il n'est même pas certain que le parasitisme soit véritablement un problème : les recherches effectuées par la CE montrent que dans l'UE, les consommateurs font autant de recherches avant-achat en ligne lorsqu'ils achètent dans un magasin physique que de recherches avant-achat en magasin lorsqu'ils achètent en ligne. Mais comme le marché en ligne est beaucoup plus petit en volume des ventes, on peut en conclure que beaucoup plus de gens finissent par acheter en magasin après avoir fait leurs recherches en ligne que le contraire.

Enfin, une étude réalisée par Hector Goma, association des marques italiennes, a demandé aux consommateurs en ligne pourquoi ils choisissaient d'acheter leurs produits de marques italiennes en ligne ; la moitié des clients aux États-Unis et dans l'UE et 8 % des clients en Chine ont répondu qu'ils voulaient ainsi éviter de devoir traiter avec un vendeur. Cela permet de recadrer le contexte, lorsque l'on essaie d'estimer les gains d'efficience que l'on peut attendre des restrictions verticales, et la nécessité d'un encadrement des prix pour protéger les revendeurs ou les producteurs.

Le Président invite alors la délégation des États-Unis à expliquer l'approche suivie.

Le délégué de la Federal Trade Commission (FTC) des États-Unis note qu'il subsiste quelques divergences entre les États-Unis et l'UE. Elles tiennent principalement à l'approche des restrictions verticales d'après la « règle de raison ». Actuellement, aux États-Unis, le traitement des restrictions verticales dans le commerce Internet se fait essentiellement au cas par cas. Lorsque l'expérience manque, la FTC préfère ne pas intervenir et observer se qui se passe en réalité sur le marché.

D'un point de vue théorique économique et juridique, la FTC ne pense pas qu'il existe des cas dans lesquels l'intervention n'est jamais indiquée. Que ce soit dans les cas de restrictions verticales prix et hors-prix, ou dans les clauses d'exclusivité, la FTC est consciente des possibilités et du risque d'exclusion. Ainsi dans l'arrêt Dentsply, les tribunaux ont statué que les clauses d'exclusivité étaient inacceptables quand la fermeture du marché atteignait un niveau préoccupant. La règle de raison n'est donc pas une approche qui s'appuie sur la licéité en soi ; il existe de nombreux cas dans lesquels des relations verticales peuvent avoir un impact anticoncurrentiel.

Le représentant du Département de la Justice des États-Unis note que, si pour les restrictions verticales hors-prix, la règle de raison a généralement prévalu depuis au moins 1977, elle n'est appliquée pour les restrictions prix que depuis l'arrêt rendu par la Cour suprême des États-Unis dans l'affaire Leegin en 2007. Par conséquent, les autorités antitrust américaines et les Cours fédérales n'ont pas beaucoup d'expérience d'application de la règle de raison dans ce domaine. Toutefois, comme le montre l'arrêt de la Cour dans l'affaire Leegin, lorsqu'elles auront suffisamment d'expérience sur les répercussions pro- et anticoncurrentielles des prix imposés, les Cours fédérales et les autorités antitrust sauront trouver des moyens équitables et efficients d'empêcher les restrictions anticoncurrentielles et de favoriser celles qui sont proconcurrentielles. Pour le moment, elles appliquent la règle de raison à l'analyse des caractéristiques spécifiques des ventes en ligne, et elles resteront attentives à l'évolution de la littérature économique et de la jurisprudence.

D'après le Président, le raisonnement de la CE semble être que lorsqu'une pratique est considérée comme anticoncurrentielle en tant que telle, c'est parce que *de facto* il a été très difficile de trouver des exemples de cette pratique où l'on pouvait établir qu'il y avait gain d'efficience. Il demande aux délégués des États-Unis s'ils ont déjà rencontré dans la réalité un cas de restriction sur la vente en ligne qui soit proconcurrentielle ou si cela reste une possibilité toute théorique.

Les délégués des États-Unis répondent que les autorités n'ont encore jamais été saisies d'affaires soulevant ce type de problèmes dans l'environnement en ligne. La décision de 1977 de la Cour Suprême, qui dispose que les restrictions hors-prix doivent être analysées à l'aune de la règle de raison, est venue après une longue évolution. Mais cette décision a donné lieu à une situation très inconfortable, parce que la logique de la Cour dans cette affaire (en l'espèce l'affaire GTE-Sylvania) aurait aussi été mot pour mot applicable aux restrictions verticales sur les prix. La Cour a établi que la règle *per se* contre les prix de revente imposés souffrait tant d'exceptions qu'elle ne pouvait plus être appliquée correctement. Maintenant, c'est aux autorités de concurrence qu'incombe de prouver qu'il y a préjudice. Par conséquent, elles recherchent d'abord une preuve du préjudice et alors seulement une preuve de l'avantage. La question de l'avantage ne sera même pas examinée si elles ne parviennent pas à prouver le préjudice.

Le Président note que tout cela est assez différent de l'approche de l'UE. Il s'adresse alors au BIAC et lui demande son avis sur la question.

Le délégué du BIAC commence par souligner la pertinence de ce débat, parce que les nouvelles technologies Internet et mobiles amènent des changements considérables en ce qui concerne la vente et la distribution de produits.

Ces changements sont porteurs d'avantages appréciables pour les consommateurs : animation de la concurrence sur les prix entre commerce en ligne et hors ligne, meilleure information des consommateurs, qui peuvent mieux choisir grâce à l'usage de comparateurs de prix, et possibilité d'acheter un éventail de produits beaucoup plus large, provenant d'autres régions du monde. En revanche, de nouveaux problèmes de concurrence se posent du fait de la transparence accrue sur les prix, de la possibilité pour les acteurs dominants d'exclure des concurrents, ou de nouvelles obligations contractuelles.

Pour certaines entreprises, les restrictions verticales peuvent être un meilleur moyen que les concentrations verticales d'obtenir des gains d'efficience dans la distribution. Les restrictions verticales peuvent aussi être avantageuses pour les entreprises parce qu'elles favorisent la concurrence hors prix et l'amélioration de la qualité. Selon le contexte, elles peuvent avoir des répercussions pro ou anticoncurrentielles.

Le BIAC trouve préoccupante la divergence entre les approches européenne et américaine - particulièrement pour le marché en ligne, dont la dimension mondiale est de plus en plus affirmée.

Le représentant du BIAC explique que l'approche de l'UE consiste à adapter les règles de la distribution traditionnelle en magasin à l'univers en ligne, d'où une moindre flexibilité que la règle de raison. Il souligne qu'il est trop tôt pour évaluer entièrement l'impact des lignes directrices de l'UE mais qu'il reste à démontrer qu'elles trouvent le bon équilibre entre le souci de promouvoir le commerce électronique et celui de protéger les intérêts légitimes et la motivation à investir de certains acteurs. La démarche des États-Unis est différente : toutes les restrictions verticales, y compris celles qui portent sur les prix, sont évaluées selon la règle de raison en mettant en balance les effets pro- et anticoncurrentiels. Avec l'explosion de la vente en ligne, les autorités de concurrence se trouvent confrontées à des questions et à des problèmes entièrement nouveaux, mais cela ne signifie pas nécessairement qu'il leur faut trouver des approches juridiques nouvelles ou des règles spécifiques. Le droit de la concurrence a toujours été suffisamment flexible pour s'adapter aux évolutions de l'environnement économique et aux nouvelles pratiques qui apparaissaient sur les marchés. Mais dans un marché en ligne de dimension mondiale, il est très important pour les entreprises que les règles soient harmonisées et qu'elles soient appliquées de la même manière. L'hétérogénéité des règles peut être source de coûts et de risques supplémentaires pour les opérateurs du marché et peut être un frein au développement du commerce électronique international. La règle de raison, approche appliquée en droit américain, est selon le BIAC assez adaptable à des situations multiples, notamment aux aspects nouveaux du marché en ligne. Le BIAC exprime donc sa préférence pour cette approche, qui laisse une marge d'appréciation pour mettre en balance les différents intérêts en présence et suppose une analyse au cas par cas de chaque restriction verticale en fonction de ses caractéristiques propres.

Le Président signale alors qu'il y a trois contributions qui s'appuient sur des études ou des rapports généraux sur le développement de l'économie numérique et du commerce électronique en particulier. Ce sont les contributions du Royaume-Uni, avec un rapport intitulé Connected Kingdom ; de la France qui étudie également l'impact du développement du commerce électronique sur la concurrence en général, et du Taipeh chinois. Il invite les représentants de ces trois pays à présenter ces rapports.

Le délégué du Royaume-Uni souligne que l'OFT, autorité compétente en matière de concurrence et de consommation, s'intéresse beaucoup au développement de l'Internet et du commerce électronique. Depuis dix ans, elle a consacré à ce sujet un grand nombre de rapports, accessibles sur son site web. D'après le Boston Consulting Group, de toutes les économies du G20, celle du Royaume-Uni est la plus axée sur l'Internet. En 2012, la contribution de l'Internet à la production a représenté 8,3 % de l'économie du Royaume-Uni, part qui devrait s'accroître de 11 % par an ces trois prochaines années jusqu'en 2016. Ces chiffres sont à comparer avec une projection de croissance de 5.4 % aux États-Unis et de 6.9 % en Chine.

Le Royaume-Uni est aussi le premier marché de commerce électronique au monde ramené au nombre d'habitants. Environ 60 % de l'économie Internet correspond à de la consommation et 14 % de tous les achats au détail sont effectués sur l'Internet (23 % en 2016, d'après les projections). D'après les estimations, 31 millions de consommateurs du Royaume-Uni ont acheté des biens et services en ligne, soit la moitié de la population officielle totale.

D'après la dernière étude en date, qui remonte à trois ou quatre ans, les consommateurs ont réalisé une économie de l'ordre de 250 millions de GBP grâce aux achats en ligne. Par ailleurs, d'après les chiffres les plus récents, le commerce sur l'Internet représente un quart du chiffre d'affaires des achats professionnels (business to business) ; quant à la publicité en ligne, elle représente plus de 35 % du marché publicitaire au Royaume-Uni. On assiste depuis quelques années à un basculement massif au détriment des supports traditionnels.

L'Internet a également été facteur de destructions dans l'économie : fermeture de grandes chaînes de distribution comme HMV (CD et DVD), et le magasin vidéo Blockbuster. En ce qui concerne les systèmes de paiement, sujet abordé au dernier Comité de la concurrence, l'essor de PayPal, de Google et d'autres modèles innovants commence à empiéter sur les systèmes de paiement traditionnels contrôlés par les banques.

D'après le dernier rapport de l'OFT, les consommateurs hésitent encore à faire confiance aux fournisseurs en ligne et s'inquiètent en particulier quant à leurs possibilités d'exercer leurs droits en ligne. L'OFT a donc engagé une réflexion sur l'économie Internet et le commerce électronique pour aider les consommateurs à renforcer leur confiance dans les marchés en ligne.

La question des prix dans le commerce électronique est l'un des thèmes prioritaires dans le plan annuel de l'OFT pour 2012/13. En matière de concurrence, plusieurs affaires de restrictions verticales sont en cours ; une communication des griefs a notamment été déposée récemment concernant la réservation hôtelière en ligne. L'OFT a également examiné quelques cas d'échanges d'information horizontaux (entre concurrents) dans le commerce en ligne. S'agissant des restrictions verticales, certaines questions intéressantes sont apparues concernant l'établissement des prix, comme le projet lancé il y a peu sur les pratiques de tarification individualisée en commerce électronique : les prix annoncés aux clients peuvent dépendre du modèle de l'appareil qu'ils utilisent et de différents autres facteurs, notamment leur historique de navigation et leurs habitudes d'achat. Les consommateurs qui visitent le site marchand peuvent voir s'afficher un prix différent selon qu'ils utilisent un Apple ou un PC. Si un consommateur se déconnecte et se reconnecte, le prix peut avoir changé, selon que l'algorithme du site détermine qu'il est plus ou moins décidé à acheter. Cela pose des problèmes de fixation des prix qui sont intéressants mais n'entrent pas dans le champ des restrictions verticales.

Le délégué de la France indique qu'un rapport a été remis sur les aspects concurrentiels du commerce électronique en septembre 2012. L'autorité de concurrence française ne juge pas nécessaire de créer un cadre spécifique pour les restrictions verticales dans le commerce de détail en ligne. Elle estime que le cadre existant permet de traiter efficacement ces pratiques. Certaines restrictions sont imposées à la fois dans les magasins en dur et sur les plateformes de commerce électronique, et l'autorité ne souhaite pas qu'il y ait des règles différentes pour les deux canaux.

Le délégué du Taipeh chinois présente quelques-unes des conclusions d'une étude consacrée aux magasins destinés aux consommateurs. Le Ministère des affaires économiques a réalisé cette enquête en novembre 2012. D'abord, si le chiffre d'affaires de la plupart des sites marchands continue d'augmenter, 48 % des boutiques en ligne ne réalisent pas de bénéfices. Deuxièmement, le nombre de nouveaux magasins en ligne qui apparaissent sur l'Internet progresse chaque année d'une moyenne de 30 %. Troisièmement, la part des commerces qui optent pour le modèle du commerce électronique B2C est en

augmentation. La part des commerces qui utilisent plus d'une plateforme pour vendre est elle aussi en augmentation. Enfin, les chaînes de commerce de proximité comme SevenEleven sont devenues des partenaires de choix pour le commerce électronique car elles apportent leur logistique et un flux de liquidité. Dans ces points de vente, les consommateurs peuvent passer prendre les produits commandés et régler leurs achats.

Confrontée à cette croissance rapide des transactions sur l'Internet, la Fair Trade Commission du Taipeh chinois a mis au point une réglementation administrative complète s'appliquant aux places de marché électroniques. On trouve maintenant sur ces plateformes un ensemble de principes déontologiques (policy statement) destinés à guider les participants afin qu'ils respectent les dispositions du droit commercial (Fair Trade Act) et ne compromettent pas les possibilités de développement portées par la technologie Internet. Ces principes concernent tant les produits vendus que les places de marché elles-mêmes. Ils traitent des problèmes de restrictions de la concurrence et de concurrence déloyale, d'échange d'informations, de puissance de marché, d'accords d'exclusivité, etc. Répondant au délégué du Taipeh chinois, M Baye note qu'il existe plusieurs documents qui traitent de la question plus générale de l'impact des restrictions verticales sur les prix – notamment l'enquête réalisée récemment par Margaret Slade et Francine Lafontaine. Il explique aussi que la théorie économique suggère que, si le nombre de points de vente qui proposent un produit donné est limité par des restrictions verticales, la concurrence intra-marque est affaiblie, ce qui aura pour effet de faire monter le prix. De même, par définition, une restriction prix sous la forme d'un prix minimum imposé aura aussi pour effet d'augmenter le prix.

M. Paolo Buccirossi revient sur le développement de Francine Lafontaine et Margaret Slade, qui ont passé en revue plusieurs études empiriques sur les restrictions verticales et ont conclu que, lorsque la restriction verticale est imposée par le producteur, il en résulte des prix de détail plus bas et une meilleure qualité de service dans la quasi totalité des cas. En revanche, quand c'est la puissance publique qui impose la restriction verticale, le prix de détail sera plus élevé.

Le Président note que la plupart des contributions concluent qu'il n'y a pas lieu de créer une réglementation spécifique pour le commerce électronique. Dans ce contexte, il demande à la Norvège d'expliquer la logique qui a conduit à l'adoption d'une réglementation sectorielle spécifique pour le commerce électronique concernant l'accès aux plateformes Internet d'annonces immobilières sur Internet depuis 2010.

Le délégué de la Norvège explique que jusqu'en 2010, l'usage voulait que sur toutes les grandes plateformes d'annonces immobilières en Norvège seuls les agents immobiliers professionnels étaient autorisés à publier des annonces de vente de biens immobiliers. On pouvait vendre une voiture ou une bicyclette sur les portails Internet, mais pas une maison. Les biens immobiliers ne pouvaient être proposés que par l'intermédiaire d'un agent immobilier. L'autorité de concurrence norvégienne a évalué cette pratique pour déterminer si elle portait atteinte aux dispositions antitrust de la loi norvégienne sur la concurrence en particulier, mais elle n'a pas trouvé de raison d'intervenir. L'autorité a estimé que cette pratique de refus de vente avait clairement des répercussions anticoncurrentielles pour les services liés à la cession et à l'acquisition de biens immobiliers, et qu'en ouvrant à tous l'accès à ces services, il en résulterait une pression concurrentielle accrue sur les agents immobiliers. Selon elle, une mesure individuelle (c'est-à-dire qui porterait sur une plateforme en particulier) en ce sens ne suffirait pas à mettre un terme à cette pratique sur ce marché. En effet, les agents immobiliers étant les principaux clients des services de publication d'annonces immobilières, ils n'auraient qu'à reporter leur demande sur les plateformes web qui n'ont pas fait l'objet de cette intervention individuelle. Par conséquent, l'autorité a considéré que l'intervention de l'autorité de concurrence devait s'appliquer à toutes les plateformes d'annonces en ligne. La solution a été trouvée dans la section 14 de la loi sur la concurrence, qui stipule que le régulateur peut intervenir sur des dispositions d'accords commerciaux ou sur des actions qui limitent ou sont susceptibles de limiter la concurrence sur un marché donné. La section 14 peut être considérée

come un outil complémentaire, à côté des sections transposent les articles 101 et 102 de la loi sur la concurrence de l'UE. Par conséquent, sur cette base, l'autorité de concurrence norvégienne a pris une mesure de régulation qui impose l'accès de tous à ces services à compter de début 2010. Elle a procédé à une évaluation et a déterminé que cette décision avait peu d'impact la première année, car seuls 2 % des annonces étaient publiées par des particuliers. Le délégué observe qu'il serait intéressant d'observer les effets de cette mesure sur le long terme.

La Norvège note qu'il est probablement trop tôt pour mesurer l'impact de la mesure sur le taux des commissions, puisqu'il n'y a encore que 2 % des annonces qui sont publiées par des particuliers.

M. Buccirossi a deux questions à poser à la délégation de l'UE. La première porte sur l'interdiction de vente en ligne. D'après son interprétation du règlement d'exemption par catégorie et du jugement récent de la Cour européenne de justice, il existe un nouveau présupposé dans l'application du droit de la concurrence aux restrictions verticales : que l'interdiction de la vente en ligne est une atteinte par objet. Dès lors, la charge de la preuve incombe à l'entreprise. Il demande si ce nouveau présupposé est bien nécessaire et pourquoi il n'a pas été appliqué à d'autres formes de vente comme la vente par catalogue, au porte à porte ou en grande surface.

Sa deuxième question renvoie à deux affirmations : les prix en ligne peuvent être plus élevés que les prix en magasin, et les consommateurs préfèrent acheter en ligne pour éviter les vendeurs en magasin. Il demande si, pour évaluer les incidences de restrictions sur la concurrence, il ne serait pas utile de commencer par analyser la logique qui pousse les fabricants à imposer ces restrictions à leurs revendeurs.

A la première question, le délégué de l'UE répond qu'une restriction sur la vente en ligne n'est pas une restriction qualifiée. La vente en ligne n'est qu'un moyen différent d'accéder au client, comme le fait d'utiliser une voiture pour les livraisons ou un téléphone pour contacter les clients. Cette restriction ne présente donc rien de nouveau : c'est simplement l'application des mêmes principes à une nouvelle manière de vendre.

A la deuxième question, le délégué de l'UE répond qu'il ne s'agit pas de réglementer la conduite des affaires, mais de s'assurer que l'exemption par catégorie couvre vraiment toutes les situations visées. En revanche, si la probabilité de gains d'efficience est faible, ou si la logique ne tient pas, il n'y a aucune raison d'accorder l'exemption par catégorie.

Le délégué de l'UE demande à M. Baye de préciser quels sont les problèmes de concurrence qui se posent si le prix de gros augmente.

M. Baye observe que cette question est liée à celle du Taipeh chinois. Si un prix de revente minimum est imposé, cela fait augmenter le prix de détail. Mais cette statistique à elle seule ne permet pas de déterminer si la restriction est *in fine* favorable ou défavorable aux consommateurs. Il faudrait prendre en compte la qualité des produits, la qualité du service, la bonne correspondance entre le consommateur et le produit qu'il recherche, etc. Par conséquent, si on soupçonne qu'une restriction verticale n'est pas motivée par la recherche d'efficience, mais qu'elle vise à affaiblir d'une manière ou d'une autre la concurrence entre marques, le moyen le plus direct d'évaluer son impact serait de regarder le prix de gros. Cela serait plus simple que de demander aux parties de faire la preuve qu'il y a gain d'efficience.

Le délégué de la CE souligne que cela diffère de l'approche des États-Unis ; pour l'UE, il faudrait d'abord que les autorités démontrent des effets négatifs, et ensuite qu'elles recherchent des effets positifs.

M. Baye observe que, pour poser la bonne question sur le prix de détail, il faudrait tenir compte du fait que le prix imposé peut aussi avoir des effets stimulants sur la demande, et ne pas poser en principe que des prix de détail plus élevés sont systématiquement néfastes pour le consommateur. Le fait d'avoir

des prix de détail plus élevés est néfaste pour le producteur : il vend moins d'unités donc ses recettes seront plus faibles. Il se passe forcément autre chose ; il se peut, par exemple, que la concurrence entre marques soit affaiblie. Mais pour savoir si c'est le cas, il faut regarder le prix de gros. Par conséquent, il suggère d'observer les prix de gros. Il est bien conscient que c'est très difficile pour la CE comme pour les États-Unis, parce qu'il faut aussi tenir compte des différences de qualité pour déterminer si les consommateurs sont pénalisés ou non.

2. Restrictions verticales dans le commerce électronique : restrictions sur les prix

Le Président invite le délégué du Royaume-Uni à s'exprimer sur la « clause de la nation la plus favorisée » (NPF) ou garantie du meilleur prix dans le commerce électronique.

Le délégué du Royaume-Uni indique que l'OFT a constaté que les offres avec garantie du meilleur prix étaient de plus en plus nombreuses sur l'Internet. Une garantie du meilleur prix est un engagement unilatéral du revendeur en ligne par lequel il s'engage soit à aligner son prix sur celui concurrent le plus bas, soit à rembourser la différence entre le prix du concurrent et le prix affiché sur son site. Au premier abord, on peut penser que ce type d'offre est favorable au consommateur puisqu'il réduit ses coûts de recherche sur l'Internet. La garantie du meilleur prix est également un moyen pour les nouveaux entrants de bâtir leur réputation de prix bas et de forte compétitivité-prix ; ce dispositif peut donc avoir des répercussions proconcurrentielles. Toutefois, il peut aussi par certains côtés affaiblir la concurrence. Premièrement, les consommateurs, attirés par la garantie du meilleur prix, peuvent être moins motivés à rechercher ailleurs des prix bas, et les concurrents peuvent être moins motivés à baisser leurs prix, puisque le détaillant qui offre la garantie va aligner son prix sur le leur. Deuxièmement, la garantie du meilleur prix peut être un mécanisme qui participe à la collusion : les consommateurs exercent un rôle de surveillance automatique et signaleront si des concurrents, dérogeant au pacte collusoire, pratiquent des prix plus bas. L'impact anticoncurrentiel le plus fort de cette pratique est qu'elle peut ériger des barrières à l'entrée et permettre ainsi à un acteur bien établi en ligne possédant sa propre base de clientèle de se bâtir une réputation de casseur de prix pour empêcher l'entrée de concurrents.

Il s'agit là de répercussions anticoncurrentielles possibles de la garantie unilatérale du meilleur prix. Toutefois, les autorités de concurrence considèrent généralement que la garantie du meilleur prix n'est pas entièrement crédible, et qu'elle perd tout sens si le défendeur peut choisir de ne pas aligner son prix.

Dans l'environnement du commerce électronique, on peut créer cette crédibilité grâce à une clause dite « NPF sur les prix de détail » (l'équivalent dans la vente au détail de la de la nation la plus favorisée, appelé aussi « accord de parité entre plateformes »). Il s'agit d'un accord passé entre un vendeur et une plate-forme de commerce électronique par lequel le vendeur s'engage à ne pas pratiquer avec cette plate-forme des prix plus élevés qu'avec d'autres plateformes.

Les problèmes de concurrence que soulève cette pratique sont les mêmes que ceux posés par la garantie du meilleur prix : affaiblissement de la concurrence, diminution de la motivation des magasins en ligne à diminuer leur commission, puisque cela ne leur procurerait pas d'avantage concurrentiel. Il existe aussi un risque non négligeable que cette pratique facilite les mécanismes collusoires, particulièrement dans le cas où plusieurs détaillants en ligne ont une clause NPF avec le même fournisseur. Dans ce cas, il s'agit purement et simplement d'une entente sur les prix entre détaillants. Le risque le plus important est l'exclusion ou la dissuasion de la vente à prix « discount ».

Ceci soulève trois problèmes. Premièrement, la seule raison pour laquelle un fournisseur accepterait une telle clause serait que le site marchand dispose d'une puissance de marché importante dans l'aval. Si le site est un « incontournable » de la distribution, il peut être en situation d'imposer ce type d'arrangement. Il se peut aussi que le fournisseur lui-même bénéficie d'une manière ou d'une autre de cet accord dans

l'aval, sous la forme, par exemple, d'un paiement arrière de la part du site marchand, ou d'une présence dans l'aval, ce qui lui procurerait les avantages d'un affaiblissement de la concurrence dans l'aval.

Le deuxième problème qui se pose est de savoir si les autorités de concurrence peuvent traiter la clause NPF comme elles traiteraient la pratique du prix imposé. Une clause NPF peut entraîner un préjudice plus grave que la pratique des prix imposés. En effet, le site marchand contrôle le prix minimum fixé sur le marché et peut le manipuler en augmentant sa marge. C'est là un autre dommage collatéral de la clause NPF.

Troisième problème intéressant : doit-on considérer que les magasins en ligne fournissent un simple service de publicité au fournisseur, ou qu'ils sont des acteurs traditionnels de la distribution de détail ? Autre question, le détaillant et le fournisseur forment-ils une entité économique unique ou deux entités distinctes ? Si le détaillant est en position d'imposer une clause NPF sur le prix de détail, c'est qu'il est, d'une manière ou d'une autre, distinct du fournisseur d'un point de vue économique.

Le Président demande alors leurs avis aux experts.

M. Paolo Buccirossi invite le public à lire le rapport préparé par LEAR pour l'OFT, car il traite beaucoup des questions qui viennent d'être soulevées. Il insiste sur la différence entre la garantie du meilleur prix et la clause NPF. Il existe une littérature économique abondante consacrée à la garantie du meilleur prix. Ce type de dispositif peut avoir d'autres explications liées à la recherche d'efficience. Offrir cette garantie peut, par exemple, être un moyen d'avantager les acteurs dont les coûts de revient sont plus faibles puisqu'ils font bénéficier de meilleurs prix aux consommateurs. Quand un revendeur affiche la garantie du meilleur prix, on peut considérer qu'il délègue à une autre entité la tâche de déterminer ses prix. Cela implique que les entreprises dont les coûts de revient sont élevés n'ont pas intérêt à adopter ce genre de pratique. C'est donc un moyen de distinguer entre les entreprises dont les coûts de revient et les prix sont bas, et celles dont les coûts de revient et les prix sont élevés. Mais cette explication ne vaut pas pour les accords de parité entre plateformes, puisque le prix des produits ne va pas à la plate-forme et que le coût de la plate-forme n'a pas d'incidence pour les consommateurs.

3. Restrictions verticales dans le commerce électronique : restrictions hors-prix

Le Président demande alors au délégué du Canada de présenter le thème des restrictions hors-prix.

Le délégué du Canada note que la Loi sur la concurrence est technologiquement neutre et fournit au Bureau de la concurrence des instruments qui permettent de considérer les restrictions verticales en ligne de la même façon que les restrictions verticales chez les points de vente physiques. Le commerce électronique présente, certes, des problèmes spécifiques – notamment de définition des marchés et de traitement des effets de réseaux – mais les raisonnements permettant de qualifier les restrictions verticales de pro- ou d'anticoncurrentielles sont généralement les mêmes dans la vente en ligne que dans le commerce traditionnel.

La délégation du Canada souhaite présenter une affaire récente dont le Bureau a été saisie, concernant une suspicion de restriction verticale sur Internet imposée par le Toronto Real Estate Board (TREB). L'acquisition d'une résidence principale est probablement la plus grosse transaction financière dans la vie d'un consommateur. Toronto est la plus grande ville du Canada et les agents immobiliers sont contrôlés par le TREB. Avec plus de 35 000 membres, c'est la plus grande chambre immobilière du Canada. Le TREB contrôle le service commun d'annonces de Toronto (appelé MLS system), la source la plus importante et la plus complète d'annonces immobilières en cours et archivées de la région de Toronto. Les candidats à l'achat ou à la vente n'ont accès qu'à un sous-ensemble des informations contenues dans le service MLS, via des sites web d'accès public comme realtors.ca.

Le système MLS du TREB contient des données très complètes sur le marché immobilier, notamment les anciennes annonces et les prix de vente, qui ne sont pas accessibles aux particuliers sur l'Internet, mais réservés aux agents immobiliers membres de TREB. Pour obtenir ces informations, les candidats à l'achat et à la vente doivent passer par un agent immobilier, dont ils devront rémunérer les services via une commission. En 2011, année où a été ouverte la procédure du Bureau contre TREB, quelques 90 000 biens recensés dans le système MLS ont été vendus, pour un chiffre d'affaires total de 40 milliards de dollars de ventes immobilières. Sachant que le pourcentage de commission est généralement de l'ordre de 5 pourcent, cela signifie qu'en 2011 les consommateurs ont payé 2 milliards de dollars de commissions sur des transactions immobilières. Par ailleurs, le Bureau prétend que le TREB impose aussi des restrictions sur la manière dont ses membres peuvent utiliser l'Internet pour fournir à leurs clients des informations extraites du MLS : ils empêchent ainsi ces agents immobiliers d'apporter un service d'intermédiation innovant sur l'Internet. En effet, les agences immobilières sont autorisées à communiquer des informations du MLS en personne, par courrier, par télécopie, par courriel, mais les mêmes informations ne peuvent être publiées sur l'Internet.

Pour donner accès à ces informations, il suffirait de créer un site de bureau virtuel (virtual office web site, VOW) protégé par mot de passe. Les clients pourraient faire une recherche sur tout le stock d'annonces en ligne en temps réel avant d'aller visiter une maison. Cela leur permettrait d'être plus sélectif et de mieux cibler leur recherche ; quant aux agents, ils perdraient moins de temps à trouver la maison qui convient à chaque acheteur et pourraient offrir à leurs clients des services plus innovants et plus performants. Selon le Bureau de la concurrence, les restrictions imposées par le TREB perpétuent le modèle du commerce traditionnel « en dur » qui correspond à la majorité de ses membres et empêche l'émergence de services innovants chez les agences immobilières. Par conséquent, dans la région de Toronto, il n'existe pas de VOW qui permette aux clients de faire une recherche sur l'ensemble des annonces, y compris des annonces antérieures et des prix de vente. Si les restrictions imposées par le TREB étaient levées, le Bureau de la concurrence pense que des modèles innovants et peu coûteux comme ceux développés autour des VOW pourraient faire leur apparition et se développer dans la région de Toronto. Les clients pourraient bénéficier de services nouveaux, de meilleure qualité et moins chers. D'ailleurs, une affaire similaire s'est produite aux États-Unis avec Redfin, un service d'intermédiation fonctionnant autour d'un VOW, grâce auquel les consommateurs auraient économisé 24 millions d'USD en 2011, d'après Redfin. En mai 2011, le Bureau de la concurrence a présenté une demande devant le Tribunal de la concurrence demandant l'interdiction des restrictions imposées par le TREB sur la manière dont ses membres peuvent informer leurs clients. La décision du tribunal est attendue[1].

L'une des grandes difficultés dans cette affaire est que, conformément à la section 79 de la Loi sur la concurrence, le Bureau de la concurrence devait démontrer que la pratique anticoncurrentielle de TREB était la cause directe d'un affaiblissement notable de la concurrence sur le marché. Sachant que les VOW ne permettaient pas aux clients de chercher une liste complète des annonces, cet effet était particulièrement difficile à démontrer. Autre difficulté, la question de la puissance de marché d'un syndicat professionnel : le TREB estime que ni lui, ni aucun de ses membres ne sont puissants sur le marché. Mais

[1] Le 15 Avril 2013, le Tribunal de la concurrence a rejeté la demande du Bureau de la concurrence (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03559.html). Le 14 mai 2013, le Bureau de la concurrence a déposé un recours auprès de la Cour d'appel fédérale lui demandant d'annuler la décision du tribunal dans l'affaire du TREB. Le Bureau estime que la décision du tribunal est fondée sur une interprétation trop étroite de l'article 79 de la Loi sur la concurrence – la clause sur l '«abus de position dominante». Le tribunal a statué que le TREB, comme une association professionnelle constituée, n'entre pas en concurrence avec ses propres membres dans le marché du courtage immobilier et par conséquent ne peut être reconnu coupable d'avoir contrevenu à l'abus de position dominante (http://www.competitionbureau.gc.ca / eic/site/cb-bc.nsf/eng/03567.html).

le contre-argument est que c'est le TREB qui impose ces restrictions et contrôle le système MLS, donc qu'il est bien en mesure d'affaiblir notablement la concurrence sur le marché.

C'est là un bon exemple de modèle basé sur des points de vente physiques faisant tout pour se préserver des effets du changement apporté par des concurrents Internet « low-cost » spécialisés, en recourant à des restrictions verticales : en limitant l'accès à des données essentielles. Avec le développement de l'économie numérique, le Bureau s'attend à être confronté à de nouvelles affaires de ce type. Un secteur du commerce électronique dynamique, dans lequel des concurrents Internet peuvent disputer des marchés aux acteurs traditionnels, lesquels sont forcés de s'adapter et deviennent plus efficients, c'est dans l'intérêt de tous les Canadiens : des prix plus avantageux, des produits de meilleure qualité, un meilleur service et in fine un plus large choix.

4. Autres problèmes de concurrence dans le commerce électronique

Le Président demande à l'Australie de présenter deux nouveaux thèmes : l'existence d'externalités de réseau dans le commerce électronique et l'utilisation de la notion de marché biface pour certains marchés.

Le délégué de l'Australie annonce qu'il va évoquer l'affaire eBay/PayPal. D'après la loi australienne, il existe une règle spécifique interdisant les accords d'exclusivité qui affaiblissent notablement la concurrence (Section 47 de la loi sur la concurrence et la consommation). Mais il existe aussi une disposition de notification : les entreprises qui passent des contrats d'exclusivité peuvent obtenir l'immunité si elles envoient une notification à la Commission australienne sur la concurrence et la consommation (ACCC). Il est rare que l'ACCC reçoive des notifications qui posent problème, mais dans cette affaire ce fut le cas. Quand l'ACCC reçoit une notification, elle engage un processus de consultation publique et, s'il est établi que cette pratique est bien susceptible de diminuer notablement la concurrence, l'ACCC publie un avis pour lever l'immunité.

Dans l'affaire qui nous intéresse, eBay avait déposé une notification et la Commission a publié un projet d'avis pour lever l'immunité. L'entreprise eBay est fournisseur d'une plate-forme d'enchères en ligne qui met en rapport des acheteurs avec des vendeurs, et qui se caractérise par des effets de réseau bifaces. PayPal, filiale d'eBay, offre un système de paiement en ligne sécurisé, réponse au problème de la confiance et au risque de transactions frauduleuses sur les sites d'enchères en ligne. La pratique qui faisait l'objet d'une notification concernait la relation existant entre la plate-forme de commerce et le système de paiement en ligne : les transactions eBay devaient impérativement être traitées via PayPal (sauf dans les cas, plutôt rares, où le paiement se faisait en espèces à la livraison). La Commission a publié un projet d'avis de levée de l'immunité, arguant qu'eBay est plutôt puissant sur le marché de la fourniture de sites d'enchères en ligne. Certes, il existe un autre acteur – qui a pour nom Austian – mais il n'est pas vraiment en mesure de contester la puissance de marché d'eBay, laquelle bénéficie d'importants effets de réseau, avec les deux faces du marché qui se renforcent mutuellement. Il a donc été déterminé que la société eBay exploitait sa puissance sur le marché des sites d'enchères en ligne pour dominer celui du paiement, auquel participait sa filiale PayPal. Le projet de décision n'a pas abouti à une conclusion définitive sur les limites exactes du deuxième marché. Une concurrence existe, avec des formes d'instruments de paiement telles que les cartes de crédits, mais PayPal présente aussi des caractéristiques uniques. Par exemple, il présente plus de sécurité pour les acheteurs, car ceux-ci n'ont pas besoin de communiquer leurs informations financières aux vendeurs, sur l'autre face de la plateforme. Pour beaucoup de petits vendeurs, PayPal permet aussi de se dispenser d'ouvrir un compte commercial auprès d'une banque. L'un des concurrents de PayPal sur ce marché était l'Australien Paymate.

La restriction notifiée avait pour effet d'exclure tous les concurrents de PayPal des transactions sur eBay et ôtait toute possibilité de choix aux utilisateurs d'eBay. De plus, elle rendait plus difficile l'entrée sur le marché de nouveaux acteurs ou d'acteurs de marchés adjacents. Autre problème, les acheteurs et les

vendeurs qui utilisaient PayPal sur eBay avaient également plus de probabilité de l'utiliser sur d'autres plateformes. Enfin, il existait le risque que cette pratique décourage l'innovation, la création de nouvelles fonctions et de nouveaux services. La Commission a été saisie d'un grand nombre de plaintes concernant la piètre qualité du service et le prix élevé des commissions de PayPal.

L'argument d'eBay était qu'en imposant l'utilisation de PayPal à ses utilisateurs, il permettait de surmonter une possible défaillance du marché. D'après eBay, les fournisseurs n'avaient pas suffisamment intérêt à proposer des services de paiement sécurisés à leurs acheteurs, et s'ils connaissaient des expériences malheureuses (Bad Buyer Experiences, BBE) les acheteurs risquaient de bouder la plate-forme eBay. Ces arguments n'ont pas convaincu la Commission que ces avantages suffisaient à compenser l'affaiblissement notable de la concurrence et celle-ci a donc publié un projet d'avis de retrait de l'exemption.

Il n'y eut jamais de décision définitive car eBay mit fin à la pratique en cause et retira la notification. eBay opta alors pour une stratégie différente, quoique voisine : au lieu d'exiger que PayPal soit le seul système de paiement possible, il imposa que PayPal soit proposé parmi les différentes options de paiement. Cette obligation, qui semble acceptable a priori, peut revenir à une restriction *de facto* car la règle de PayPal veut qu'il ne soit pas appliqué de supplément à l'acheteur lorsqu'il utilise ce mode de paiement. Si les vendeurs investissent dans un système, ils n'ont pas besoin d'en avoir un deuxième. Or, il n'existe pas de mécanisme pour reverser la différence de prix aux acheteurs pour respecter l'interdiction du supplément. Là non plus, la Commission n'eut pas l'occasion de présenter ses conclusions sur cette nouvelle variante de restriction, et l'enquête n'aboutit pas.

Le Président invite alors l'Allemagne, l'Autriche et le Japon à présenter des affaires survenues dans leurs pays.

Le délégué de l'Allemagne explique que le Bundeskartellamt a ouvert une instruction sur deux plateformes en ligne : le service de réservation hôtelière HRS et la plate-forme d'Amazon. Concernant le préjudice potentiel, les autorités allemandes partagent l'analyse des celles du Royaume-Uni, avec lesquelles elles collaborent étroitement sur le verrouillage à l'entrée, le relèvement des barrières à l'entrée, la motivation pour la plate-forme à faire monter les prix et le risque accru de collusion. Des questionnaires ont été envoyés à 2 400 revendeurs Amazon, dont certains se trouvent dans d'autres pays de l'OCDE.

Le délégué de l'Autriche note que son autorité a été saisie d'un grand nombre d'affaires d'entente en rapport avec des restrictions verticales et qu'en 2012 elle a mené des inspections inopinées sur une trentaine de sites.

Dans une affaire récente, il était question de restrictions verticales dans la vente en ligne chez les « commerçants hybrides » c'est-à-dire travaillant à la fois sur Internet et depuis des points de vente physiques. Cette affaire avait démarré suite à une étude montrant que 47 % des vendeurs de produits électronique en ligne avaient le sentiment que leurs fournisseurs exerçaient des pressions sur eux, en particulier sur leurs tarifs. L'affaire porte entre autres sur l'autorisation/la livraison de vendre à la fois en ligne et en magasin, susceptibles d'être dus à des prix bas en ligne. Une autre question qui se pose souvent dans ce contexte est si l'autorisation peut être divisée entre les ventes en ligne et les ventes en magasin. Cela est particulièrement intéressant dans les cas où le point de vente physique a uniquement une notoriété locale, alors que la boutique en ligne est connue dans tous les pays germanophones (Allemagne, Autriche et Suisse) sous un nom différent. Le fabricant autorisait le détaillant à vendre ses produits en magasin, mais pas en ligne. Les fabricants assurent que cette pratique entre dans le champ de l'exemption par catégorie de l'UE, qui autorise que certaines conditions soient posées à la vente sur une plate-forme.

Le délégué de l'Autriche demande alors aux autres délégués s'ils ont aussi rencontré des cas de « commerçants hybrides » pour lesquels l'autorisation à vendre en ligne est dissociée de l'autorisation à vendre en magasin, et s'ils pensent que cette dissociation doit être interdite *per se* puisqu'elle aurait pour effet d'empêcher la vente passive.

Le délégué de l'UE note qu'en règle générale, le fait qu'un revendeur soit tenu à certaines conditions de vente n'est pas considéré comme une restriction de la vente passive. Par exemple le revendeur peut être tenu d'utiliser un même style commercial et une même identité tant en ligne qu'en magasin : il ne pourrait pas, par exemple, vendre les mêmes produits dans un magasin luxueux situé à une adresse prestigieuse et sur Internet à prix cassés en n'offrant pas la même qualité de service. Exiger de l'acheteur qu'il ait le même type d'identité et de conditions de vente en ligne et en magasin ne serait donc pas une restriction caractérisée, et serait donc difficile à qualifier d'illégale *per se*.

Le Président invite alors le Japon à présenter son cas, qui a trait à la pratique des prix imposés.

Le délégué du Japon note que deux affaires sont évoquées dans sa contribution : une sur la laine, l'autre sur les lentilles de contact. Au Japon, la pratique des prix imposés n'est pas interdite *per se* mais la pratique des prix imposés sans raison valable est jugée illégale. La charge de la preuve incombe à la société qui en prend l'initiative. Dans les deux affaires, la Japan Fair Trade Commission (JFTC) a conclu que les pratiques étaient illégales et a pris un arrêté imposant d'y mettre un terme. Dans les deux cas, l'impact des prix imposés sur la concurrence était sensiblement le même pour la vente en ligne et pour la vente en magasin.

Le Président demande ensuite à la délégation de la Turquie d'expliquer les décisions de l'Autorité de concurrence de Turquie (ACT), qui autorise les producteurs à se réserver le privilège exclusif de la vente sur Internet.

Le délégué de la Turquie note qu'il y a eu trois affaires concernant des fabricants de prêt-à-porter qui passaient des accords de distribution exclusifs sur la totalité du marché turc. L'ACT a appliqué quasiment le même raisonnement dans les trois cas, qui consiste à considérer que les clients qui achètent en ligne forment un groupe de clients séparés. L'ACT a autorisé les fabricants à se réserver l'exclusivité de la vente en ligne, considérant que cette disposition entrait dans le cadre du règlement d'exemption par catégorie, qui autorise les accords d'exclusivité s'ils portent sur des groupes de consommateurs et sur des territoires exclusifs. Du fait de l'application du règlement d'exemption par catégories, ces décisions n'ont pas donné lieu à une analyse concurrentielle détaillée des dispositions.

Le Président invite alors les délégués à poser leurs questions aux experts.

Le délégué du Royaume-Uni demande si les technologies Internet ou les technologies numériques ne pourraient pas permettre de compenser quelques unes des externalités évoquées précédemment. Par exemple, pour remédier au problème du parasitisme, on pourrait concevoir une technologie qui compterait le nombre de fois où un article est regardé et non le nombre de ventes. Autre parade possible au parasitisme, un show-room qui serait financé par les fabricants et rémunéré au fixe, mais ne réaliserait pas de ventes.

M. Baye observe que les choses peuvent changer : l'Internet, les canaux de distribution et les entreprises évoluent, les technologies ne cesse de progresser, mais il a tout de même l'impression que certains produits se prêtent mieux que d'autres à la vente en ligne.

M. Buccirossi note que les entreprises vont chercher à développer des outils pour résoudre le problème des externalités, comme ils l'ont fait pour résoudre les problèmes d'asymétrie de l'information. Par conséquent, si cela est technologiquement faisable, ils le feront.

Par ailleurs, selon le délégué du Royaume-Uni, il peut être difficile de connaître exactement le prix de gros des produits, car il arrive que le fournisseur établisse directement son prix sur Internet ; le détaillant Internet considère alors cela comme un élément du coût.

M. Michael Baye convient qu'il n'est pas aisé de mesurer les coûts unitaires : il faudrait pouvoir tenir compte du coût d'opportunité, des coûts de distribution etc. Mais il est également très difficile de dissocier les effets sur les quantités, ainsi que l'impact des services complémentaires.

Le délégué de l'UE souligne alors qu'il tend à partager l'analyse de M. Baye sur les prix de gros lorsqu'il s'agit de restrictions verticales imposées par des fabricants. En revanche lorsque les restrictions ont trait à la puissance d'acheteur, si un acheteur dominant exclut ses concurrents au moyen d'accords d'exclusivité, il n'y aura pas relèvement du prix de gros. Peut-être même que le prix de gros diminuera. En revanche en aval, le prix de détail va augmenter, ce qui posera un problème certain en termes de consommation et de concurrence. Les experts souscrivent à cette conclusion.

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1	Competition Policy and Environment	OCDE/GD(96)22
2	Failing Firm Defence	OCDE/GD(96)23
3	Competition Policy and Film Distribution	OCDE/GD(96)60
4	Efficiency Claims in Mergers and Other Horizontal Agreements	OCDE/GD(96)65
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