

The restrictions of online sales in the EU digital market: an interplay between Competition Law and Regulation¹

di Massimiliano Bocchio²

Europe will not be made all at once, or according to a single plan.

It will be built through concrete achievements which first create a de facto solidarity.

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Introduction

The work addresses issues related to online sales within the European common market, specifically analysing the vertical restrictions on prices and commercial channels that both businesses and consumers encounter when engaging in sales over the internet within the EU single market. Although these phenomena intersect with various legal disciplines, such as data protection and intellectual property rights, the analysis of the

restraints is conducted primarily through the lens of EU competition law and relevant sectoral regulation, both of which play a fundamental role in the EU legal framework. The choice behind this topic stems from the recognition that the EU internal market, with its regulatory framework, has been at the core of the European project since its inception and will continue to shape its future. A unified market across all Member States should not be regarded as a goal already achieved by the Treaties, but rather as an ongoing process that continues to deliver tangible benefits to all EU citizens. The future of the European Union is thus intrinsically linked to the development of the common market and its ability to adapt to upcoming challenges. Over the years, the provisions governing the EU internal market have evolved and achieved significant tangible results. Three decades after its formal establishment, the internal market now serves nearly 448 million consumers and accounts for approximately 18% of global gross domestic product.

Today, however, the EU internal market is facing one of its biggest challenges: the digitalisation of our economy. This transformative shift has disrupted the traditional way of doing business across the entire value chain, from producer to end consumers. New economic actors have entered the EU (digital) market, offering goods and services in ways that are arguably more successful than current brick-and-mortar models.³

Consequently, a pressing question emerges: to what extent are the existing regulatory frameworks equipped to address the realities of the digital internal market, particularly in preventing regulatory fragmentation across national borders?

The work seeks to address this issue from a practical perspective by analysing the current set of provisions governing online distribution, with particular attention to relevant case law and the positions of competition authorities at both the national and EU level. Rather than offering a mere summary of the applicable legislation, the analysis critically assesses how effectively the EU legal system identifies and responds to the unique characteristics of the digital economy. The ultimate aim of this writing is thus to determine whether the existing framework of EU competition rules established by the Treaties, along with its recent developments, is adequate to regulate sales restrictions in the digital market - or whether a shift toward more comprehensive regulatory intervention is required.

The analysis of the legal framework's application is conducted from a dual perspective, considering both EU competition law and relevant sectoral regulations. This approach reflects the current trends in the digital sector: alongside the traditional enforcement of

³ See Chapter 1, Section 2.

competition provisions, the new challenges arising from the online market have prompted the introduction of sector specific rules.

The work begins by outlining the structure of the competition law framework, a set of rules originally designed for the traditional economy, and its interaction with sector-specific regulation.⁴ The interplay between these two fields of law, marked by the evolution of competition rules on one side and the emergence of sectoral regulatory measures on the other, constitutes a recurring theme throughout this analysis of the online sales restrictions.

Accordingly, the introduction places significant focus on recently adopted regulatory instruments, such as the Digital Markets Act,⁵ alongside the most significant development in competition law relevant to the digital market: the revised Vertical Block Exemption Regulation.⁶ In the following chapters, this set of rules is then examined in the context of the two main thematic restraints observed within the online market: price restrictions and restrictions on the use of the internet.

The second chapter focuses on pricing restrictions, exploring whether their implementation in the digital market alters the traditional legal analysis, especially in light of algorithmic pricing.⁷ The online hotel booking sector is used as a case study, given the interesting divergent legal assessments at both national and EU levels.⁸

The final chapter addresses restrictions on the internet as a sales channel, beginning with judicial interpretation by courts and progressing to relevant legislative developments.⁹ The latter part of the chapter examines cross-border sales restrictions, with particular attention to the impact of competition enforcement and the potential regulatory solutions arising from the Geo-blocking Regulation.¹⁰

⁴ See Chapter 1, Section 3.

⁵ See Chapter 1, Section 4.1.1.2.

⁶ See Chapter 1, Section 4.3.

⁷ See Chapter 2, Section 2.1; on algorithms see Chapter 2, Section 4.1.

⁸ See Chapter 2, Section 3.2.

⁹ See Chapter 3, Section 2.

¹⁰ See Chapter 3, Section 3.

Chapter 1: Foundations

1. Introduction

“When we look to the future, we see one big change that overshadows everything else [...]...There are really only two types of industry today - those that have been transformed by digitisation, and those that will be.”¹¹

From the first steps of the European integration there has been a certain dominance of the market integration objectives. After the unsuccessful attempts at European integration in the mid-1950s, the Treaty of Rome in 1957¹² shifted the focus of the European project to economic objectives rather than a wider political European integration.¹³ The central aim then became to achieve integration between the Member States through the creation of a common market, and this particular form of economic integration chosen was certainly more ambitious than other, less ambitious forms of integration, such as a free trade area (FTA).¹⁴ The envisioned European common market encompassed not only a free trade area and a customs union, but also provisions to facilitate the free movement of production factors, including labour, goods, capital, establishment, and services. The underlying aspiration was then - and it is still today - that ultimately “a common market would lead to political unification”.¹⁵

The most recent recognition of this centrality of the common market in the European project can be found in the High-Level Report on the future of the Single Market published by the former Italian Prime Minister Enrico Letta.¹⁶ The report emphasises that the EU’s internal market is a cornerstone of European integration and that its future

¹¹ Vestager M., Competition Commissioner, European Commission, Speech at the OECD/G7 Conference: Competition and the digital economy, Jun. 3, 2019, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-digital-economy_en

¹² European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 1957.

¹³ Bache and Others, *Politics in the European Union*, 4th edn., Oxford University Press, 2015, pg. 83 ff.

¹⁴ C. Barnard, J. Scott, *The Law of the Single European Market- Unpacking the Premises*, Oxford-Hart Publishing, p. 3 ff.: *In a pure free trade area (FTA) tariffs and quotas between the participating states are removed. Each of the states will therefore concentrate on producing those goods in relation to which it has a comparative economic advantage. The states will however retain their own national tariffs as against third countries.*

¹⁵ Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, 2013, 3(1) CLES Working Paper Series, page 14.

¹⁶ Letta E., *Much more than a market – Speed, Security, Solidarity Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, 2024.

is linked to the EU's strategic objectives. It should therefore never be seen as a completed project, but rather always as a work in progress.¹⁷

The evolving nature of the internal market means that it has always been called to adapt to the changing European and global economic context. From this underlying concept of the common market's centrality to the European project arises this work. While not addressing all the issues arising from the development of the EU internal market, the core objective here is to examine the ramifications of the most significant economic challenge encountered in this decade: the digitalisation of commercial relations between businesses and consumers.

As an introduction, the traditional concept of an EU common market needs to be declined within his legal framework. The term “economic constitution” (*Wirtschaftsverfassung*) commonly refers to the sum of the constitutional elements governing the organization of the economy.¹⁸ The same concept is now consolidated at EU level in Art. 3(3) of the Treaty on European Union (TEU). The economic constitutional profile of the Union is upheld through prohibitions against discrimination, protection of fundamental freedoms, and the framework of undistorted competition. These elements underscore the intimate connection between the internal market objective and the broader question of the European economic constitution.¹⁹ At the top of the complex list of objectives set out in Article 3(3) TEU, there is indeed the reference to the internal market, which was previously articulated in Article 2 of the Treaty of Nice and Article 2 and Article 3(a) to (c) of the Treaty establishing the European Community (EC). In terms of content, the internal market consists first and foremost of an economic area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.²⁰

The provisions of the Rome Treaty in 1957 laid the foundations for this single market, but they operated primarily through negative integration. They explicitly prohibited discrimination against foreign goods, workers, and other elements.²¹ However, as it has been pointed out, relying solely on negative integration would not be sufficient to achieve a genuine common market. Positive integration, involving the harmonisation of the laws of the Member States, was considered already at the early stages necessary

¹⁷ Ibid, pg. 3.

¹⁸ Schmidt, *Öffentliches Wirtschaftsrecht*, 1990, S. 70.

¹⁹ Grabitz/Hilf/Nettesheim/Terhechte, 80. EL August 2023, EUV Art. 3, para. 48.

²⁰ Article 26(2) TFEU.

²¹ see also Chalmers, Davies and Monti, *European Union Law*, Cambridge University Press, 2019, pg. 11 ff.

to ensure the effective functioning of the common market.²² The same concept can be seen in the formula used by German scholars that the common market “creates freedom internally and conveys unity externally” (*Freiheit nach innen schaffen und Einheit nach außen*).²³

While the European Union is a long way from achieving unity externally at global stage, important progress has been reached over the last 70 years towards an internal economic unification. Within the EU, the internal market integration has achieved notable progress in numerous, although not all, sectors of the economy and society, and approximately 80% of national legislation in these areas arises nowadays from decisions taken in Brussels.²⁴

This perspective helps to explain the shifts of focus beyond the fundamental freedoms – currently emphasised in Article 26(2) TFEU – in order to highlight additional dimensions of the common market.²⁵ Under these additional dimensions falls the development of the rules concerning the competition within the internal market: a framework of rules originally designed for a landscape of brick-and-mortar stores and face-to-face transactions, now facing a market dominated by interactions in a digitalised world, the EU digital market.

The term EU digital market reflects the economy reality of our common market, which has been drastically changed by the rise of the technology. The traditional way business operated alongside the entire production chain, from the manufacturer to the end consumers, has been shaped by one central element: the digitalisation. In other words, all operators on the market have been faced over the last decades with the alternative: either adapt their business model to respond to this new reality or be progressively pushed out of the market. The former option opened to the implementation of the practice of the e-commerce, which can be defined as the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders.²⁶ Interestingly, this need to embrace the practice of online sales is particularly true for the biggest operators on the market, which

²² Pelkmans J., *European Integration, Methods and Economic Analysis*, 1997, pg. 8.

²³ Ipsen, *EG-Recht*, § 12, para. 12.

²⁴ Letta E., *Much more than a market – Speed, Security, Solidarity Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, 2024, pg. 3.

²⁵ Grabitz/Hilf/Nettesheim/Terhechte, 80. EL August 2023, EUV Art. 3, para. 39.

²⁶ Commission, *Eurostat Glossary*, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:E-commerce>; see also OECD, *Implications of E-commerce for Competition Policy - Note by the United Kingdom*, 2018, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2018\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)53/en/pdf)

ultimately are also those that are able to operate across borders and thus are most effected by the EU set of rules.

As in so many other areas, the legislator - with no distinctions at both national or European level - responds to evolving realities by continuously updating rules that govern economic relations. In this regards the title already gives away that this response has been implemented between the enforcement of the antitrust law and the introduction of sectoral regulation.

The study recognises the importance of the digitalisation within our economy system and aims to analyse the way that the legislation has been able to understand these developments and regulate them. In particular, within the emerged phenomenon of the e-commerce, the study will focus on the way business operate in the online dimension alongside the vertical chain of production. This vertical dimension refers to the relationship between enterprises each of which operates at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods.²⁷ In terms of legal assessment, this means that the focus will be on the rules governing the relationship between companies providing certain goods or services, the manufacturers or sellers, and the subjects purchasing those goods or services, the retailers or buyers. In addition, the study takes into consideration the entry of a third party within the production chain – the online platforms – which adds interest to the analysis of the vertical relationship in the EU digital market and serves as further evidence of how the digitalisation of the economy has affected the traditional market.

As a last introduction point, is it noteworthy to indicate how the analysis of the practice of online sales and distribution is carried out under the European perspective, which means through the lenses of both EU competition law and EU sectoral regulations. Although the study will also consider developments in case law and national regulations, there are at least two core elements that dictate the need to consider the issue from a wider European perspective. Firstly, this appears as a logical consequence if the aim is to understand the phenomenon within the EU common market. It has been indeed anticipated in the very first paragraph how under the concept of a positive integration the internal market requires also a set of uniform competition rules for all Member States. Secondly, it is only by looking at the law at EU level that one can truly understand how effective its application is in the digital marketplace. Without pre-empting the later discussion, the very nature of the internet is to be able to cross borders

²⁷ See Regulation (EU) 2022/720, Recital 3.

and facilitate interactions across different jurisdictions. The consequence in terms of legislation is that a unilateral national approach can hardly regulate these dimensions effectively, as several examples will show. The analysis of online sales cannot therefore be confined to a single national jurisdiction; rather, the EU legislator appears to have - at least in theory - the right tools to respond to the challenges posed by the digitalisation of the economy.

As a final note, the focus of the study is on the rules of the EU internal market, but it should be also clear how their impact can nevertheless extend well beyond the borders of the EU common market, as in the field of technology regulation the term ‘Brussels effect’ is often quoted to refer to extra-territorial reach of EU laws.²⁸ In this respect, it should be noted that, on one side, there have been good examples in the past of EU competition law being enforced outside the territorial borders of the common market. The most recent case is the Intel saga, where - without going into the specific competition assessment of the case - the conduct by a foreign company was carried out outside the EU jurisdiction and was nevertheless sanctioned by the Commission.²⁹ On the other side, the current academic and political debate is increasingly focusing on the impact of the EU's sectoral regulations in the digital environment on the global behaviour of foreign companies. The recently adopted Digital Services Act for instance – analysed below – does bear an extraterritorial effect as it applies to service providers established outside the EU: the failure to comply with the Regulation could result in fines of up to 5% of annual turnover. In particular, this Regulation applies to intermediary service providers – as defined below - established outside the Union but which offer services to users within the EU. These intermediary service providers not established in the EU do indeed need to appoint a legal representative within the European Union.³⁰ From a practical standpoint, this extraterritorial reach can be clearly illustrated by Apple's decision to implement a USB-C charger for all devices globally, although formally the business was only obliged to adopt such decision within the EU common market.³¹

²⁸ See for example Charlotte Siegmann and Markus Anderljung, *The Brussels Effect and Artificial Intelligence: How AI Regulation will impact the global AI market*, Centre for the Governance of AI, 2022.

²⁹ Case T-286/09 RENV - Intel Corporation Inc v Commission.

³⁰ Regulation (EU) 2022/2065, Art. 13.

³¹ Reuters, *Apple forced to change charger in Europe as EU approves overhaul*, available at: <https://www.reuters.com/technology/eu-parliament-adopts-rules-common-charger-electronic-devices-2022-10-04/>

In conclusion, concerning the phenomenon of the “Brussels effect” within both competition provisions and sectoral regulations, it appears how the EU legislator found more appropriate – and probably more judicial enforceable - the latter solution. If companies want to operate also in the wide and attractive European consumer market, they must comply with the established rules outlined in the relevant sectoral regulations. Rather than depending on ex post judicial enforcement under EU competition law, this approach ensures that companies are informed of their obligations under the regulatory regimes and so adjust their behaviours accordingly. Consequently, these often stricter EU rules are frequently extended beyond the Union’s borders, influencing commercial practices in global markets.

2. Competition issues in the digital era

2.1. Online sales in the EU digital market

Once the rationale behind selecting an analysis focused on the digitalisation of the economy within the EU single market has been presented, it becomes necessary to contextualise the phenomenon of online selling and examine how it is integrated into our economic system.

The practice of e-commerce, as anticipated, can be defined as the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders.³² The phenomenon manifests itself through different commercial relationships, including potential combinations of consumers (C), enterprises (B) or governments (G). Traditional business-to-business (B2B) transactions continue to dominate e-commerce sales in the private sector. However, there is a growing trend for e-commerce transactions directly involving consumers, particularly in business-to-consumer (B2C) transactions.³³

The sales online within the EU internal market are booming as customers are increasingly connected via smartphones or computer tablets and use them to make purchases of all kinds from home or on the move. The trend spans all sectors, touching for instance e-books, pharmaceuticals, sporting goods, drugstores, electronics, e-banking, online media and even insurance. Internet price comparison platforms facilitate e-shopping, providing information on product features, and saving customer's time. On the side of the consumers, the data indicate how within the EU the number of individuals aged between 16 and 74 who have ordered goods or services over the internet has shown consistent year-on-year growth, with the impressive figure of 69% having ordered goods or services online in 2023.³⁴

On the business side, e-commerce is set to continue its fast and dynamic climb with revenues reaching nearly 900 billion U.S. dollars by 2028.³⁵ Especially for large companies the digital marketplace appears to be increasingly essential to their business:

³² Commission, Eurostat Glossary, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:E-commerce>; see also OECD, Implications of E-commerce for Competition Policy - Note by the United Kingdom, 2018, available at: [https://one.oecd.org/document/DAF/COMP/WD\(2018\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)53/en/pdf)

³³ Unpacking E-commerce Business Models, Trends and Policies, OECD, ch. 1.

³⁴ Eurostat, Individuals – internet use, 2024, available at: https://ec.europa.eu/eurostat/databrowser/view/isoc_ci_ifp_iu/default/table?lang=en

³⁵ Eurostatista, E-commerce in the European Union – statistics & facts, 2024, available at: <https://www.statista.com/topics/3792/e-commerce-in-europe/#topicOverview>

in 2022, 45.9% of large enterprises have engaged in online sales, contributing to a value of online sales equivalent to 22.9% of total turnover in this category.³⁶

The development of e-commerce has profoundly influenced competition and its mechanisms, as it “has [affected] both demand and supply fundamentals of markets”.³⁷

Also the Commission recognised how “the growth of e-commerce over the last decade and, in particular, increased online price transparency and price competition, had a significant impact on companies’ distribution strategies and consumer behaviour”.³⁸ As

the way businesses sell online has changed, consumers face new challenges and issues.

For instance, the European Commission and the national consumer protection authorities screened retailers’ websites and found manipulative practices in 148 cases out of 399.³⁹ The “sweep” encompassed online shops operated by retailers offering

products, revealing the presence of so-called dark patterns. These are interfaces deliberately designed to guide consumers into making choices that may not be in their best interest, employing tactics like fake countdown timers or false hierarchies.⁴⁰

The online commerce is, by its very nature, closely linked to and dependent on the expansion of the internet and the rise of the digital economy. A notable aspect - and one

that also illustrates the remarkable fluidity of this sector - is the ongoing shift from desktop to mobile computing. An increasing portion of e-commerce, reaching 60% of

online sales globally,⁴¹ is now conducted not just online but also on-the-go, facilitated by mobile devices that are accompanying consumers everywhere.⁴² Furthermore, being

the usage of the internet by its very nature borderless and with the capacity for online sales to target the entire globe, is not surprising how national governments and

competition authorities have recognised for these commercial activities the need of a stronger international cooperation in competition matters, as shown by the report

³⁶ Eurostat, Individuals – internet use, 2024, available at: https://ec.europa.eu/eurostat/databrowser/view/isoc_ci_ifp_iu/default/table?lang=en

³⁷ Georgios Petropoulos, Vertical restraints and e-commerce, 2018, Concurrences N° 1-2018, Art. N° 86057, para 2

³⁸ Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229, pg. 4.

³⁹ Commission, Press release, 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_418

⁴⁰ Commission, Behavioural study on unfair commercial practices in the digital environment: dark patterns and manipulative personalisation, Final report, 2022, pg. 32.

⁴¹ Statista's Market Insights, 2023, available at: <https://www.statista.com/chart/13139/estimated-worldwide-mobile-e-commerce-sales/>.

⁴² Evans, David, Multisided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-Based Firms, Coase-Sandor Institute for Law and Economics Working Paper No.753, 2016.

between several NCAs and the European Commission on the digital economy in 2019.⁴³

⁴³ Common Understanding of G7 Competition Authorities on “Competition and the Digital Economy”, 2019, available at: https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf

2.2. The different channels for online sales

Beside the traditional relation between a manufacturer and a retailer in the vertical line of sale, within the digital market, a wide range of business channels can be found through the internet.

Firstly, the online sales may take place directly. Many traditional brick-and-mortar retailers have expanded their operations to include an online presence, essentially making the e-commerce component an extension of the in-store shopping experience.⁴⁴ The manufacturers and service providers have indeed the option of vertically integrating by running their own online stores and offering goods or services directly to consumers. The growth of e-commerce has led in fact many manufacturers, even those renouncing to a physical retail presence, to venture into online retailing. For example, in the European Commission's E-commerce Sector Inquiry, 92% of consumer goods manufacturers surveyed said they sell through their own websites.⁴⁵ This can be easily understood if considered how such vertical integration is particularly straightforward and cost-effective for service providers who don't rely on a physical delivery network. Furthermore, this gives manufacturers and service providers the highest level of control over online sales, particularly over factors such as pricing,⁴⁶ which, as will be discussed below, often poses significant challenges in the context of vertical restraints.

Secondly, on the digital market producers may reach the consumers indirectly. Under this second category it can be inferred both the reselling online to wholesalers and retailers, and also the selling through the services offered by online platforms. The latter option will be assessed in the next paragraphs.

2.2.1. The selling through online platforms

In addition to running their online store, businesses can also reach consumers in the digital marketplace through online marketplaces. These can be defined as multi-sided platforms that bring together multiple manufacturers and retailers and serve as a forum to access customers and facilitate thus transactions between sellers and buyers.⁴⁷ These platforms were already in the traditional economy named as multi-sided because they

⁴⁴ Fenwick, Mark and Vermeulen, Erik P.M., *A Sustainable Platform Economy & the Future of Corporate Governance*, European Corporate Governance Institute (ECGI) - Law Working Paper No. 441/2019, pg. 5.

⁴⁵ European Commission, *E-commerce Sector Inquiry*, paras. 93 ff.

⁴⁶ Hovenkamp, Herbert, *Antitrust and Information Technologies*, 68 *Florida Law Review*, 2016, pg.419; see also European Commission, *E-commerce Sector Inquiry*, para. 75.

⁴⁷ Friederiszick, Hans W, Ela Glowicka, *Competition policy in modern retail markets*, *Journal of Antitrust Enforcement*, Volume 4, 2016, pg. 42.

facilitate connections between two or more distinct groups within the market. For example, a traditional newspaper connects different groups of users on its offline platform: readers interested in the content displayed on the one hand, and advertisers interested in the readers on the other. In such multi-sided markets, the intermediary service provider is commonly referred to as an (online) platform.⁴⁸

Within the online economy, these online marketplaces can operate in different capacities. Firstly, they may simply act as intermediaries, hosting listings for third party sellers. A prominent example of this model is eBay. The platform in this context provides only the technological infrastructure that facilitates connections and transactions for the various participants. Taking into consideration, for example, a ride-sharing platform such as Uber: it connects passengers (buyers) with drivers (sellers) through a mobile application. The platform only provides the technology infrastructure for seamless booking, payment processing and driver ratings, enabling so transaction for both sides of the market. On the contrary, Uber as a platform does not own any of the cars used, nor does it employ the drivers active on its platform. Alternatively, marketplaces may adopt also a hybrid model in which they not only provide intermediation services for other retailers, but also offer their own retail products. Amazon Marketplace is perhaps the best known example of this approach, combining its direct sales with a platform for third-party sellers.⁴⁹

Within these marketplaces offered by the platforms there are several actors that engage in different commercial activities. In this regard, the advertising market plays a special role, as online advertising is often the only side of multi-sided platform markets on which revenue is generated for the platform operators. In theory, there are alternatives to advertising, such as the possibility of paying for access to the platform's service, but the willingness of many online users and consumers to pay for online content is still relatively limited.⁵⁰ Despite the rise in offering a paid version of the service on digital platforms – such as Spotify Premium or Amazon Prime - consumers tend to prefer indeed the free version provided. A prominent example could be seen in the case of the music streaming platforms of Spotify. In 2023 it reported 317 million users on the normal plan, which provides the service but with less features and with advertising

⁴⁸ Van den Boom J., *Regulating competition in the digital network industry: A proposal for progressive ecosystem regulation*, 2023, pg. 46.

⁴⁹ OECD, *Implications of E-commerce for Competition Policy - Background Note*, 2018, pg. 9.

⁵⁰ Monopolkommission, *Wettbewerbspolitik: Herausforderung digitale Märkte – Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB – Kurzfassung*, pg.59, available at: https://www.monopolkommission.de/images/PDF/SG/SG68/S68_Kurzfassung.pdf

contents, while only 210 million users had been willing to subscribe to the premium program.⁵¹ Advertising activities on online marketplaces primarily manifest through display advertising, which can adopt various formats such as text or images, the most recognized forms include banners and pop-ups. On the online platform of Booking.com for example advertising has been implemented throughout the Booking Network Sponsored Ads, which allows the sellers to buy visibility on the platforms by appearing as one of the top search results for users.⁵² This example shows that within the online marketplace there are several actors engaged in economic activities, in addition to the two main user groups.

The legal definition for these online platforms can be traced back to the Platforms-to-Business relations Regulation,⁵³ which did not directly mention online platforms or marketplaces, making instead only reference to the online platform economy. Nonetheless under this Regulation are deemed as online intermediation service all those information society services – as previously defined under EU law⁵⁴ - that allow business to offer goods or services to consumers, facilitating the initiating of direct transaction between these two groups of users.⁵⁵ Already in 2000, the definition covered therefore the most common online platforms such as Amazon, Booking.com, and eBay. Moving forward more than 20 years in terms of legislation, the Digital Services Act (DSA) and the Digital Markets Act (DMA) - both of which will be analysed in a later section - directly reference online platforms. Specifically, the DMA defines online intermediation services by making reference to the term of the previous P2B Regulation and it introduces additional obligations for those online platforms that not only provide core platforms services but also falls within the category of gatekeepers.⁵⁶

Against this background, a significant proportion of e-commerce activity within the internal market comes from such online platforms. For consumers these platforms offer several benefits, including greater market transparency, a wider range of products,

⁵¹ Spotify, Q1 2023 Shareholders update, pg.3, 2023, available at: https://s29.q4cdn.com/175625835/files/doc_financials/2023/Shareholder-Deck-Q1-2023-FINAL.pdf

⁵² Booking.com Partner Hub, Booking Network Sponsored Ads, 2023, available at: <https://partner.booking.com/en-us/help/commercial-insights/keys-success/all-you-need-know-about-booking-network-sponsored-ads>

⁵³ Regulation (EU) 2019/1150.

⁵⁴ Directive 2000/31/EC, Art. 2(a): any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services .

⁵⁵ Regulation (EU) 2019/1150, Art. 2(2).

⁵⁶ Regulation (EU) 2022/1925, Art. 2(5).

increased confidence in online shopping and the ability to transact across borders.⁵⁷ On the other side for sellers, especially smaller ones, trading platforms also offer several advantages. In the case of Booking.com, sellers do profit from lower barriers to entry, access to a large customer base – than for instance their own website - and additional services such as payment and further booking features.

As a complementary note, within this definition of online platforms, online sales may take a hybrid approach, combining the own retail offering with brokerage services for external retailer, the most prominent case being Amazon marketplace. A further distinction hereunder can be made between open marketplaces, which welcome all third-party listings, and closed sites, where retailers need prior approval to list their products on the platform.⁵⁸ As will be shown later, these platforms are subject to different treatment under EU competition law on the basis of the greater likelihood of distortion of competition.

Nevertheless, a common feature of all these online platforms is their ability to create links between 'creators' and 'extractors' of value.⁵⁹ It goes without saying that online platforms profit from facilitating these connections, either through commission-based transactions or advertising.

⁵⁷ Monopolkommission, Wettbewerbspolitik: Herausforderung digitale Märkte – Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB – Kurzfassung, pg.7, available at: https://www.monopolkommission.de/images/PDF/SG/SG68/S68_Kurzfassung.pdf

⁵⁸ Jonathan B., Protecting and Fostering Online Platform Competition: The Role of Antitrust Law, pg. 494.

⁵⁹ Fenwick, Mark and Vermeulen, Erik P.M., A Sustainable Platform Economy & the Future of Corporate Governance, European Corporate Governance Institute (ECGI) - Law Working Paper No. 441/2019, pg. 3-4.

2.2.2. Features of online platforms

The widespread adoption of the new technologies, such as laptops and smartphones also in the elderly generations, fosters an environment in which more users and service providers are motivated to join an online platform. The more users and service providers add more "content" to the platform, and in a virtuous circle, this added content in turn attracts more users and service providers.⁶⁰

In this respect, it is also important to note how – alongside the many differences that can be traced between the traditional market and the digital market - the competition within these online platforms is determined by the so-called network effects. Direct network effects relate to the size of the network and take place when the value of a product or service to users increases in proportion to the number of other users of the same product or service. A field where these direct effects are particularly relevant is telecommunications networks, with social media platforms like WhatsApp and Instagram being prime examples.⁶¹ On these platforms, consumers benefit indeed simply from being part of the same network as other users.

On the other hand, for ecommerce multi-sided platforms the indirect networks effect plays a vital role.⁶² These occurs when benefits to users using a platform on one side of the market is directly proportional to the growth of customers joining the network on the other side.⁶³ Contrary to the direct effects, in this case the benefit to one customer is realised through the expansion of the opposite side of the market.⁶⁴ A notable example of this dynamic is seen in platforms such as Amazon and Booking, where the influx of potential buyers attracts more sellers, leading to an expanded range of goods. Specifically, concerning these multi-sided platforms, it is noteworthy that - in contrast to the social media platforms highlighted above - direct interaction between users on

⁶⁰ Ibid, pg. 5.

⁶¹ Nirmala Reddy, How to Harness the Power of Network Effects, Forbes, 2018, available at: <https://www.forbes.com/sites/forbescoachescouncil/2018/01/02/how-to-harness-the-power-of-network-effects/?sh=6b5c545062e8>; see also Paul Belleflamme & Martin Peitz, Platforms and Network Effects, Handbook of Game Theory & Industrial Organization, 2018, pg 286 ff.

⁶² Peitz M., Marktplätze und indirekte Netzwerkeffekte, Perspektiven der Wirtschaftspolitik 7, 2006, pg. 317-333.

⁶³ Zelger, Restrictions of EU Competition Law in the Digital Age, pg. 144; see Haucap, Justus & Heimeshoff, Ulrich, Google, Facebook, Amazon, eBay: Is the internet driving competition or market monopolization?, DICE Discussion Papers 83, 2013, pg. 3.

⁶⁴ Frishammara J., Cenamorb J., Cavalli-Björkmanc H., Hernelld E., Carlsson J., Digital strategies for two-sided markets: a case study of shopping malls, 2008, pg. 35; Competition Policy: The challenge of digital markets, Special Report by the Monopolies Commission pursuant to section 44(1)(4) of the Act Against Restraints on Competition, pg. 56, 2015, available at https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf

one side of the platform is not the core business. Consequently, direct network effects are considered less relevant for these online marketplaces. Instead, there are strong indirect network effects. As platforms such as eBay and Amazon.com show, buyers do not benefit directly from the presence of other buyers, but rather from the presence of more sellers, who in turn are attracted by the presence of buyers.⁶⁵

Furthermore, the competitive implications of positive network externalities reflect those of the “increasing returns to scale”: this economic principle describes how the cost for a single unit of production usually decreases when there is an increase in the total volume of outputs.⁶⁶ For online platforms there are fixed costs, such as servers and administrative costs, however these costs will remain mainly unchanged as the users’ numbers increase. As a result, expenses for the online platform do not increase proportionally with each new customer who joins the platform to perform a transaction, but rather each new additional transaction actually lowers the average cost.⁶⁷ It becomes therefore clearer why larger platforms are more efficient than smaller ones, meaning that only a limited number of platforms can survive in the digital market. Beside the advantage in terms of costs, a large platform also offers a more valuable service - such as access to a larger user base for a one-way platform - than a smaller one. Inevitably all this contributes to the tendency of the digital market to become more concentrated in a handful of companies.⁶⁸ This needs to be seen in connection with the fact that the above mentioned characteristics of network effects make the digital economy susceptible to 'winner-takes-all' effects.⁶⁹ This phenomenon means that once a player in the digital market reaches a certain 'tipping point', positive feedback mechanisms ensure that the winner attracts an increasing number of customers, making

⁶⁵ George J. Stigler, Report of the Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee Report, The University of Chicago Booth School of Business, 2019, pg. 16.

⁶⁶ International Economics: Theory and Policy, Saylor Academy, 2012, Section 6.2.

⁶⁷ Competition policy: The challenge of digital markets, Special Report by the Monopolies Commission pursuant to section 44(1)(4) of the Act Against Restraints on Competition, 2015, para 46-49, available at: https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf

⁶⁸ See above pg. 17.

⁶⁹ Fernando Diez, Promoting Competition in Digital Markets, a Case Against the Google, A Case, and the Futile Search of 'Neutrality' in On-line Searches, Competition Policy International, 2015.

it extremely difficult for existing or potential rivals to compete. As an overall result, digital markets can quickly become dominated by a (quasi-) monopolistic winner.⁷⁰

An additional feature peculiar to the digital economy is the usage of users' data by online platforms. The collection of the data represents a crucial element for their business model and this is mostly linked to the above practice of advertising. As mentioned earlier, online platforms typically offer their services to users without charging fees, relying instead on advertising as their primary source of income. This advertising model heavily depends on the collection and utilization of users' personal data. Without analysing further, the legal issues related to the compliance of such business models with the General Data Protection Regulation,⁷¹ the relevance of user's data for online platforms can be inferred by the latest developments adopted. In response to the additional obligations coming from the Digital Markets Act under Art. 5(2)(a), tech companies – such as Meta on its online platforms of Instagram and Facebook - have indeed changed their practice and embraced a “consent or pay model”. Their services will be provided under a fee to users who do not want to consent to the use of their personal data, while an ad-supported free version of these services will continue to be available if users do consent to the use of their data.⁷² This development – fuelled by the ongoing debate about the legal compatibility of such practices⁷³ - highlights the centrality of the use of users' data by online platforms and how this core feature of the online economy poses one of the greatest challenges for the regulators compared to the traditional offline market.

Moreover, it is noteworthy to highlight at this introduction stage, that a natural feature of platforms in the online environment is to bring together buyers and sellers from different jurisdictions within the same digital space, thus constituting, at least at European level, a 'true' digital single market.

⁷⁰ Joshua Cooper Ramo, 'Why 'Network Power' is the Secret of Success for Apple, Facebook and Amazon' Fortune, 2016, available at: <https://fortune.com/2016/07/19/21st-century-network-power/>

⁷¹ Regulation (EU) 2016/679; see for instance C-252/21 - Meta Platforms and Others, para. 1117; C-252/21 - Meta Platforms Inc and Others v Bundeskartellamt.

⁷² Meta, Facebook and Instagram to Offer Subscription for No Ads in Europe, 2023, available at: <https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/>

⁷³ European Data Protection Board, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, 2024, available at: https://www.edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-082024-valid-consent-context-consent-or_en

3. The legal framework in the offline market

The analysis of sales within the EU digital market requires first an understanding of the relevant legal provisions foreseen already for the traditional common market. This section aims therefore to provide the necessary legal background for the discussions in the following chapters of the specific issues related to the restrictions in the selling on the digital market. As anticipated, the field of the online commerce – alongside with the wider area of the digital market – has been subject to two different legal areas: the provisions governing European Union competition law and the EU sectoral regulatory regimes. Throughout this entire study, the examination of online sales restrictions will thus see a concurrent application of both general competition law and regulatory provisions. This is reflected in the subtitle of the thesis, which emphasises the interplay between competition law and regulatory law.

This section begins by examining the distinct goals and objectives pursued by competition law and sectoral regulations in the offline economy and then proceeds to compare these aims, highlighting their respective impacts in the application.

3.1. Aims of EU competition law

Competition law at Union level has consistently served a broad spectrum of normative goals and values that lie at the core of our modern economic system. The EU competition law lacks a singular, overarching objective. Rather, competition law and policy within the Union can be seen as tools employed to pursue a variety of both political and economic objectives. According to Bishop and Walker, for instance, the two main goals of EU competition policy can be split between non-economic and economic ones, being respectively the integration goal and the economic goal of consumer welfare.⁷⁴

Analysing in detail all conceivable aims of EU competition law, as considered by competition authorities, courts, and academic commentators, exceeds the scope of this study. Among these diverse objectives one can suggest fairness in the economy, the realization of the internal market, the principle of freedom of competition, and the safeguarding of specific groups of market actors, such as final consumers or small and medium-sized enterprises.⁷⁵ In addition, it should be noted that objectives and priorities

⁷⁴ Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 2022, pg. 5.

⁷⁵ See for instance J. Almunia, ‘Competition and Consumers: The Future of EU Competition Policy’ (Speech at European Competition Day, Madrid, 12 May 2010), pg.4-14; see also Whish and Bailey, *Competition Law*, 2021, pg. 17.

of EU competition policy have not remained static across time,⁷⁶ instead - as Wesseling noticed - three phases can be seen in the development of EU competition policy: the market integration, the establishment of an industrial community and finally antitrust policy directed at promoting values in Article 2 TEU.⁷⁷

Within this rather broad landscape, the study will focus on examining the objectives that play a role in shaping EU competition law in today's digital market: economic integration - which played an important role in the early stages of the European process; and consumer welfare, which became relevant at a later stage through the focus on an economic approach.

3.1.1. Integration of the internal market

As anticipated in the first sections, EU competition law can be understood as a set of corresponding rules to those related to the fundamental freedoms of the European Union - the free movement of goods, persons, services and capital within the EU. These fundamental freedoms serve as essential pillars for the promotion and construction of the European Single Market and play a crucial role in breaking down barriers imposed by nation states. However, while Member States shall not issue legislation which may hinder any of the four freedoms, there are also obligations for private enterprises which “should refrain from restrictive business practices which could equally form effective barriers against competition originating in other Member States.”⁷⁸

In addition to these obligations imposed by public authorities, competition rules play thus a complementary role by preventing private undertakings, in their economic capacity, from creating obstacles to European integration process.⁷⁹ Consequently, from the very beginning of the European project, the primary objective of EU competition law has been to promote market integration within the EU, an aspect that distinguishes it from other competition law systems today.⁸⁰ Craig and De Burca even argue how market integration can be identified as an ultimate objective of EU

⁷⁶ The Evolution of EU Law, Oxford University Press, 2011, ch 23; see also Craig de Burca, 2020, ch 27.

⁷⁷ R Wesseling, The Modernisation of EC Antitrust Law, pg. 48-49.

⁷⁸ R. Van den Bergh, Comparative Competition Law and Economics, Edward Elgar Publishing, 2017, pg. 109.

⁷⁹ Terhechte, in: Internationales Kartell- und Fusionskontrollverfahrensrecht, 2008, § 3 para. 31.

⁸⁰ Jones & Sufron, EC Competition Law, p. 35; see also L. Parret, 'Do we (still) know what we are protecting?', Tilburg Law and Economics Center (TILEC): Discussion Paper, 2009, pg. 13.

competition policy. This classification is based on the acknowledgement of the role of the internal market as the “starting point and core of the Union.”⁸¹

Without aiming to set a hierarchy of the objectives of competition law within the EU, the indication towards regarding market integration emerges throughout other important factors. In its enforcement practice, the Commission has recognised in the context of vertical restraints - relevant for online sales - that market integration is a key objective of competition policy. The Commission has cited this as the underlying rationale for its actions against vertical restraints and exclusionary conduct.⁸² Furthermore, also from the case law of the Court of Justice it emerges a clear acknowledgment of the market integration objective, as it has been recognised how “an agreement between producer and distributor might tend to restore the national division in trade between Member States and might be such as to frustrate the Treaty’s objective of achieving the integration of national markets through the establishment of a single market.”⁸³

Furthermore, from the practice of territorial allocation – which will be relevant for the later discussion of restrictions in the online sales – emerges a clear indication of the primary importance of such an objective for EU competition law. It is widely recognised that practices, such as export restrictions or, more generally, restrictions to parallel trade, fall within the category of restrictions of competition by object under Article 101(1) TFEU. They are not covered by the *de minimis* rule,⁸⁴ are excluded from the benefit of the block exemption regulations as hardcore restrictions⁸⁵ and have rarely fulfilled the conditions for exemption under Article 101(3).⁸⁶

3.1.2. Consumer welfare

Beyond these particularities in the application of EU competition law in today's economy, the aim of the competition law provisions across all jurisdictions is to protect

⁸¹ P. Craig and G. de Burca, *EU Law: Text, Cases, and Materials*, 2015, pg. 1-40.

⁸² *Guidelines on Vertical Restraints*, (2010/C, 130/01), para. 7.

⁸³ *Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P - GlaxoSmithKline Services and Others v Commission and Others*, para 61.

⁸⁴ *Case C-226/11 - Expedia Inc. v. Autorité de la concurrence and Others*, para. 37-38.

⁸⁵ *Regulation (EU) 2022/720*, Art. 4(b)(c)(d).

⁸⁶ See, however, *Joined cases C-501/06 P, 513/06 P, 515/06 P and 519/06 P - GlaxoSmithKline Services v. Commission*; see also Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, 2013, 3(1) CLES Working Paper Series, pg. 14 ff.

fair competition by preventing collusive cooperation and behaviour that abuses market power.⁸⁷

In this regard, a change of approach began in the mid-1990s as the Commission committed itself to a “more economic-based” approach, meaning that competition law would start been based more on sound economic principles. A key development in strengthening the influence of economic theory in the application of competition law took place under the leadership of former Competition Commissioner Mario Monti – the first economist in this role - who brought forward reforms of EC competition policy, emphasising a more pronounced economic approach. The impact of the new strategy of the DG Competition within the European Commission emerges from a speech given towards the end of Monti's tenure as Competition Commissioner, indicating that the more economic approach means going beyond the mere adoption of a new methodology. Instead, it suggested a broader shift that favoured the use of economic tools in competition assessments while maintaining the otherwise unchanged competition rules.⁸⁸

A practical example of how this new approach has been prioritising competition policy objectives lies in the significance of the Guidelines on Vertical Restraints and the Guidelines on the Application of Article 101(3) of the Treaty.⁸⁹ The Guidelines are here taken into further consideration – not only because the later analysis of the restriction of online sales will be focused on the recently introduced updated Vertical Block Exemption Regulation – but the Guidelines on Vertical Restraints of 2010 are also particularly noteworthy because is first instance in which the Commission recognises a new priority in competition policy objectives.⁹⁰ As explained above, until this moment the Commission had previously mainly emphasised the importance of promoting market integration through its enforcement practice, instead this piece of legislation for the first time explicitly stated that “the protection of competition is the primary objective of EU competition policy”, although market integration continues to be recognised as “an additional objective of EU competition policy”.⁹¹ Furthermore, from this example emerges also how this shift to a “more economic approach” by the European Commission led to a narrower approach regarding the objectives of EU

⁸⁷ Bechtold/Bosch, *GWB*, Introduction, 2024, para. 51.

⁸⁸ M. Monti, ‘Convergence in EU-US Antitrust Policy Regarding Mergers and Acquisitions: an EU Perspective’, Speech at the UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, 28 February 2004.

⁸⁹ Guidelines on Vertical Restraints, (2010/C, 130/01).

⁹⁰ Guidelines on Vertical Restraints, 2010/C, 130/01), para 7.

⁹¹ Guidelines on Vertical Restraints (2010/C, 130/01), *ibid.*

competition law, thereby focusing on consumer welfare. In the same paragraph of the Guidelines is stated notably how competition increases consumer welfare and leads to an efficient allocation of resources.⁹²

The terminology used in this respect within the EU Commission has not been straightforward, making reference for instance in the Guidance on Article 102 TFEU sometimes to “consumer harm” or “detriment to consumers”, other times “consumer welfare”.⁹³ However a broad definition can be inferred, covering all practices restricting competition in the form of higher prices, lower innovation, and/or narrower consumer choice.⁹⁴ Noteworthy in this regards is the former Competition Commissioner Almunia, who explicitly endorsed the consumer-centric focus of EU competition policy. In an intervention at the start of his mandate, he emphasised: "All of us here today know very well what our ultimate objective is: competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions."⁹⁵

Furthermore, both the provisions of the Treaties and the case law of the Court of Justice support the central objective of consumer welfare. Among the Treaty provisions, the second condition of Article 101(3) TFEU is a notable example, which requires that consumers receive a "fair share" of the potential efficiency gains that are claimed to result from an anti-competitive agreement. As explained in the Commission's Guidelines on the application of Article 101(3) TFEU, the concept of a 'fair share' implies that the benefits of an agreement must at least compensate consumers for any actual or likely negative effects of the restrictions of competition identified under Article 101(1) TFEU.⁹⁶ The same concept has been recognised by the Court of Justice as it clearly articulated that the rules aiming to prevent the distortion of competition in the internal market serve the purpose of enhancing the well-being of consumers.⁹⁷

The Commission's decision-making practice over the last two decades has also reflected this new interpretation. As a recent development, this is evidenced by the ongoing activities of the Commission concerning the revision of its 2008 Guidance on

⁹² Guidelines on Vertical Restraints (2010/C, 130/01), *ibid*.

⁹³ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paras 19, 30, 86.

⁹⁴ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para 19.

⁹⁵ J. Almunia, ‘Competition and Consumers: The Future of EU Competition Policy’, Speech at European Competition Day, 12 May 2010.

⁹⁶ Guidelines on the Application of Article 81 (3) of the Treaty (2004/C 101/08), paras. 85 and 86.

⁹⁷ Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse v Commission*, para 115.

enforcement priorities regarding Article 102 TFEU.⁹⁸ In March 2023, the Commission published a communication indicating forthcoming amendments to its Article 102 TFEU Guidance, where it acknowledged that its current guidance no longer reflected the Commission's approach in determining whether to prioritise cases. In that occasion, indeed, the Commission announced it would give priority to "conduct that is most harmful to consumers," focusing on the effects of potentially abusive conduct on the competitive process and, consequently, consumers. Although these priorities are here not elaborated in detail as they concern the abuse of dominance, they underscore the shift towards innovating the concept of consumer welfare under the Commission's activities.

Furthermore, since 2004, the Commission's decisions only take economic efficiency into account when assessing agreements for their alleged beneficial effects. As a result, the number of successful Article 101(3) TFEU defences against Commission's decisions has decreased significantly. This is evidenced by the fact that since 2004, in no decision involving a full assessment of the case, has the Commission found that the agreement could be justified on the basis of pro-competitive efficiencies.⁹⁹ This indication could lead to the conclusion that this new approach to beneficial effects represents an important development in the enforcement of competition law.¹⁰⁰ However, it has been pointed out how there are also several alternative explanations for this trend.¹⁰¹ First, since Regulation 1/2003 made Article 101(3) TFEU directly applicable, there is no longer any need for the Commission to adopt formal exemption decisions. As stated above, the direct application of Art.101(3)TFEU means that currently the Commission only declares Article 101 TFEU inapplicable by decision when it is deemed necessary in the public interest, for example to set a precedent, as indicated in Regulation 1/2003 (n 3), Art 10. Second, as it will be discussed below in this chapter, many cases started being filtered out through the application of increasingly lenient Block Exemption Regulations, meaning that those agreement are exempted from an individual assessment under competition rules in the Treaty. Third, following the decentralisation of Article 101 TFEU enforcement by Regulation 1/2003,

⁹⁸ Communication from the Commission – Guidance enforcement priorities in applying Article 82 of the EC Treaty.

⁹⁹ Case AT.39685 – Fentanyl, recitals 400-39; Case AT.39226 – Lundbeck, recitals 1112-230; Case COMP/34.579 – Mastercard, recitals 670-733; Case COMP/39.398 – Visa Europe, recital 21; Case AT.39398 – Visa MIF recitals 55-65; Case AT.39595- Continental/United/Lufthansa/Air Canada, recitals 91-94.

¹⁰⁰ The more Economic Approach to EU Antitrust Law, Anne C. Witt, 2018, pg. 167.

¹⁰¹ Ibid, pg. 167-168.

the Commission has prioritised the prosecution of the most serious cases, leaving “softer” cases to the national competition authorities. As a “procedural” consequence, in front of the Commission will be discussed hardcore cartels, where there is no space for an consumers efficiency gain argumentation, while the other cases will be scrutinised already at national level.¹⁰²

This last element of the decentralisation takes an even greater importance for the following sections. Anticipating the analysis of Art.101 TFEU, the agreements falling under the prohibition in Article 101(1) TFEU due to their anti-competitive effects but meeting the conditions for exemption in Article 101(3) TFEU are now inherently valid and enforceable without prior approval. This modernisation of competition law permits – and also imposes – undertakings to independently assess the legality of their agreements and practices, weighing potential efficiencies and consumer benefits against any competitive restrictions. It becomes therefore clearer the need of uniform rules concerning the definition and assessment of legal elements such as the consumer’s welfare. In terms of legislation this has indeed meant the adoption of specific set of rules that both private undertakings and also national competition authorities have in order to guide them in the application of EU competition law. As it will be shown later within this chapter, acts such as the Block Exemption Regulations and the Market Definition Notice not only have become a useful tool in the competition enforcements, but they are also particularly influential in guiding the application of legal frameworks, especially within the digital market.

3.2. The relationship between competition law and sectoral regulation

3.2.1. Common objective of a free competition

Against the above highlighted aims of competition law, the provisions of the “general” competition law are based on the assumption that competition within the market is fundamentally functional. It consists of the three pillars: prohibition of cartels, prohibition of abuse of dominance and merger control. With the exception of merger control, intervention will then generally only take place once competition has already been distorted and these ex-post interventions are intended to restore a fair competition.¹⁰³ On the other hand, regulatory provisions also pursue, at least,

¹⁰² See eg Commission Decision Case COMP/E-1/38.823, recital 591; Case COMP/F/38.899, recital 221.

¹⁰³ Justus Haucap and Uhde André, *ORDO*, Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft, 2008, p. 246.

competitive objectives by ensuring effective and undistorted competition.¹⁰⁴ Possible concrete example is the Directive on Airport Charges,¹⁰⁵ which aims to create a uniform regulatory framework for fees at significant EU airports. Its primary objective is indeed to regulate the interaction between airport management bodies and their users, and – as recognised by the case law - specifically to avoid market power abuses by airport authorities.¹⁰⁶ For a specific example in the digital market, below it will be discussed how the recent Digital Services Act package¹⁰⁷ in form of two regulations aim also to avoid possible distortion of competition within the EU digital market. Specifically, under the Digital Markets Act, recital 5 recognises the need to make competition work within the digital market, as it states that: “the market processes are often incapable of ensuring fair economic outcomes with regard to core platform services.”

As a consequence, it can be therefore seen how both general competition law and sector specific regulatory law serve primarily to protect competitive market activity. A concrete form of this protection of competition is the prohibition of the abuse of a dominant market position by imposing unreasonable conditions on trading partners. Consequently, these two legal domains can be characterised as possessing a "twin nature."¹⁰⁸ Therefore, at least for the offline market, for the most effective protection of competition, it may be advisable for sectors specific *ex ante* regulation and *ex post* competition control to be applied in tandem and complement one another.

3.2.2. Differences

Besides the common purpose of ensuring free competition, differences between these areas arise however firstly from the respective starting positions that justify the legislative intervention and secondly from the different range of aims.

3.2.2.1. Different starting points

The aim of competition law is to prevent the unlawful acquisition of market power and, where market power already exists, to control its exercise so that the typical benefits of fair competition - lower prices, greater choice, higher quality - can be fully realised. As a logical consequence, these are therefore *ex-post* interventions, after competition

¹⁰⁴ Säcker, in: EnWZ 2015, 531 (533 ff.).

¹⁰⁵ Directive 2009/12/EC.

¹⁰⁶ C-51/08 - Commission v Luxembourg, para 42.

¹⁰⁷ Commission, Digital Services Act package, available at: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

¹⁰⁸ Säcker, in: AöR 2005, 180, 189: twin nature “Zwillingscharakter”.

has already been disrupted.¹⁰⁹ On the other hand, the role of the regulatory authority could be described as an "ex-ante controller of market power through price, revenue and investment control".¹¹⁰ The regulatory provisions do regulate the market and affects the company's activities as soon as the legislation comes into force. Different timeframes of operation can thus be derived for these two areas of law.

This being said, it should also be noted that the monitoring of compliance of the regulatory provisions is also supplemented by a separate, ex-post supervision, which has strong parallels to the control of abuses under competition law.¹¹¹ At the same time, for instance, the prohibition under Art. 102 TFEU already applies before an abuse occurs, i.e. in the ex-ante area, and can therefore have as well a preventive effect.¹¹²

Besides the temporal aspect, significant differences may arise also from the respective starting points of competition law and regulatory law. As stated above, competition law establishes the existence of free competition in open markets as an indispensable prerequisite and therefore could be defined as "process-oriented":¹¹³ the aim is to protect the free interplay of market forces as such in order to guarantee free competition between undertakings. As a consequence, it assumes the existence of effective competition, in which several suppliers should operate independently in the market.¹¹⁴

In regulated sectors, on the other hand, regulatory provisions must replace certain behaviours of entrepreneurs due to a lack of effective competition.¹¹⁵ The intervention of the legislation is based on the assumption that competition can no longer control markets so that a market failure is permanent and there is therefore the need to create competitive structures in the first place. Competition is "taken out of the hands of market forces and made the responsibility of the state".¹¹⁶ The market conditions, for instance concerning prices and profits, are therefore known in advance to all market participants, which means that they cannot be the result of free competition within the market.

Within this perspective the freedom of businesses is restricted as certain practices are banned or prescribed from the outset so to achieve the results wanted by the

¹⁰⁹ OECD, Competition Policy Roundtable Background, 2019, page. 7.

¹¹⁰ OECD, Competition Policy Roundtable Background, 2022, page. 7 ff.

¹¹¹ See Berger-Kögler, in: Geppert/Schütz: TKG, § 38, para. 15-16 ff.

¹¹² Jones, Private enforcement of antitrust law in the EU, UK, and USA, page. 233-234; see also Kirchner, in: Freier Wettbewerb – Verantwortung des Staates, 81, page. 85.

¹¹³ Haucap/Uhde, in: ORDO (2008), 237, pg. 246.

¹¹⁴ Schröter/Thinam/Klotz, Europäisches Wettbewerbsrecht, Kapitel 5, para. 1938 ff.

¹¹⁵ See also Schedl/Kühlmann, Sektorspezifische Regulierung, page. 3.

¹¹⁶ Ehricke, Die Regulierungsbehörde für Strom und Gas, pg. 30.

regulator,¹¹⁷ as highlighted in the section below on the DMA. Regulatory law is thus not “process-oriented” - it does not protect the process of competition - but has a "goal-oriented"¹¹⁸ approach, which is determined by the legislator. The different starting points thus lead to conceptual divergences between competition law and regulatory law.

3.2.2.2. Divergences of aims

In addition to the different starting points that justify the legislative provisions, further differences may arise from the respective aims of competition and regulatory law. As already explained, the EU competition rules serve to protect competition as an economically beneficial element for the single market¹¹⁹ and, according to the Court of Justice, under these provisions the structure of the market and competition as such should be protected.¹²⁰

On the other hand, additional objectives are pursued under regulatory provisions and as example the prohibition of discrimination is taken here into account. Notably under competition law an objective distortion of competition is necessary in order for the prohibition of discrimination under Art. 102(2) para. a) TFEU to find application, whereas "the mere existence of a direct disadvantage for economic operators"¹²¹ is not sufficient. Ultimately a functioning competition could also serve consumer welfare and the direct interests of individual competitors; however, the Court of Justice has made it clear that these are only derived consequences of functioning competition and that cannot be attributed to the primary purpose of competition provisions.¹²²

Instead, regulatory provisions are also applied to prohibit the conduct of undertakings that, while not violating competition laws due to the absence of market distortion, discriminate against individual operators in the market. The most prominent example can be seen under the Geo-blocking Regulation,¹²³ which addresses the issue of restricting the online selling based on geographical factors and therefore will be analysed in the last chapter concerning the territorial restrictions of online sales. While

¹¹⁷ Podszun, Rupperecht, From Competition Law to Platform Regulation – Regulatory Choices for the Digital Markets Act, De Gruyter, 2024, pg. 6.

¹¹⁸ Ehricke, in: Entwicklungstendenzen des Energierechts nach Inkrafttreten des EnWG, 2007, pg. 20-21.

¹¹⁹ Mestmäcker/Schweitzer, Europäisches Wettbewerbsrecht, § 2 Rn. 39 ff.

¹²⁰ Case C-501/06 P - Glaxo Smith Kline, para 63.

¹²¹ Case. C-525/16 -Meo, para 26.

¹²² See e.g. Case C-8/08 - T-Mobile Netherlands and Others, para 38; Case C-501/06 P - Glaxo Smith Kline, para 63.

¹²³ Regulation (EU) 2018/302.

the practice of limiting online sales based on a customer's location is allowed under competition law provisions, as will be highlighted in the last chapter, the very same conduct is explicitly prohibited under this sectoral Regulation. From this practical example concerning the prohibition of discrimination it becomes clear that, while competition law—even in regulated markets—only protects the existing market from distortions of fair competition, regulatory law has more far-reaching objectives.

Furthermore, in line with the above section on different justifications, the objective of fair competition on the market under competition law means that companies are always allowed to rely on efficiency defences to justify anti-competitive agreements. This is however not the case under regulatory law. In the field of the digital market the DMA gives the perfect example, as there is no possibility for the targeted companies to raise efficiency defences. This is explained by the Commission's position under Recital 11, where it indicates that distortions of fairness cannot be offset by economic efficiencies as these are different categories. From this it follows how the protection of competition is not the only objective to be pursued by the provisions, as other values are taken into account.

In addition, the differences in both the methodology and the objectives of these two areas of law help to understand why the *ne bis in idem* principle is not found to have been infringed in parallel proceedings involving firstly competition rules and secondly regulatory rules. This principle – also recognised as primary law within the Charter of Fundamental Rights of the European Union¹²⁴ – prevents the duplication of proceedings and penalties against the same natural or legal person and for the same offence. In two recent judgements the Grand Chamber of the Court of Justice indicated how the same conduct can indeed lead to separate sectoral and competition law investigations.¹²⁵ In particular, Bpost faced two separate administrative penalties for implementing a new tariff system, one from the Belgian Postal Regulator and another from the Belgian Competition Authority. The regulator considered the tariffs to be discriminatory, while the competition authority considered them to be an abuse of a dominant position. This raised the question of whether the imposition of two fines violated the *ne bis in idem* principle. The Court of Justice stated how that principle does not prohibit the initiation of separate proceedings for the same conduct under different legal frameworks, such as sectoral rules and antitrust rules, as long as they pursue different legitimate objectives. However, clear and precise rules are needed to enable

¹²⁴ Charter of Fundamental Rights of the European Union, Article 50.

¹²⁵ C-151/20 - Nordzucker and Others; C-117/20 – bpost.

companies to anticipate which actions may give rise to such duplicative proceedings and whether the authorities involved will synchronise their investigations. The possibility of opening a second procedure in respect of the same conduct thus stems from the recognition of the different objectives pursued by the competition rules on the one hand and the regulatory provisions on the other.

In conclusion, for the later analysis of the legal framework applicable online sales, it should be recalled that, despite the common objective of maintaining fair competition on the market, competition law and regulatory provisions differ in terms of the circumstances in which they are required, and in the respective methods implemented. This argumentation takes a greater relevance in the assessment of the sectoral regulation relevant for the digital market. The ongoing implementation – and the future enforcement - of regulations such as the Digital Markets Act will highly depend on their relationship with the set of existing competition rules. As will be analysed later in the case of the DMA, the classification of provisions between their competition objectives and regulatory instruments does have indeed practical consequences.

3.3. Structure of EU competition law

The previous sections have set out the perspectives of both competition law and sectoral regulation and analysed how they diverge. The assessment of their application in the digital context requires then a deeper understanding of how the traditional system of competition law has been structured within the EU internal market and which legal instruments it offers for the offline economy.

3.3.1. EU and national competition law

As stated above, the study will assess the restrictions of the selling online at the Union level, thus considering the competition law of the European Union.

In this regard, it should be reminded how, in accordance with the principle of conferral laid down in Article 5 TEU, the European Union can only act within the limits of the competences conferred on it by its Member States in the Treaties. These competences are laid down in Articles 2 to 6 TFEU, and all competences not conferred on the EU in the Treaties remain entirely with the Member States. According to Article 3(1)(b) Treaty on the Functioning of the European Union (TFEU), the EU has exclusive competence to lay down the rules on competition necessary for the functioning of the internal market. Article 119(1) TFEU provides that the activities of the Member States and the EU shall be conducted in accordance with the principle of an open market economy with free competition. Undistorted competition is thus enshrined as a fundamental principle of EU law, and these references to competition in the EU Treaty and the TFEU also have a significant influence on European Commission decisions and case law.

As a consequence of Art. 3(1)(b) TFEU, there are two systems of competition law within the European Union: EU competition law, which derives from the provisions of the Treaties, and national systems of competition law, which are implemented in the legal systems of the individual Member States. The main distinguishing feature of these two systems of competition law is their territorial scope, as EU competition law applies only to conduct that has an appreciable effect on trade between Member States (so-called interstate trade).¹²⁶ Each EU Member State has a competition law system that is largely shaped by Articles 101 and 102 TFEU. In some Member States, there is even a requirement for national law to be interpreted in a manner consistent with EU law, thereby reinforcing the harmonisation of the EU and national legal frameworks. For instance, under the Italian Competition Act is stated how national provisions are to be interpreted in accordance with the principles of European Community competition law.¹²⁷ As a result, many cases would have the same outcome whether assessed under EU or national law. For example, a horizontal price-fixing agreement that violates Article 101(1) TFEU would normally also violate national competition law in the EU, unless it concerns a sector that is not subject to national regulation.¹²⁸ Furthermore, a

¹²⁶ Whish and Bailey, *Competition Law*, 2021, pg. 77.

¹²⁷ Legge 10 ottobre 1990, n. 287, Art.1(4).

¹²⁸ *Ibid.*

second consequence of this alignment between the two systems is that, in the absence of a minimum level of cross-border effects within the EU, agreements or decisions that do not fall under Article 101 and Article 102 TFEU will nonetheless typically violate the national competition law of the respective single member state.

This alignment between the two set of competition law has been further developed under the above-mentioned decentralisation introduced under Regulation 1/2003,¹²⁹ after which the European Commission, together with national competition authorities (NCAs) and national courts, has the power to enforce Articles 101 and 102 TFEU.¹³⁰ In addition, NCAs and national courts are competent to still apply their respective national competition laws.¹³¹

Under Regulation 1/2003, Recital 8 emphasises the need to ensure the effective enforcement of EU competition law by obliging national competition authorities (NCAs) and national courts, when applying national competition law to an agreement or practice, to also apply Article 101 or Article 102 TFEU, as long as it finds application. In this regard the obligation to apply Articles 101 and 102 is triggered by the concept of "trade between Member States", which prompted the Commission to issue Guidelines on the subject in 2004.¹³²

The requirement of the inter-Member State trade clause limits the scope of application of the provisions in the treaty and plays a fundamental role as it is “the boundary between the areas respectively covered by [EU] law and the law of the Member States”.¹³³ It is important in this regard that the concept of 'trade' goes well beyond the traditional trade in goods and services across borders. It encompasses all forms of cross-border activity, including the establishment of agencies, branches or subsidiaries by companies in other Member States.¹³⁴ The concept of trade furthermore reaches scenarios where agreements or conducts affect also the competitive structure of the market,¹³⁵ which will be highly relevant for the assessment in the digital market.

A practical example comes from the Austrian cartel case of *Raiffeisen Zentralbank Österreich v Commission*. The case emerged from the Commission's decision which

¹²⁹ Regulation (EC) No 1/2003.

¹³⁰ Parret Laura, Side effects of the modernisation of EU competition law, pg. 178-179.

¹³¹ See also The interplay between European and national competition law after regulation 1/2003 : "United (should) we stand? Tomé Fêteira Dias Santos, João Lúcio, pg. 51.

¹³² Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07).

¹³³ Case 22/78, Hugin Kassaregister AB v Commission.

¹³⁴ Guidelines on inter-state trade, para 19 and 30.

¹³⁵ Guidelines on inter-state trade, para 20.

declared that eight Austrian banks had participated in a cartel agreement to fix deposit, lending and other interest rates (the Lombard Club cartel). In 2006 the General Court delivered its judgment, upholding the Commission's findings and dismissing all appeals. In particular, the General Court found that the cartel was capable of affecting the conditions of competition throughout Austria and that the mere existence of this Lombard Club created obstacles to free access to the Austrian market, thereby restricting trade between Member States.¹³⁶ Therefore collusive practices concerning purely national services have been found capable of affecting trade between Member States.

3.3.2. The instruments of EU competition law

The framework of EU competition law is shaped by primary and secondary EU legislation, the case law of the Court of Justice of the European Union, the enforcing activity of the European Commission, as well as soft law in the form of Guidelines of the Commission. In the area of EU competition law, the European Commission has indeed an integral role, as at EU level competition law is primarily enforced through public enforcement by the Commission, rather than private litigation at national level.¹³⁷

While the treaty provision relevant for vertical restrictions – notably Art.101 TFEU – will be analysed in the next sections, in terms of secondary law there are several types of relevant legislation set out in Article 288 TFEU. Regarding competition law, Regulations hold significance as they are binding and directly applicable, eliminating the need for national transposition and allowing individuals and businesses to rely on them directly. One notable example is the EU Merger Regulation (EUMR),¹³⁸ which oversees merger control at the EU level. It mandates that parties involved in mergers surpassing specific turnover thresholds must notify the Commission. Furthermore, the procedural rules applicable to the enforcement of EU competition law are also laid down under the form of Regulations and they are accompanied by an implementing Regulation addressing in more detail certain procedural issues.¹³⁹ Concerning Directives, which require Member States to achieve a certain result leaving the implementation decisions at the national legislator, have relevance within the EU competition only in terms of unfair state aids. Furthermore, Decisions are the

¹³⁶ Case T-259/02, Raiffeisen Zentralbank Österreich AG and Others v Commission of the European Communities, para. 177 ff; appealed: C-125/07 P.

¹³⁷ Jones & Sufrin, EU Competition Law, Text, Cases, and Materials, pg. 94.

¹³⁸ Council Regulation (EC) No 139/2004.

¹³⁹ Council Regulation (EC) No 1/2003; Commission Regulation (EC) No 773/2004.

Commission's main tool for enforcing EU competition rules. They declare certain behaviour by companies to be incompatible with the competition rules and may impose fines or require the addressee to cease such behaviour. In cartel cases, the Commission may adopt a Decision on the compatibility of the undertaking's agreement with the internal market. In particular, when the Commission decides to pursue a case, it is likely to adopt one of two types of decision. The first is a formal finding of an infringement under Article 7 of Regulation 1/2003: the Commission may require the company concerned to bring the infringement to an end, impose remedies and/or impose a fine (prohibition decision).

Alternatively, the Commission may adopt a commitments decision based on Article 9 of Regulation 1/2003. This provision allows companies to offer commitments to remedy the competition concerns identified by the Commission. If the Commission accepts these commitments, it adopts a decision, which makes the commitments binding on the parties without finding an infringement. In addition, under Article 5 of the Regulation 1/2003, NCAs may decide that there are "no grounds for action on their part". A "positive" decision needs thus to be understood as a formal decision taken by the public authority to reject a complaint or to close a case where it has concluded that the conditions for a prohibition are not met.

Following on from the types of secondary legislation, Article 288 TFEU also provides for non-legally binding acts such as Recommendations and Opinions. However, the Commission has used various other forms of soft law to communicate its position on specific issues, therefore as a practical consequence there is no *numerus clausus* of the types of soft law adopted by the Commission in the area of competition law.¹⁴⁰ In this regard, the Commission has released several Notices addressing different aspects of EU competition law, a prominent example being the newly updated Notice delineating the definition of the relevant market for EU competition law purposes, which will be subject of a separate section.¹⁴¹

Finally, the Commission issues Guidelines setting out its position on legal issues relating to block exemption Regulations. These Guidelines aim at explaining the concepts used in the block exemption Regulations and provide guidance on their practical interpretation, thus enhancing the legal certainty for private operators.¹⁴²

¹⁴⁰ Hofmann, Herwig, Negotiated and Non-negotiated Administrative Rule-Making: The Example of EC Competition Policy', *Common Market Law Review*, 43, 2006, pg. 153.

¹⁴¹ Commission Notice (C/2024/1645) on the definition of the relevant market for the purposes of Union competition law.

¹⁴² Hofmann, Negotiated and non-negotiated administrative Rule-Making: The example of EC competition policy, pg. 159-160.

It is important to remember that, although Article 288(5) TFEU clearly states that these acts have no legally binding value, they can nevertheless influence the application of EU competition rules by national competition authorities and courts in terms of interpretation. When applying EU competition law, these bodies must take them into account in order to interpret the legal provisions correctly. A further analysis of the Vertical Block Exemption Regulations and the relevant Guidelines will be discussed in the next chapter.

Furthermore, the Guidelines can even be found to be binding on the European Commission. The principles of legal certainty and legitimate expectations mean indeed – as indicated by the Court of Justice - that any EU institution that adopts Guidelines or other acts on its administrative policy must often comply with them, and that third parties can rely on these acts when challenging a failure by the institution to do so.¹⁴³ This highlights the importance for those businesses engaged in online sales of the later assessment of the Guidelines accompanying the updated Vertical Block Exemption Regulation.

¹⁴³ Cases 42 and 49/59; *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community*; see also C-101/08 – *Audiolux and Others*.

3.4. Anti-competitive agreements

As mentioned above, EU competition law – beside state aid provisions - is based on two ex post pillars found in Title VII, Chapter 1 of Part Three of the TFEU: Art.101 – Art. 102 TFEU. In the digital sector there has been a great interest in tackling violation of competition law against dominant players, given the susceptibility of the online environment to the concentration of a few undertakings.¹⁴⁴ In terms of legal provisions this makes Article 102 TFEU a prime candidate for application in this context. As the Green Paper on Digital Platforms of Germany highlighted, while the continued expansion of players such as Facebook, Google, Uber, Airbnb and Amazon is undoubtedly a measure of the growing popularity of digital platforms and power of consumers, the above mentioned specific circumstances of the online world and the difference from traditional market structures are indeed also leading to increasing market concentration and subsequent market power.¹⁴⁵ The enforcement of competition law under Art. 102 TFEU, alongside with the ongoing introduction of regulations in the digital sector for online platforms, a prime example being the Digital Services Act package,¹⁴⁶ has been therefore and it is still nowadays subject of intense studies and papers coming from the academic community. These issues have attracted the attention also outside the legal spectrum, surely helped by the notoriety of the companies involved.¹⁴⁷

However, the innovation in the digital market has given rise to challenges also concerning Art.101 TFEU over the past years. While these challenges may be less visible and prominent, they are certainly no less intriguing from a legal perspective. The entry into force in 2023 of the new VBER Regulation¹⁴⁸ is one of the most

¹⁴⁴ Zelger, *Restriction of EU Competition Law in the Digital Age*, pg. 174; see also Australian Competition & Consumer Commission, ‘Digital Platforms Inquiry: Preliminary Report’, 2018, p. 35, available at: <https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/preliminary-report> ; Schweitzer, German Federal Ministry for Economic Affairs and Energy, *Modernising the law on abuse of market power*, 2018, available at: https://www.bmwk.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3

¹⁴⁵ Green Paper on Digital Platforms, German Federal Ministry for Economic Affairs and Energy, 2016, pg. 23, available at https://www.bmwi.de/Redaktion/EN/Publikationen/green-paper-digital-platforms.pdf?__blob=publicationFile&v=4

¹⁴⁶ Regulation (EU) 2022/2065; Regulation (EU) 2022/1925.

¹⁴⁷ European Parliament, Press Release, available at: <https://www.europarl.europa.eu/news/en/press-room/20211118IPR17636/digital-markets-act-ending-unfair-practices-of-big-online-platforms>

¹⁴⁸ Regulation (EU) 2022/720.

prominent examples on how the digital market in the form of E-commerce has led to a fundamental amendment of the traditional application of competition rules.

Against this background, the enforcement under Art. 102 TFEU against online dominant undertakings is therefore not dealt with in this study as it would go beyond its scope. However, its application in the EU internal digital market - the latest example up to date being the fine imposed on Apple for the abuse on music streaming providers-¹⁴⁹ certainly further highlights the fundamental challenges imposed by the digital market, reshaping the way competition and our society as a whole have traditionally operated.

3.4.1. Art.101(1) TFEU

Under Article 101(1) TFEU there is a prohibition in the Treaties of agreements and practices restricting competition, with exceptions outlined in Article 101(3) TFEU. The assessment of agreements under Art. 101 TFEU consists therefore of two steps. The first step is to assess whether an agreement between undertakings that may affect trade between Member States has an anti-competitive object or actual or potential anti-competitive effects under Art. 101(1) TFEU. Notably the Treaties do not themselves contain a definition of the criteria set out in Article 101(1) TFEU. In other words, they do define what is an undertaking, when a measure affects trade between Member States and when such measure should be considered restrictive 'by object' or 'by effect'.¹⁵⁰

The concept of an undertaking has been then defined broadly by EU Courts and NCAs and it covers any natural or legal person engaged in an economic activity, regardless of its legal status and the way in which it is financed.¹⁵¹ The method for determining whether an individual is acting as an enterprise takes a "functional" approach.¹⁵² The central consideration is the nature of the single activity carried out by the individual or entity and whether it qualifies in that concrete case as an economic activity.

¹⁴⁹ Commission, Press release, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161

¹⁵⁰ Witt, Anne C., Restrictions on the Use of Third-Party Platforms in Selective Distribution Agreements for Luxury Goods, *European Competition Journal*, 2017, pg. 439; Whish and Bailey, *Competition Law*, 2021, pg. 121.

¹⁵¹ Case C-41/90 - Höfner and Elser v Macroton GmbH, para.21; Case C-244/94 - Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche.

¹⁵² See Case C-49/07 - Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, para 25; see also Opinion of AG, Cases C-67/96 - Albany International BV v SBT., para 207.

Furthermore, another important clarification is the one regarding the economic engagement of the undertaking. An economic activity is defined as any undertaking that provides goods or services in a market.¹⁵³ The fact that an organisation is not profit-seeking or has no economic purpose does not in itself mean that an activity is not economic.¹⁵⁴ The Court has held, for example, that non-profit-making medical aid organisations, such as the German Red Cross, which provide ambulance services in return for were acting as undertakings.¹⁵⁵

3.4.2. The concept of agreement

The concept of an agreement plays a pivotal role in the development of Art.101 TFEU in the digital sector, considered the possibility developed in the recent years to establish implicit agreements through algorithms and other automatic services. For this requirement there has been as well a wide interpretation through the case law of the Court of Justice. If the competition rules were only applicable in cases of explicit, formal agreements, their practical utility would be limited, as undertakings could potentially achieve anti-competitive goals through less formal means. Hence, it becomes essential to address and regulate any less formal type of agreement.¹⁵⁶

The concept of agreement goes therefore beyond legally binding contracts and covers situations where there is a mutual understanding between at least two parties who have expressed their joint intention to act in a certain way on the market.¹⁵⁷ Consequently, agreements within the meaning of Article 101(1) TFEU may be written or oral and may even be inferred from the parties' conduct. This last element of the conduct of the parties becomes highly relevant in the case of unilateral conduct in vertical cases. At first sight, it is true that, in order to infer an agreement from the conduct of the parties, the Commission only needs to demonstrate that an undertaking took part in meetings where an anti-competitive agreement was reached without opposing it.¹⁵⁸ However the

¹⁵³ Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*; see also See Opinion AG, Case C-205/03 - *P FENIN v Commission*, para 13.

¹⁵⁴ See eg Case C-244/94 - *Fédération Française des Sociétés d'Assurance*, para 21; Case C-222/04 - *Cassa di Risparmio di Firenze*, para 123.

¹⁵⁵ Case C-475/99 - *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*, paras 19-22.

¹⁵⁶ Craig, de Búrca, *EU Law: Text, Cases, and Materials*, 2020, pg. 1034 ff.

¹⁵⁷ See eg Cases 41, 44 and 45/69 *ACF Chemiefarma NV v Commission*, paras 110 ff; Case T-41/96, para. 69.

¹⁵⁸ Cases C-204, 205, 211, 213, 217 and 219/00 *P Aalborg Portland AS v Commission*, paras. 81-86; Case C-113/04 *P Technische Unie BV v Commission*, para. 114.

Court of Justice clarified that an agreement does actually require the concurrence of will between at least two parties, as distinct from unilateral measures.¹⁵⁹

On this issue, concerning the relationship between dealers and suppliers, the Court of Justice made important clarification in the Bayer case. The judgment was based on the decision of the manufacturer Bayer to reduce the supplies to certain countries in order to prevent the exports of products by wholesalers to the United Kingdom, where higher prices were charged. According to the Commission, the actions of the wholesalers of Bayer proved how they had adapted their own behaviour by limiting the orders to their domestic needs only and therefore Art.101 TFEU was fulfilled. However, the manufacturer Bayer was then successful in front of the Court to challenge this finding by stating that it had adopted a unilateral policy of limited delivery to avoid parallel export and that in the absence of any agreement between itself and its wholesalers the conduct did not fall within the scope of Article 101(1) TFEU. The General Court confirmed the latter view and indicated how the Commission must provide compelling evidence that there is “a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.”¹⁶⁰ In particular, the judges rejected the argument that the wholesalers, by continuing their commercial relations with Bayer after the reduction of supplies, could be deemed to have agreed to restrain exports.¹⁶¹ The requirements for establishing an agreement in the vertical relationship within distribution systems play nowadays a fundamental role in the enforcement of competition law in the sales online, as later it will be shown regarding agreements restricting pricing.

3.4.3. Vertical and horizontal agreements

Furthermore, the term "agreement" covers both horizontal and vertical commercial relationships. A horizontal relationship is a relationship between competitors who want to use their agreement, for example, to keep prices high or to share markets, and the two cartel members are at the same economic level in the value chain, i.e. they are both producers. On the other hand, a vertical relationship describes an agreement between companies at different economic levels, the most important case being between a producer and a retailer. In broad terms, vertical agreements are considered less

¹⁵⁹ Case C-338/00 P Volkswagen AG v Commission, paras 63-65; Cases T-49-51/02 Brasserie Nationale SA v Commission, 2005, para 119.

¹⁶⁰ Case T-41/96 para 69; upheld in Cases C-2 and 3/01 P Bundesverband der Arzneimittel-Importeure EV and Commission v Bayer.

¹⁶¹ Case T-41/96, paras 172-182.

detrimental to competition compared to horizontal agreements, as explicitly acknowledged by the Court in the *Allianz Hungária* case.¹⁶² Nonetheless, this should not lead to a less strict application on vertical agreements of Article 101 TFEU. In the *Consten and Grundig* case, the Court emphasized that in principle no differentiation should occur when the Treaty itself does not make such a distinction.¹⁶³ In his reasoning the Court stated how: “Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market”. This passage further underscores an aspect that is regarded even in the vertical dimension as one of the most serious violations of competition law: the segmentation of the internal market.¹⁶⁴ The objective of preventing this fragmentation of the common market is also pursued under the new Vertical Block Exemption Regulation, which will be assessed later.¹⁶⁵

Concerning the assessment of vertical agreements, outside the EU jurisdiction, in the landmark *Leegin* decision of 2007¹⁶⁶ the US Supreme Court established that all vertical restraints should be assessed under the "rule of reason" standard. On that occasion, the Court overturned nearly a century of precedent by ruling that resale price maintenance (RPM) agreements – which, as explained in the next chapter, limit the retailer's ability to set prices – are not inherently illegal, notably *per se* illegal, under Section 1 of the Sherman Act. Instead, they must be evaluated on a case-by-case basis in accordance with the rule of reason. This standard requires a balancing of the likely anticompetitive effects against the procompetitive benefits, thereby eliminating the possibility that such restraints are automatically deemed *per se* illegal under Section 1 of the Sherman Act. The Supreme Court's stance against *per se* illegality has prompted several actions by state legislators in the US. In response to this ruling, Maryland, for instance, amended its antitrust laws to make RPM agreements *per se* illegal, explicitly adopting a contrary standard.¹⁶⁷ Similarly, under California's *Cartwright Act*, minimum RPM agreements have historically been judged under a *per se* rule.¹⁶⁸ This perspective on RPM becomes

¹⁶² Case C-32/11 - *Allianz Hungária Biztosító*, para. 43.

¹⁶³ Case C-194/14 P *AC-Treuhand v Commission*, para 35; see also Cases 56 and 58/64 - *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*.

¹⁶⁴ see for instance Case C-373/14 P - *Toshiba Corporation v European Commission*.

¹⁶⁵ *Guidelines on Vertical Restraints (2022/C 248/01)*, paras. 119, 129.

¹⁶⁶ *Case Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 2007.

¹⁶⁷ Maryland, Commercial Law Code Ann. § 11-204(b).

¹⁶⁸ *Mailand v. Burckle*, 572 P.2d 1142, 1147, 1978.

even more relevant when one considers the emerging trend of vigorous RPM enforcement in the US, as evidenced by recent comments by the Maryland antitrust authorities.¹⁶⁹

In contrast, within the European Union, the Court of Justice has in several subsequent rulings upheld the "by object" treatment of certain vertical restraints under Article 101(1) TFEU. An example of this rather rigid approach at the EU level, rejecting the rule of reason coming from the US, can be seen in regard to the controversial topic of the free rider's issue. Without going into details, as this issue will be addressed in the next chapter, the imposition of restrictive measures by undertakings is often directed to avoid the free-riders problem, where users (or also other undertakings) benefits from the actions and efforts of another actor but without paying for or sharing the costs.¹⁷⁰ The Commission has always rejected a possible justification of these practices under Art.101(1) TFEU coming from the free-riders problem, as for instance in the case of the vertical agreements between ISU and the athletes did not considering the free-rider concern as a legitimate or leveraging aim.¹⁷¹ A possible justification of restrictive measures in competition due to free-riders did also not change the approach of the Commission regarding resale price maintenance (RPM), as the Guidelines on Vertical Restraints indicates.¹⁷² Nevertheless, both in the mentioned ISU case and in the Guidelines, the possibility of assessing free-riding under Article 101(3) TFEU remains open.

Against this background, it has been recognised how this more rigid approach in the EU is due to the peculiar aim of "our" competition law, as explained above, to pursue the market integration.¹⁷³ Hence, this stricter approach is applied in particular to restrictions that aim at segmenting and dividing the EU single market. As a matter of fact, the Commission has been particularly active in recent years on the vertical aspects of Art. 101 TFEU regarding distribution agreements that prevent distributors from selling products online outside their contractual territories within the EU.¹⁷⁴ This

¹⁶⁹ Chris May, MLEX, Maryland AG Investigating Potential Resale Price Maintenance Violations, Official Says, 2023.

¹⁷⁰ See Chapter 2, Section 1.2.

¹⁷¹ Case AT.40208 - International Skating Union's, para. 224; see also C-124/21 P - International Skating Union v Commission, still pending.

¹⁷² Zelger, Restriction of EU Competition law in the Digital Age, pg. 34.

¹⁷³ Ibid.

¹⁷⁴ See e.g., Commission decision of 25 March 2019 - Case AT.40436 (fine of €12.5 million on Nike); Commission decision of 9 July 2019 - Case AT.40432 (fine of €6.2 million on Sanrio);

enforcement practice against vertical agreements has been driven precisely by the aim of market integration and the rejection of possible partitioning of the internal market. However, as anticipated, despite not adopting the “rule of reason”, EU law still permits the justification of *prima facie* restrictive coordination based on countervailing efficiencies under Article 101(3) TFEU, an exception to the provisions of Article 101(1) TFEU. It is precisely in the context of vertical restraints that this exception is of considerable importance, as the discussion on free-riding will show.

As a last point, Article 101(1) TFEU applies only to agreements that either have the object or effect of preventing, restricting, or distorting competition. The former covers certain types of collusive behaviour which are considered to have such a high potential for negative effects - in particular on the price, quantity or quality of goods or services - that they can be considered to fall under Article 101(1) without the need to demonstrate actual or likely anti-competitive effects on the market.¹⁷⁵ In particular, as regards the definition of a restriction by object, one of the first occasions on which the Court of Justice applied this concept was in the *Consten and Grundig* judgment.¹⁷⁶ The case involved a German radio manufacturer and a French distributor who agreed to make the French company the sole distributor of Grundig radios in France. This issue concerned thus geographical restrictions and will be so further addressed in the last chapter on territorial restrictions. In the case it was argued by the applicant that the agreement allowed the German producer to enter the French market, thereby furthering market integration by giving a German company access to France. However, the Court indicated that the agreement violated the Treaties because its object was to harm competition by restricting which distributors could sell the radios and how the radios could be imported and exported. The anti-competitive object of the agreement meant that any potential beneficial effects for the market are irrelevant. When, instead, the agreement does not reveal such high degree of anti-competitive objective, the question is then whether it has an appreciable anti-competitive effect on competition. For an agreement to have restrictive effects on competition it must have, or even just be likely to have, an appreciable adverse effect on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation.

Commission decision of 30 January 2020 - Case AT.40433 (fine of €14.3 million on NBCUniversal).

¹⁷⁵ Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, para. 21.

¹⁷⁶ Cases 56 & 58/64, *Consten and Grundig v. Commission*.

The relationship developed by the Court between a restriction by object or by effect does build up on the clear indications provided already in 1966 in the LTM judgment.¹⁷⁷ According to this case law, when analysing restrictions under Article 101(1) TFEU it is necessary to first consider the precise purpose of the agreement within the economic context in which it is to be pursued. If this reveals conducts that are “obvious” – in other words by object - restrictions of competition, then there is no need to consider the effects. In particular, for the assessment of the anticompetitive object is not necessary to prove that the parties have the subjective intention of restricting competition when entering into the agreement.¹⁷⁸ Otherwise, it is necessary to analyse the effects of the undertaking’s conduct in detail. For it to be caught by Article 101(1) TFEU competition must then, as just indicated, have been prevented, restricted, or distorted to an appreciable extent. As a final point it should be noted that these conditions are alternative, meaning it is sufficient to establish that an agreement either restricts competition by its object or by its effects.¹⁷⁹

3.5. Art.101(3) TFEU

As briefly anticipated, the second step under Article 101 TFEU is to examine the nature of the benefits, if any, flowing from the agreement and to assess whether those benefits outweigh the restrictions of competition under Article 101(3) TFEU. If the agreement fulfils the conditions and justifications of Art. 101(3) TFEU, it is exempted from the prohibition in paragraph 1.

The application of Article 101(1) TFEU to agreements, in particular by the Commission, has been a source of controversy for many years as it has been argued that Article 101(1) TFEU is applied too broadly and covers agreements that ultimately do not harm competition at all.¹⁸⁰ The practical relevance can be seen in the fact that agreements falling under Article 101(1) TFEU are considered void and unenforceable and may be subject to fines and damages, unless they fulfil the criteria set out in Article 101(3) TFEU. The solution to these procedural issues came with the introduction of Regulation 1/2003.¹⁸¹ As indicated above, this Regulation eliminated the need for an individual exemption system, where agreements had to be notified to the Commission,

¹⁷⁷ C-56/65 - Société Technique Minière v Maschinenbau Ulm.

¹⁷⁸ Case C-32/11 - Allianz Hungária Biztosító and Others, para. 37.

¹⁷⁹ Case C-228/18 - Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, paras. 33-36.

¹⁸⁰ See Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective*, 1967, pg. 77–106, 117.

¹⁸¹ Regulation (EC) No 1/2003.

and instead established a directly applicable system of legal exception. As consequence, the Commission is no longer the sole institution with the power to grant exemptions under Article 101(3) TFEU, as national courts and national competition authorities can apply the entirety of Article 101 TFEU.

The fundamental consequence in the legal praxis of the end of the notification for individual exemption has been that undertakings must now be self-reliant and carry out their own 'self-assessment' of the application of Art.101(3) TFEU.¹⁸² In this regard, the Commission has published Guidelines on the application of Article 101(3) TFEU¹⁸³ which provide guidance to national courts and NCAs, as well as to undertakings. Furthermore, there is also the possibility for the Commission, mostly acting under delegated authority from the Council, to declare the provisions of Article 101(1) TFEU inapplicable to a category of agreements. When an agreement falls under such block exemption it is presumed to fulfil the conditions of Article 101(3) TFEU, as consequence the necessity to assess whether the conditions for the application of Article 101(1) TFEU are met in the single case is eliminated. Block exemptions have been greatly used to address vertical restraints; the following analysis will thus focus on the last development from the Vertical Block Exemption Regulation.¹⁸⁴

This relationship between paragraph 1 and paragraph 3 within Article 101 TFEU is a delicate and balanced one, as it should be noted that even an agreement which has as its object the restriction of competition within the meaning of Article 101(1) TFEU may in theory satisfy the conditions for exemption under Article 101(3) TFEU.¹⁸⁵ This point takes further importance if considered how from the case law it follows how any type or category of agreements may benefit from the exemption.¹⁸⁶ In the case of vertical restrictions, for instance, the Court of Justice affirmed how for an undertaking there is the possibility “ in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU”.¹⁸⁷ This therefore applies – at least in theory – also to those agreements which are not covered by the

¹⁸² See Communication from the Commission to the European Parliament and the Council - Report on the functioning of Regulation 1/2003, COM(2009)206 final.

¹⁸³ Guidelines on the application of Article 81(3) of the Treaty, (2004/C 101/08).

¹⁸⁴ Commission Regulation (EU) 2022/720.

¹⁸⁵ Guidelines on vertical restraints (2022/C 248/01), para. 181; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2023/C 259/01), para. 341.

¹⁸⁶ Case T-17/93 - Matra Hachette SA v Commission of the European Communities, para 85; Case T-168/01, appeal Case C-501/06 P - GlaxoSmithKline Services Unlimited v Commission, para 82.

¹⁸⁷ Case C-439/09 - Pierre Fabre Dermo-Cosmétique, para 57.

Vertical Block Exemption Regulation because they contain clauses regarded as restricting competition (hardcore restrictions). As later it will be shown, however, the Guidelines establish that an individual exemption under Art.101(3) TFEU of vertical agreements containing such hardcore restrictions is also unlikely.¹⁸⁸ From this it follows how, while not imposing a *per se* prohibition for such agreements - a similar regime finds application.

4. Legal framework for the digital market

Over the years, attitudes towards the expansion of commercial activities in the digital marketplace have evolved significantly at EU level. In particular, there has been a shift in the perspective of the Commission on the application of existing rules. Up to five years ago, it was often emphasised the robustness of competition law and its adaptability to evolving market dynamics. For instance, following its E-commerce Sector Inquiry in May 2017, the European Commission initiated several antitrust investigations concerning online vertical restrictions. These inquiries led to four fines for online resale price maintenance (RPM) involving four manufacturers of consumer electronics products in July 2018,¹⁸⁹ and a decision on an online cross-border sales restriction concerning Guess in December 2018.¹⁹⁰ Both cases will be further assessed in the next chapters. At this stage is important to notice how the Commission officials argued at the time that traditional competition instruments were sufficiently equipped to meet the demands of the emerging digital economy and society.¹⁹¹ Remarkable in this regard is the statement by Competition Commissioner Vestager in 2018: “competition rules are designed to adapt. The principles they set out are valid for every market, for the ones we know today and the ones we’ll see in the future. And that’s why dealing with digital markets isn’t really about new rules. It’s about deepening our understanding of how those markets work”.¹⁹²

The case law at the time saw also the application of the traditional rules for the digital market. In the field of non-price restrictions on online sales - which will be in depth

¹⁸⁸ Guidelines on vertical restraints (2022/C 248/01), para. 180.

¹⁸⁹ European Commission, Press release 2018, available at: https://ec.europa.eu/commission/presscorner/detail/cs/IP_18_4601

¹⁹⁰ European Commission, Press release 2018, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844

¹⁹¹ Laitenberger J., Speech, 14th Annual Conference of the GCLC ‘Competition Enforcement in Digital Markets: Using Our Tools Well and a Look at the Future, 2019.

¹⁹² Vestager M., Fair Markets in a Digital World’ Speech to the Danish Competition and Consumer Authority, 2018.

examined in the final chapter - the Court clarified, first in the case *Pierre Fabre* and then in *Coty*, under which circumstances a restriction on distribution on online platforms constitutes an infringement of Article 101 TFEU.¹⁹³

However, in the following years the same European Commissioner for competition argued that competition policy did not have all the answers and that she was unsure whether what was needed was to reinterpret existing rules or add new rules.¹⁹⁴ Over the last two decades the EU has indeed made significant efforts to adapt traditional rules to the digital market, culminating in the adoption of a comprehensive framework of both updated competition rules and newly introduced regulatory provisions to address specific aspects of online sales in the digital market.

4.1. New regulatory provisions

The primary objective of this shift was to create a legal basis that would facilitate in the digital market the free movement of services and goods between Member States. Within this legislative framework, the E-commerce Directive¹⁹⁵ played a pivotal role as the cornerstone for incorporating the new economic reality into the internal market by effectively eliminating barriers to economic connections among EU members.¹⁹⁶

While the following section does scrutinise the impact of recent sectoral regulations on the online market, notably the Digital Services Act and the Digital Markets Act, it is important to first highlight the path that led to these provisions. This is especially relevant for online platforms, as the Digital Services Act addresses various new and existing issues in the online environment, while leaving, however, most current Directives and Regulations unchanged. For instance, the E-commerce Directive does retain its effect even after the DSA entered into force, except for the liability exemption regime where the DSA replaces the previous provisions.¹⁹⁷

The E-commerce Directive came in 2000 at a key moment in the development of modern society, when the activities on the internet began to flourish. These services, characterised by the fact that they involve the supply of goods or services and payment by electronic means and at a distance, marked a significant departure from traditional

¹⁹³ C-439/09 – *Pierre Fabre Dermo-Cosmétique*; C-230/16 - *Coty Germany GmbH*.

¹⁹⁴ European Commission, DG Competition Conference, *Shaping Competition Policy in the Era of Digitisation*, 2019, available at: https://ec.europa.eu/competition/information/digitisation_2018/conference_en.html

¹⁹⁵ Directive 2000/31/EC.

¹⁹⁶ *The Legal Framework for E-commerce in the Internal Market*, Policy Department for Economic, Scientific and Quality of Life Policies, 2020, pg. 14.

¹⁹⁷ See on this Regulation (EU) 2022/2065, Art. 89.

commercial practices. At the time of the Directive's adoption, however, this burgeoning sector had not yet been fully integrated into the internal market and the national legal frameworks differed widely, leading to fragmentation and legal uncertainty, as recognised in the Directive's recital.¹⁹⁸ It is therefore important to mention this piece of legislation when analysing online sales, as the E-commerce Directive aimed to create a coherent European legal framework that would provide the basis for further legislative developments.

Furthermore, by aligning with international standards,¹⁹⁹ the Directive sought to ensure that the competitiveness and innovation of European industry would not be hampered. This is linked to the argument that strict digital regulation could potentially deter digital companies and widen the gap between the European market and its counterparts in the US or Asia, a line of argument that was central at the time and is still relevant today, as the debate on the newly adopted AI law shows.²⁰⁰ With the longstanding mantra “America creates, Europe regulates”²⁰¹ critics point out that all major innovations and advances in the digital market actually come from outside the European Union. While the AI Act is the first regulatory framework to be adopted in the field of artificial intelligence, the actual developments in terms of technological developments do not rise within the EU common market. The most prominent example in the area of digital platforms is the fact that all but one of the officially designated gatekeepers under the DMA are not based in the European Union.²⁰² This disparity in terms of competitiveness underlines so the need for the Union to strike a delicate balance between fostering innovation within his borders and implementing necessary regulation in the digital industry.²⁰³

After the E-commerce Directive, the EU has been responding to the evolving digital market dynamics by introducing additional legal instruments. Already in 2015, as part of its Digital Single Market (DSM) agenda, the European Commission proposed a package of regulatory measures to facilitate the cross-border supply of goods and services online within the internal market. The situation at the time saw online barriers

¹⁹⁸ Directive 2000/31/EC, Recital 5.

¹⁹⁹ Ibid, paras 58-60.

²⁰⁰ See on this European Parliament, Procedure File 2021/0106/COD.

²⁰¹ Pedro Domingos, Tweet on X, 2024, available at: <https://x.com/pmddomingos/status/1752815635443368142>

²⁰² Commission, Press release, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

²⁰³ A Comparative Perspective on AI Regulation, available at: <https://www.lawfaremedia.org/article/a-comparative-perspective-on-ai-regulation>

limit citizens' access to goods and services, with for instance only 15% of EU citizens shopping online from another EU country.²⁰⁴ The aim was therefore to start removing regulatory barriers and shift from 28 national digital markets to one single market. The legislative measures adopted in the following years include, as the most important pieces of legislation, the GDPR²⁰⁵ addressing the use of personal data, the Geo Blocking Regulation,²⁰⁶ focusing on geographical discrimination, and further regulatory measures such as the Portability Regulation.²⁰⁷ Furthermore, since July 2020, the EU's Platform-to-Business (P2B) Regulation²⁰⁸ - tailored to the platform economy - has aimed to prevent market distortion, foster fair competition, and prohibit unfair trading practices on online platforms. Together, these regulatory measures collectively aim to adapt regulatory frameworks to the changing landscape of digital commerce and ensure a more comprehensive and responsive legal environment.

Nevertheless, the technological and economic developments that have taken place since the adoption of this legislative framework are deep. While the E-commerce Directive, adopted in 2000, sought to solve the problems of that time, society has become even more digitalised, giving rise to new business models and consumer habits, with new challenges and opportunities. As an example, when the E-commerce Directive entered into force, Amazon operated solely as a bookseller, and Facebook had yet to emerge. Over the past two decades, these online platforms have steadily amassed considerable economic influence and exerted a significant political and social impact, as evidenced by the use of user data highlighted above.

Under the new Commission in 2019, the growing importance and closer links between regulating competition and the digital economy became evident. The Commissioner Margrethe Vestager's portfolio expanded indeed from overseeing only competition under the Juncker Commission, to encompass under the Von der Leyen Commission both *Competition* and the program *Europe Fit for the Digital Age*. Regarding the legislative reforms for the online economy, in line with this emphasis on innovation highlighted, the package of the Digital Services Act and the Digital Markets Act has been indeed introduced as a top priority.²⁰⁹

²⁰⁴ European Commission, Press release, A Digital Single Market for Europe, 2015, available at: file:///C:/Users/maxi/Downloads/A_Digital_Single_Market_for_Europe_Commission_sets_out_16_initiatives_to_make_it_happen.pdf

²⁰⁵ Regulation (EU) 2016/679.

²⁰⁶ Regulation (EU) 2018/302.

²⁰⁷ Regulation (EU) 2017/1128.

²⁰⁸ Regulation (EU) 2019/1150.

²⁰⁹ Political Guidelines for the next European Commission 2019-2024, pg. 13 available at:

4.1.1. The implications of the DSA and DMA

As an introduction to the following sections on both the Digital Services Act and the Digital Markets Act, it is important to recall the specific reasons behind these sectoral regulations. In line with the above assessment, the increasing significance of the digital economy in recent years prompted indeed Commissioner Vestager in 2019 to appoint a panel of three external advisers. Their task was to publish a report on how competition policy should adapt to the evolving digital environment.²¹⁰ Following legislative developments undertaken first under the Juncker Commission and then under the current Commission, this Special Advisers' Report²¹¹ did not propose a fundamental change of the aims of competition law in the realm of digital markets. Instead, it has been highlighted that the existing rules and methodologies are adequately flexible to adapt to the unique challenges posed by these markets and emphasise how “vigorous competition policy enforcement is still a powerful tool to serve the interests of consumers and the economy as a whole.”²¹² Nevertheless, the unique characteristics of platforms and digital market require the adaptation and refinement of established concepts and legal provisions, as well as competition enforcement more broadly.²¹³ The report acknowledges a recurring theme in numerous discussions on digitisation, which has also been highlighted throughout this study and mentioned in the title: the question of whether competition law should retain its predominant role or if greater emphasis should be placed on a regulatory framework.

Competition law is designed to adapt to the evolving nature of markets and to respond to the specific characteristics of the markets and this flexibility is regarded as a significant advantage.²¹⁴ However, while much of the current debate on digitalisation

https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf; see also The von der Leyen Commission's priorities for 2019-2024, pg. 5 available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646148/EPRS_BRI\(2020\)646148_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646148/EPRS_BRI(2020)646148_EN.pdf)

²¹⁰ Commission, Press release, 2019, available at: https://competition-policy.ec.europa.eu/about/europes-digital-future/shaping-competition-policy-era-digitisation_en

²¹¹ EU Commission Special Advisers Report on Competition Policy for the Digital Era, April 2019.

²¹² EU Commission Special Advisers Report on Competition Policy for the Digital Era, April 2019, pg. 3.

²¹³ Ibid.

²¹⁴ EU Commission Special Advisers Report on Competition Policy for the Digital Era, April 2019, pg. 52.

focuses on the urgency of intervention, the process of identifying the relevant competitive dynamics in each case is proving to be time consuming and resource intensive. A possible solution emerging from the above mentioned Report thus suggests that in certain cases, issues closely related to market power may require a new regulatory framework due to their frequent and systematic occurrence. Conversely, the case-by-case approach of competition law may still be considered the most appropriate regulatory framework in other situations. The overall approach emerging from this report, which rejects a radical amendment of competition provisions in favour of adopting specific provisions tailored for online markets, explains the Commission's regulatory initiatives in the following years.

After an examination in the previous section of the regulatory provisions for the digital market that were originally introduced and have been updated in recent years, the most recent regulatory instruments, namely the Digital Services Act and the Digital Markets Act, are also examined. These acts represent in fact the latest legislative innovation for the digital market and demonstrate once again how - alongside a review of existing competition rules - at EU level there is a growing emphasis on the regulatory framework to tackle the challenge raised by the digital market.

4.1.1.1. The Digital Services Act

The Digital Services Act (DSA)²¹⁵ introduces new rules for online platforms offering services to businesses and consumers within the EU. The DSA imposes obligations based on a tiered approach, depending on the tier the platform will be subject to different obligations: intermediary services, hosting services, online platforms and marketplaces, very large online platforms and very large online search engines.

As for the content of the DSA, the obligations are variegated, ranging from provisions regulating transparency and reporting requirements to rules on due diligence for intermediaries and online platforms for third-party content. Analogically to the scheme followed in the Digital Markets Act, as well as in the Artificial Intelligence Act, the legislation aims at creating macro-categories and also in this case the Commission differentiates based on the quantitative element of the service providers: from the mere conduit and caching providers, up to the upper category of "very large online platforms" (VLOP) and "very large online search engines" (VLOSE).²¹⁶ Indeed, under the DSA Section 5 service providers will qualify under the highest tier, if the amount of monthly users exceeds 10% of the total number of EU consumers, meaning 45

²¹⁵ Regulation (EU) 2022/2065.

²¹⁶ Regulation (EU) 2022/2065, Art. 33.

million at the time of the adoption of the text. An online platform or search engine will qualify under this highest tier if the amount of monthly users exceeds 10% of the total number of EU consumers, meaning 45 million at the time of the adoption of the text.²¹⁷ This figure does indeed correspond to 10% of the EU's population in 2022 and it will be periodically adjusted in the coming years. When designating a VLOP or VLOSE, the Commission can use any available information, relying primarily on self-reported figures published by search engines and platforms under Article 24(2) of the DSA. Following these criteria, the first tranche of VLOPs was designated in April 2023 and these include important online platforms such as Booking.com or Amazon Store, which play a fundamental role in the online sales within the internal market.²¹⁸

Furthermore, an aspect directly relevant for the practice of sales on online platforms, Art. 29 of the Regulation foresees an exclusion for “online consumer marketplace that qualifies as a micro or small enterprises within the meaning of the Annex to Recommendation 2003/361/EC”, unless it has been designated as a VLOP or a VLOSE in accordance with Article 33. The same exemption is foreseen in the case of those service providers classified as online platforms under Art. 19 of the Regulation. From it can be inferred how, in contrast with the legislative framework highlighted above in this section, the introduction of the Digital Services Act does target only a certain category of businesses active online. This fits into the wider approach taken in the recent years, where the EU regulator has focused on the few – mostly foreign based – tech businesses active on the market, as the next section on the DMA also shows.

Nevertheless, whilst the majority of these obligations coming from the DSA target the tech giants and does not affect the bulk of companies active in the online single market, the DSA still plays a crucial role in terms of the number of transactions within the online single market as the Regulation aims to catch all those undertakings reaching at least 10% of the EU's population.²¹⁹

4.1.1.2. The Digital Markets Act

Alongside the Digital Services Act, another piece of legislation that came into force in November 2022 has been the Digital Markets Act (DMA).²²⁰ This Regulation is pivotal for analysing the regulatory framework governing online sales. It represents the

²¹⁷ Ibid.

²¹⁸ Commission, Press release, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413

²¹⁹ Regulation (EU) 2022/2065, para 76.

²²⁰ Regulation (EU) 2022/1925.

legislative update reflecting the latest developments in the digital market, building upon the previously examination of E-commerce directive and thus constitutes the final “piece” of the legislative framework.

The DMA aims at completing the existing competition provisions with additional *ex ante*-regulations for certain large online undertakings, notably the gatekeepers. The obligations contained in the DMA are significantly influenced by previous EU competition enforcement decisions and the recognition of the limits of existing investigative powers. The Commission therefore shifted with this act the legislative intervention from an *ex-post* review under traditional competition law towards an *ex-ante* regulation, making certain conducts under the DMA prohibited from the start.²²¹ This legislation follows indeed the principle that “what is forbidden offline should be forbidden online”.²²²

In terms of scope, in line with trend indicated above for the DSA, the DMA is relevant only for a restricted number of businesses in the digital market, the so called “gatekeepers”. However, the few undertakings that are being targeted are also the biggest players in e-commerce: these include Amazon and - in the latest development at the time of writing - it does also include Booking.com.²²³ The Regulation indeed targets undertakings that provide one or more of the ten core platform services, under which fall also activities such as online intermediation services.²²⁴ However, the undertakings providing such services need to fulfil three qualitative criteria in order to be qualified as a “gatekeeper”, such as having a significant impact on the internal market.²²⁵ In addition to the qualitative criteria, there is a presumption for an undertaking to fulfil them if it meets certain quantitative thresholds in terms of turnover of the business and active users.

The Commission only designated few gatekeepers that fall within this scope of application and as of March 2024 six of them have to fully comply with all obligations coming from the DMA.²²⁶ In addition, in Mai 2024, Booking.com has also been

²²¹Clarke Laurie, Europe’s Digital Markets Act: A shift to proactive Big Tech regulation, 2020, available at: [Digital Markets Act: A shift to proactive Big Tech regulation - Tech Monitor](#).

²²² Commission, Press release, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545

²²³ Commission, Press release, 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_24_1342; for Booking.com see https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2561

²²⁴Regulation (EU) 2022/1925, Article 2(2)).

²²⁵ Regulation (EU) 2022/1925, Art.3(1), (2), (6) and (7) and Annex.

²²⁶ Commission, Press release, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_24_1342

classified as such. As demonstrated therefore the focus of the DMA is only on very large digital platforms, which are undertakings that enjoy market power. Consequently, these entities are unlikely to benefit from the safe harbour provisions of the Vertical Block Exemption Regulation.

Nonetheless, there are several interesting aspects for this study emerging from the new Regulation. Concerning the restriction of online sales, the DMA introduces indeed prohibition for gatekeepers from undertaking specific actions that until now were accepted under the current provisions. In the case of vertical agreements, for instance, gatekeepers are forbidden from enforcing clauses that restrict business users from providing identical products under different prices or conditions through their own website or third-party online intermediary services (so called most favoured nation clause).²²⁷ Interesting to notice is that below this scope of application the general rules will still apply, meaning that for vertical agreements falling within the Block Exemption Regulation narrow most favoured nation clauses – limiting better prices or conditions on the own businesses' websites - will be exempted from the scrutiny of Art.101(1) TFEU.²²⁸ In addition, also for those agreements not included in the VBER, there is still the possibly - which however for gatekeepers under the DMA is no longer possible - to assess most favoured clauses individually under Art.101 TFEU.

Furthermore, a relevant obligation in terms of e-commerce concerns the practice of advertising under Art. 5(9) DMA. As mentioned above, also online platforms acting as online intermediation services are increasingly using advertising as a source of revenue.²²⁹ A gatekeeper platform such as Amazon or Booking.com must now share in a transparent way with advertisers all relevant information in respect to the advert posted, such as the remuneration received and the pricing methods. This obligation could have an important impact on the business's model of these platforms, as both advertisers and publishers will be able to assess their activities on the platform and may choose to switch to another provider.²³⁰

Additionally, in this context, the aforementioned sections have already emphasised the significance of user data within online platforms. On this element build several additional obligations within the DMA. The designed gatekeepers operating as hybrid platforms, such as Amazon, are indeed restricted to use ex Art. 6(2) DMA, in

²²⁷ Regulation (EU) 2022/1925, Art. 5 para.3.

²²⁸ Regulation (EU) 2022/720, Art. 5(1)(d); Guidelines on Vertical Restraints (2022/C 248/01), para 254; for more on most-favored-nation clauses see Chapter 2.

²²⁹ See above Section 2.2.1.

²³⁰ Regulation (EU) 2022/1925, Recital 45.

competition with business users, any data that is not publicly available and that is generated within their platforms.²³¹ The importance of such obligation can be seen in the investigation by the Commission over Amazon's use of non-public marketplace seller data, which ended in a commitment decision.²³² A parallel investigation and a related commitment decision concerned another additional conduct subject to an obligation introduced recently under the DMA: under Art. 6(5) DMA a gatekeeper must not treat services or products which it offers more favourably than similar third party services or products. In this regard, the Commission concluded that Amazon's rules and criteria for the Buy Box and Prime unduly favoured its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.²³³

As further and final evidence of the developing impact of these obligations on online platforms engaged in e-commerce under the scope of the DMA, there is also the recent decision to open an infringement investigation into whether Amazon may be favouring its own brand products on the Amazon Store in violation of the above-mentioned Art. 6(5) DMA.²³⁴

4.1.1.3. The DMA between competition law and sectoral regulation

After establishing the legislative importance of the Digital Markets Act, which represents the latest development in sectoral regulation for online sales within the digital market, it is interesting to further examine the unique legal nature of this specific piece of legislation. The enforcement of competition law in relation to the biggest undertakings active on the market has traditionally relied on *ex post* assessment. In contrast, the DMA introduces a sector specific, *ex ante* regulatory framework that imposes several strict restrictions and obligations on the digital gatekeepers. Nevertheless, as will be demonstrated, the provisions are deeply rooted in the principles of competition law and serve to enhance and complement the existing competition rules. The analysis of the legal nature of this Regulation serves as an exemplary case of the approach indicated in the title and reflected throughout this work: the legislation governing the digital market is currently divided between the enforcement of competition law and the application of, mostly newly adopted, sectoral regulations.

²³¹ Regulation (EU) 2022/1925, Art.6(2).

²³² Commission, Press release, 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777

²³³ Ibid.

²³⁴ Commission, Press release, 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689

4.1.1.3.1. Competition aims

As it has been recognised,²³⁵ the influence of the competition law within the DMA can be seen in the source of the legal obligations contained in the Regulation, which are mainly deriving from competition law cases. For instance, under Art. 6(2) DMA a gatekeeper must allow third party services and hardware providers effective interoperability with hardware and software features accessed or controlled via its operating system. This obligation sees a direct connection with the Commission's investigation into Apple's practices in the markets for mobile wallets on IOS devices. In particular, in that investigation the Commission verified whether Apple's practices have prevented third-party developers of mobile wallet applications from accessing the necessary software to develop a competing product to Apple Pay. The consequence of Apple Pay being the only option available to iPhone users, was that "such exclusionary conduct may restrict competition in the market for mobile wallets on iOS devices."²³⁶ Additional links between the DMA Regulation and the enforcement practice of competition law by the Commission can be seen under Art. 6(5) DMA: the prohibition for gatekeepers from treating their own products and services more favourably than those of third parties mirrors the Commission's decision in the Google Shopping case.²³⁷

4.1.1.3.2. Regulatory methods

While this shows how the DMA in terms of contents reflects those of competition law, aiming at a better and more suitable application of those rule on the digital market, the method used within the Regulation is not typical of competition law. It is true that DMA still allows under Art. 17 DMA the Commission to conduct market investigations in order to design providers of core platforms as gatekeepers. However, the Regulation also – and this represents the real innovation – introduces a notification system under Art. 3(3) and Art. 4 DMA. The undertakings fulfilling the above mentioned criteria need to "self-notify" their status to the Commission. As a consequence, for the designation of gatekeepers under the DMA a prior investigation of the Commission in order to assess the relevant markets and the market share hold by the single undertaking is no longer necessary. In addition, at this stage those undertaking are also not allowed

²³⁵ Moreno Bellosio, Natalia and Petit, Nicolas, The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove, 2023, page 4.

²³⁶ Commission, Press release, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2764

²³⁷ Commission Decision AT.39740 - Google Search (Shopping).

to bring forward possible efficiency justifications nor the Commission needs to prove anti-competitive effects of their conducts, as the application of the obligations is “independently from the actual, likely or presumed effects (...) on competition on a given market”²³⁸ The burden of proof traditionally seen in competition cases is thus also rebutted, with the Commission no longer required to prove any anti competition effects on the market.

As a final point, an example of additional obligations under the DMA deviating from the traditional competition law, concerns concentrations. The Regulation introduces indeed a duty for all designed gatekeepers to inform the Commission of any concentration if the entities provide services in the digital sector. This is required regardless of whether the thresholds under the traditional EU Merger Regulation or under the applicable national competition law are met.²³⁹ This illustrates the application in practice of the above section on the different aims between competition law and sectoral regulation. The sectoral obligations under the DMA go beyond a mere economic assessment adopted to maintain competition in the market – typical of competition law - and take into consideration additional elements.

4.1.1.3.3. Conclusion

Against this background, the system of the DMA reverses the traditional scheme followed under EU competition law, where first the conditions within the markets are to be assessed and only afterward the business’s conduct of the undertaking is to be evaluated and possible breach of competition law established. In adopting this approach, the Regulation thus diverges from the practices of competition law and adopts a process akin to the *ex ante* designation method used in regulatory frameworks, such as those governing electronic communications.²⁴⁰ Consequently, situated between its origins in competition law and its regulatory techniques, the DMA occupies a middle ground between these two legal domains, and this reflects once more the path highlighted throughout this entire chapter of an increasingly interplay between competition law and regulation in addressing issues arising in the digital single market. Notably, this unique classification of the DMA does have several practical consequences, that will especially arise once the Regulation will see further

²³⁸ Regulation (EU) 2022/1925, Recital 11.

²³⁹ Regulation (EU) 2022/1925, Art. 14; see also Regulation (EU) 2022/1925, Recital 71.

²⁴⁰ Electronic Communications Code. Art. 63; see also Moreno Bellosio, Petit, Nicolas, The EU Digital Markets Act (DMA), A Competition Hand in a Regulatory Glove (2023) 48 *European Law Review* 391, pg. 30.

development within the digital market. Earlier in this chapter the different aims of competition law and sectoral regulation have been highlighted, with the latter pursuing much wider objectives than the mere protection of the internal market. A categorization of the Digital Markets Act as purely competition law would mean that future additional obligations should fall within this narrow anti-competitive dimension.²⁴¹

Furthermore, the recent status of a gatekeeper reached by Booking.com does additionally bring to the surface the relevance of this section. As it will be shown in the next chapter on pricing restrictions, with the implementation of the DMA undertakings such as Booking.com could indeed face two different proceedings – one under competition law and one under the DMA – linked however to the exact same implemented conduct.²⁴²

4.2. The interplay in the case of online sales

The above analysis of the evolving legislative landscape in the digital sector has highlighted a constant interplay between competition law and regulation. This dynamic is evident also in the more recent years, with the introduction alongside the traditional Article 102 TFEU of the Digital Markets Act in 2023, as well as for Art.101 TFEU of the new Vertical Block Exemption Regulation (VBER) in 2022.

Concerning the practice of online sales, the most practical field of application of this legislative framework can be seen alongside the vertical chain within the EU digital market. Following from the above assessments on digital market, it should be noted that in today digitalised economy, technology would in theory permit EU-wide sales of products across national borders, especially for service supplied entirely online. While with a physical store, the customer base is limited to the local area, by going online, one can tap into a much larger audience, reaching - at least in theory - days and nights customers from all corners of the world. This new reality has also been recognised by the Commission in the revised Market Definition Notice 2024, where a distinction is made in the definition of the geographic market as to whether the location of the customer influences the conditions of the product offering.²⁴³ Further details of the changes introduced by the updated Notice are set out below.

However, despite the theory, the reality shows how selling online often faces territorial limitations, and barriers still exist even across the internal borders of the EU digital

²⁴¹ See also Moreno Bellosa, Natalia and Petit, Nicolas, *The EU Digital Markets Act (DMA)*: pg. 33.

²⁴² See Chapter 2, Section 3.2.3.

²⁴³ Commission Notice on the definition of the relevant market for the purposes of Union competition law, (C/2024/1645), para. 40.

single market. Factors such as language barriers, differing consumer preferences, increased cross-border shipping costs, and varying national regulations can hinder cross-border trade, even within the EU.²⁴⁴ The case of geo-blocking of audiovisual content is the most prominent example, where the sale of digital services offering copyrighted content - such as music and sport – can still discriminate on the basis of the customer's location within the EU.²⁴⁵ This last example will be further assessed in the last chapter of the work.

4.2.1. The approach of EU competition law

In terms of competition law within the EU internal market, issues in the sales online may arise due to the significant buyer power of a few online players, and thus fall within the scope of Art. 102 TFEU. As described above indeed, the explanation behind this is that digital markets are driven by high initial costs and network effects.²⁴⁶ This reality has seen a response in terms of legislative initiatives, such as the EU Digital Markets Act²⁴⁷ in Europe, while examples outside the EU common market has been in 2020 the Report on Competition in Digital Markets released by the US Judiciary Subcommittee.²⁴⁸ Furthermore, in the US in terms of legal enforcement there are ongoing lawsuits by the Federal Trade Commission against the monopoly power in the digital market: particularly interesting for the field of online commerce appears to be the current proceeding against the big tech of Amazon.²⁴⁹ The targeted conduct is the implementation of a set of interlocking anticompetitive and unfair strategies to illegally maintain its market power, while raising prices and degrading the quality of the services.

In terms of recent enforcement actions against dominant online players, a response has come also from the EU Commission, being prominent examples, the high-profile cases

²⁴⁴ Monopolkommission, Wettbewerbspolitik: Herausforderung digitale Märkte – Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB – Kurzfassung, available at https://www.monopolkommission.de/images/PDF/SG/SG68/S68_Kurzfassung.pdf

²⁴⁵ European Parliament, Press release, 2023, available at <https://www.europarl.europa.eu/news/en/press-room/20231208IPR15768/meps-want-to-revise-eu-geo-blocking-rules-to-eliminate-remaining-barriers>

²⁴⁶ See above, Section 2.2.2.

²⁴⁷ Regulation (EU) 2022/1925.

²⁴⁸ US Congress House, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, 2020.

²⁴⁹ Federal Trade Commission et al v. Amazon.com Inc, Case Nm. 2:2023cv01495, 2023.

involving Google, including Google Shopping,²⁵⁰ Google Android²⁵¹ and Google AdSense,²⁵² as well as the recent decision against Apple.²⁵³ In contrast, cases of infringements of Article 101 TFEU in the online environment are less considered. In this respect - although this study focuses on the relationship alongside the vertical supply chain and thus does not directly analyse the issues related to Art. 102 TFEU - it should be clear that in the digital market there are cases where both provisions, Art. 101 TFEU and Art. 102 TFEU may be infringed if the company in question also holds a dominant position in the relevant market.

A recent example emerged from the Commission's decision to start an investigation of Amazon.²⁵⁴ The case concerned the interdependencies between Amazon's third-party sales platform for merchants (Amazon Marketplace) and Amazon's own online retail business. Operating both in an upstream intermediation market for businesses and in downstream retail markets towards its end customers created indeed a significant conflict of interest for Amazon as an online platform. The investigation started from the claim that Amazon was using the data it collects to identify successful new products offered on its platform to then contact the manufacturers and market an Amazon-own version. From this scenario it emerges clearly how both provisions can be relevant. On one side, under Article 101 TFEU the exchange of competitively sensitive information between rivals is specifically prohibited. Amazon's collection and use of market data gathered through its Marketplace could infringe this provision. In particular, as indicated in the relevant Guidelines of the Commission, making available up-to-date, non-aggregated data that is competitively sensitive would be problematic, as, for instance, in this case Amazon can take into account for its own strategic market behaviour sales figures, market shares, and even customer names and costs.²⁵⁵ On the other side, under Art. 102 TFEU Amazon's use of non-public marketplace seller data would allow it to calibrate its retail decisions, distorted fair competition on its platform and prevented effective competition. Against this background, where the same conduct can infringe both provisions, it could be argued that an investigation and subsequent infringement finding under Article 101 TFEU should be preferred. This approach does

²⁵⁰ Commission, Case AT.39740 - Google Search (Shopping).

²⁵¹ Commission, Case AT.40099 - Google Android.

²⁵² Commission, Case AT.40411 - Google AdSense.

²⁵³ Commission, Case AT.40437 - App Store Practices

²⁵⁴ Commission, Press release, 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291

²⁵⁵ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2023/C 259/01), para. 86.

indeed not require the Commission to demonstrate that the undertaking holds a dominant position within the relevant market, which—especially in the digital sector—can entail legal uncertainties and potential challenges. However, in this case on Amazon, the subsequent proceeding revealed that the Commission decided to pursue the investigation under Article 102 TFEU. It found that Amazon's use of non-public marketplace seller data allowed it to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany, where it holds – and still does hold - a dominant position.²⁵⁶ The reasoning behind this decision might be found in the fact that there have been important precedents in the digital market where these issues have been addressed under Art. 102 TFEU. In previous years, the Commission has indeed successfully investigated and fined Google for self-preferencing – in other words favouring - its own services while downgrading competitors in Google's generic search results.²⁵⁷ Furthermore, it should be noted that, at the national level, the German Bundeskartellamt found already in 2019 that Facebook's platform abused its dominant position by imposing exploitative business terms for the collection of user data. Although the NCA relied primarily on the General Data Protection Regulation (GDPR), his assessment could already at the time have supported an infringement under Article 102 TFEU, paragraph 2.²⁵⁸

Without addressing the issue related to Article 102 TFEU, it appears that the Commission, in those cases where it is able to establish the dominant position of the platform within specific markets - such as the national German and French markets in its investigation into Amazon – tends to rely on the abuse of dominance. This approach enables indeed the enforcement authority to follow existing case law regarding the practice of self-preferencing in the digital sector, without having to prove collusive behaviour under Article 101 TFEU, which, as indicated below regarding algorithms, poses challenges for those conducts being implemented online. In addition, as a final note, these assessments once again highlight the centrality of data to the business model of online platforms, as previously indicated.

Nevertheless, there are several – highly relevant in the praxis - topics where the violation of competition law by online players is based under the other main provision of Art.101 TFEU. An interesting indication at national level arises from the German

²⁵⁶ Commission, Press release, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077; see also on this Commission, Press release, 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777

²⁵⁷ Commission, Case AT.39740 - Google Search (Shopping).

²⁵⁸ Bundeskartellamt - B6-22/1, 2019.

expert committee “*Monopolkommission*”, which is an independent advisory body to the German Federal Government and the legislative bodies in the areas of competition policy, competition law and regulation.²⁵⁹ In 2015, this committee highlighted issues related to pricing, such as parity clauses, as well as concerns about the range of products available for sale. These issues included third-platform bans and practices that restrict sales based on geographical location within the EU internal market.²⁶⁰ These aspects have been then reflected in the area of competition law in the updates to the existing framework of Art.101 TFEU, such as the 2022 Vertical Block Exemption Regulation and the revised Market Definition Notice. These two elements are further analysed in this chapter.

4.2.2. The added value of regulatory provisions

Alongside the application of EU competition law, the Digital Single Market Agenda initiated by the Commission in 2015 covers practices by undertakings that are already addressed under Art.101 TFEU, specifically going against territorial restraints and differentiation in distribution practices.

Both regulatory and the competition rules target territorial restrictions and differentiation in the distribution of products.²⁶¹ Apart from that, however, it has been described earlier in this chapter how sectoral regulations go beyond the scope of the competition rules and have further and additional objectives other than the maintenance of the free competition in the market.²⁶² Linked to the example of the prohibition of discrimination used above, differentiations in the distribution and territorial restraints presents a significant challenge to the European integration, as they not only limit cross-border competition but also contradict the objectives of creating a single market, by dividing the online market along national borders.²⁶³

Alongside the application of the competition rules, the Geo-blocking Regulation aims to eliminate discrimination between consumers in certain cross-border scenarios. The background to this regulation is that in 2017 around 68% of EU internet users engaged

²⁵⁹ Monopolkommission, Aufgaben, available at: <https://www.monopolkommission.de/en/monopolies-commission/mission.html>

²⁶⁰ Monopolkommission, Wettbewerbspolitik: Herausforderung digitale Märkte – Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB – Kurzfassung, available at: https://www.monopolkommission.de/images/PDF/SG/SG68/S68_Kurzfassung.pdf

²⁶¹ Competition Law for the Digital Economy, pg. 213 ff.

²⁶² See above Section 3.2.2.2.

²⁶³ See e.g. Cases 56 and 58/64 - Consten & Grundig v Commission.

in online shopping. However, merely 19% of consumers made online purchases from other EU countries, and only 9% of companies engaged in cross-border sales.²⁶⁴ In particular, this Regulation introduced in 2018 sees a prohibition of utilizing a consumer's nationality, place of residence, or place of establishment to impede or restrict access to a catalogue of products provided through an online interface. Additionally, it bars redirecting customers to another online interface without their explicit consent.²⁶⁵ These prohibitions prevent certain practices by businesses that directly or indirectly refuse to sell to or discriminate against customers on the basis of factors such as their place of residence. A practical consequence is that under the Regulation is no longer allowed to refuse to sell goods or services or to apply higher prices in certain cross-border situations where a customer is resident or a national of another Member State.²⁶⁶

Alongside this, the Portability Regulation ensures that individuals can access online content services even when they are temporarily resident in another Member State.²⁶⁷ Furthermore, from the Portability regulation it derives also how copyright holders and distributors are prohibited from restricting the supply of online content services to a particular Member State or from imposing additional charges for the use of these services beyond the borders of that Member State.²⁶⁸

At first sight, it could be argued that the legal effects of the regulatory framework merely duplicate those arising from Articles 101 and 102 TFEU, which already impose obligations to enter into transactions, prohibit discrimination and restriction on the validity of agreements and the exercise of copyright. On closer examination, however, these regulatory provisions go much further in several important respects, prohibiting practices that would otherwise be permitted under traditional competition law. In particular, it should be noted how these principles apply also to unilateral conduct by non-dominant companies. This differs from EU competition law, where unilateral conduct only by dominant companies is addressed under Art. 102 TFEU, whereas Art.101 TFEU requires a concurrence of will between at least two parties.²⁶⁹

²⁶⁴ Commission, Factsheet, E-commerce, 2018, available at: <https://digital-strategy.ec.europa.eu/en/library/e-commerce-eu-how-you-can-make-most-out-it-consumer>

²⁶⁵ Regulation (EU) 2018/302, Art. 3(1).

²⁶⁶ See Regulation (EU) 2018/302, Recital 22.

²⁶⁷ Regulation (EU) 2017/1128, Art. 1(1).

²⁶⁸ Regulation (EU) 2017/1128, Art. 2 and 3(1); see also Competition Law for the digital economy, pg. 216.

²⁶⁹ Competition Law for the Digital Economy, pg. 222.

In addition, the regulatory framework extends the scope of EU competition law by targeting practices that do not necessarily constitute restrictions of competition under Article 101 TFEU. For example, in the case of online sales, Article 101 TFEU allows the supplier to set up a selective distribution system, supplying only distributors that meet certain minimum criteria, and within that system to impose restrictions on whom the distributors may sell to based on the location of the buyers.²⁷⁰ On the other hand, the Geo-blocking regulation explicitly prohibits any possible restriction based on the geographical position of the buyers. As described in the introduction, the aim of the regulatory provisions is thus much broader of that of general competition law and as a consequence is it therefore not surprising that the legal implications of these rules go beyond those of EU competition law.²⁷¹

Indeed, concerning the online sales, these regulations hold the potential to diminish the appeal and practicality of territorially exclusive and differentiated distribution systems, theoretically fostering a cross-border and EU-wide supply. However, it is also critical to understand that the applicability of these rules in the form of Regulations is confined to particular scenario: the Geo-Blocking Regulation specifically targets certain online service categories, excluding instead audio-video services.²⁷² Against this background, it flows the potential that the Geo-blocking Regulation does have in order to achieve the aim of market integration. Therefore, further analysis on his scope of application and the relationship with competition law will be conducted in Chapter 3.

4.3. The Vertical Block Exemption Regulation 2022

4.3.1. Scope of application

Within this innovation of the legal framework, the Commission recognised that companies selling online need clarity specifically on data sharing and commercial activities taking place in the digital environment. In the Annex to the Communication "A Competition Policy Fit for New Challenges", the current Commission has thus grouped the competition initiatives to support the digital transition into three main categories: new horizontal instruments, the review of antitrust and merger rules, and changes to the state aid framework.²⁷³ The approach taken by the Commission

²⁷⁰ Guidelines on vertical restraints 2022/C 248/01, paras. 227 ff.

²⁷¹ See above pg. 11-12.

²⁷² European Parliament, Press Release, available at: <https://www.europarl.europa.eu/news/en/press-room/20231208IPR15768/meps-want-to-revise-eu-geo-blocking-rules-to-eliminate-remaining-barriers>

²⁷³ Annex to the Communication COM(2021) 713 final/2 cit.

reproposes this constant interplay between competition law and regulatory provisions and involves a dynamic balance of rules and exemptions in order to interpret and apply competition rules in a way that is conducive to the digital transition.

As a background note, in addition to the above described system of EU competition law between primary and secondary law, it should be noted that the EU primary competition law has not seen any substantial changes over the years. At national level there have been in several Member States initiative to amend the relevant legislation, even anticipating the changes at EU level. In this regard, interesting is to point out to Germany, where a regulation to limit the market power of so-called gatekeepers was introduced already at the start of 2021 within the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen - GWB*). The 10th amendment to this national competition law granted indeed new, far-reaching powers of intervention to the German NCA concerning "*companies with paramount significance for competition cross-market*" (so-called super-dominant companies).²⁷⁴ Notably, these provisions anticipated the later Digital Markets Act at the EU level, but there are still significant differences. In particular, the scope of addressees under Section 19a GWB is broader, and the obligations are not presented as an exhaustive catalogue, as in the DMA, but rather as examples of rules.

Instead, at EU level, the most innovation at EU level has come from the amending of the secondary competition law. In this context, the block exemption Regulations and accompanying Guidelines within EU secondary legislation have played a key role in adapting the competition framework to developments in the digital internal market. These pieces of EU secondary law have provided valuable tools for businesses, especially considering the introduction of the self-assessment system for private parties in 2003. In terms of thematic categories, one the greatest innovation for the application of competition law has concerned online sales and online platforms, where undertakings require clarity on permissible vertical contractual restrictions and distribution agreements under Art.101 TFEU. In this regard, implementing on the above general description of block exemption Regulations, the Vertical Block Exemption Regulation provides a clear and direct path to obtain an exemption under Article 101(3) of the TFEU.²⁷⁵

All the block exemption Regulations show the same structure: they outline the types of agreements that can be exempted, and the criteria needed, such as market shares and detailed lists of not allowed clauses (so called hardcore restrictions). Against this

²⁷⁴ Gesetz gegen Wettbewerbsbeschränkungen, § 19a.

²⁷⁵ Regulation (EU) 2022/720.

background, the revision of the Vertical Block Exemption Regulation, together with the Guidelines²⁷⁶ published by the Commission, aims to respond to this need by offering updated guidance, especially regarding new supply and distribution models in the digital market. Concerning the accompanying Guidelines, although they are only formally "Communications from the Commission", they have been described above as binding upon the Commission as issuing authority on the basis of the principle of legitimate expectations and good administration. This explains why, even if as Communication they are not legally binding on courts or national competition authorities, they have nevertheless become a "de facto standard"²⁷⁷ of interpretation of EU law, and both national competition authorities and courts often look to them for guidance. Nevertheless, there can be differences in interpretation from other institutions that leads to legal uncertainty. This is illustrated by the different outcomes in the case law on marketplace bans in Germany and by the different positions taken by national competition authorities on price restrictions in the hotel sector, which will be assessed in the next chapter.

Concerning the Vertical Block Exemption Regulation, it exempts from competition law such categories of agreements that contribute to better coordination within the distribution chain and thus increase efficiency and profitability.²⁷⁸ Under Art. 1(1)(a) VBER is indicated that for an agreement to be exempted under Art.101(1)TFEU, the undertakings must be active at different levels of the production or distribution chain and the agreement must regulate the conditions under which the product is purchased, sold or resold. The basic criteria for exemption remain unchanged from the previous version of 2010: firstly, these vertical agreements are exempted if neither the market share of the supplier nor the market share of the buyer exceeds the 30% threshold.²⁷⁹ Fundamental for the application of the block exemption is thus the definition of the market share of the parties involved: on one side, the relevant market shares held by the supplier on the market where the supplier sells the goods or services to its customers, and on the other side the market share held by the buyer on the market where the buyer purchases the goods or services. In line with the overall system of competition law, also under VBER the markets are to be defined by the goods or services - the relevant product market - and the territory being the relevant geographic

²⁷⁶ Guidelines on Vertical Restraints (2022/C 248/01).

²⁷⁷ Bernhard J, Vertikal-GVO, Einleitung, Art. 1-3, Art. 6-10, in: Säcker F-J, Karpenstein U, Ludwigs M., Münchener Kommentar zum Wettbewerbsrecht, vol 1/2, 2020, Einleitung, para.17.

²⁷⁸ Regulation (EU) 2022/720, Recital 6.

²⁷⁹ Guidelines on Vertical Restraints (2010/C 130/01), paras. 171 ff.

market.²⁸⁰ Below the 30% market share threshold, it is generally presumed that vertical agreements lacking certain severe restrictions of competition typically result in enhanced production or distribution.

In addition to this threshold, the second requirement under Art. 1(1)(a) VBER is that the agreement does not contain any of the hardcore restrictions listed under Article 4 of the Regulation. Hardcore restrictions are likely harmful for the competition within the internal market or considered not indispensable for reaching efficiency effects. These restrictions are considered so severe that they disqualify not just the specific provision but the entire agreement from being covered by the Vertical Block Exemption Regulation, irrespective of the parties' market share. Consequently, these provisions are presumed to harm competition as restrictions "by object," as foreseen under both Article 4 VBER and the accompanying Guidelines.²⁸¹ As indicated, the hardcore restrictions are presumed to be restrictions by object, meaning therefore that are agreements which provide a "sufficient degree of harm to competition that there is no need to examine their effects".²⁸² However, from the case law it also emerges that, despite the classification of a hardcore restriction as a restriction by object – such as in the case of resale price maintenance – it does not automatically mean a *per se* infringement of Art. 101 TFEU. Instead, an individual assessment is necessary to determine if the agreement overall has pro-competitive effects and thus fulfils the conditions for an individual exemption.²⁸³ Indeed, even if the agreement were to be considered in breach of Art.101(1) TFEU, the undertaking has nonetheless as a last resort the possibility to seek an individual exemption of such agreements under Art.101(3) TFEU. Under this provision it must show –in addition to the other conditions – substantive pro-competitive effects and prove that these are likely to result from including the hardcore restriction.²⁸⁴ This being said, the presence of hardcore restrictions is a good indicator of whether Article 101(3) TFEU is fulfilled: an agreement containing one or more hardcore restrictions is unlikely to meet the conditions for an individual exemption.²⁸⁵

Against this background, regarding the burden of proof, it is important to note the consequences of a hardcore restriction within a vertical agreement. As highlighted

²⁸⁰ Ibid, para 172.

²⁸¹ Guidelines on Vertical Restraints (2010/C 130/01), para. 179

²⁸² C-373/14 P - Toshiba Corporation v Commission, para. 25.

²⁸³ Guidelines on Vertical Restraints (2010/C 130/01), para 180; see also Case C-211/22 - Super Bock Bebidas, paras. 41-42.

²⁸⁴ Guidelines on Vertical Restraints, para 181, see also para 195.

²⁸⁵ Ibid, para 180.

above, under the VBER provisions, a hardcore restriction presumes an infringement of competition by object. Nonetheless, the undertaking always has the opportunity to demonstrate the beneficial effects of the agreement and thereby secure an individual exemption under Article 101(3) TFEU. Consequently, in such cases, the burden of proof lies with the undertaking to show the authority that the overall agreement does not infringe Article 101 TFEU.²⁸⁶ Instead, in the cases where the Block Exemption Regulation does not find application – for instance due to the threshold of the parties – it will be up to the authority alleging the infringement within an investigation to prove the breach of Art.101(1) TFEU, as foreseen under Art. 2 of the 2003 Regulation.²⁸⁷

4.3.2. The innovation for online sales

Before the new drafted block exemption Regulation, the then in-force Regulation 330/2010 did not explicitly mention online sales, and it were only the accompanying Guidelines that set out the Commission's views on this aspect. A clear distinction between active and passive sales was made under the previous Block Exemption Regulation. At this point, it should be clarified that active selling refer to the active approach of customers, such as through direct mails (even unsolicited) or through advertising in the media. On the other hand, passive selling refers to responding to unsolicited requests from individual customers, including the delivery of goods or services to such customers.²⁸⁸ Against this background, according to the Guidelines, online sales were considered to be a form of passive sales.²⁸⁹ Consequently, any prohibition on a distributor selling via the internet was likely to infringe Article 101(1) TFEU and to exclude the agreement from the block Exemption Regulation. Therefore, the previous version of the block exemption Regulation has been the subject of much criticism, with many pointing to its failure to adapt to the rapidly changing landscape of online use and technology. The Regulation was seen as undermining the purpose and effectiveness of both exclusive and selective distribution systems by heavily favouring unrestricted online trade due to the classification of online sales as passive

²⁸⁶ See on this also Rohrßen, VBER 2022: EU Competition Law for Vertical Agreements, 2024, pg. 86.

²⁸⁷ Council Regulation 1/2003, Art. 2.

²⁸⁸ Guidelines on Vertical Restraints (2010/C 130/01), paras 51-52.

²⁸⁹ Ibid, para 52.

sales. In fact, through this classification most restrictions on internet sales resulted being excluded from the protection of the Vertical Block Exemption Regulation.²⁹⁰

In this context, it should be explained how in the vertical dimension selective distribution system is a model in which a supplier agrees to supply only approved distributors who meet specified minimum criteria, and the distributors themselves agree only to supply end users or other distributors or dealers within the approved network.²⁹¹ The exclusive distribution system instead is to be defined, under the VBER, as a model where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group.²⁹² It is interesting to note that not only does the updated Block Exemption Regulation introduce a definition of exclusive distribution for the first time, but it also changes the previous classification of active sales. This definition has been extended to include indirect forms of online communication, such as advertising or promotion; all of which are now be restricted by the supplier within an exclusive or selected distribution system.²⁹³ This amendment takes further relevance if considered how the definition is no longer within the Guidelines, but it is included under Art. 1(1)(l) VBER, making it thus binding for all EU courts and national authorities. These changes benefit suppliers, who will have more freedom to design their distribution systems under the updated VBER, while still complying with the Block Exemption Regulation.

This proves how, while the basic structure of the Vertical Block Exemption Regulation has not been amended, the contents and the aims of the new vertical regime reflect the more digitalised dimension of the internal market. On this line, on May 10 2022, the European Commission introduced the new regime for vertical agreements, which emerged after a comprehensive review of the previous rules.²⁹⁴ In particular, the reasoning and arguments presented by the Commission in its Impact Assessment Report²⁹⁵ provide useful insights to better understand the rationale behind the changes adopted under the new vertical regime. The assessment of the Commission, which

²⁹⁰ Commission, Explanatory note on the new Vertical Block Exemption Regulation and Vertical Guidelines, 2022.

²⁹¹ See Regulation (EU) 2022/720, Art. 1(1)(g).

²⁹² Ibid, Art. 1(1)(h).

²⁹³ Ibid, see also Guidelines on Vertical Restraints (2022/C 248/01) para 213.

²⁹⁴ See Commission, Inception Impact Assessment, 2022, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12751-EU-competition-rules-revision-of-the-Vertical-Guidelines_en.

²⁹⁵ Commission, Impact Assessment Report accompanying the draft VBER and Vertical Guidelines, Staff working document 2022/139, 2022.

builds on the findings of the already mentioned E-commerce Sector Inquiry, recognises how the growth of online sales and of new market players such as online platforms have had a significant impact on distribution models. For instance, making more common nowadays for online platforms to perform a dual role, acting as both an intermediary service provider and a retailer.²⁹⁶

In terms of definition these dual platforms not only bring together buyers and third-party sellers, but they also engage in selling their own goods or services, competing directly with the undertakings for whom they provide intermediary services online.²⁹⁷

This has also led to a change in legislation: not only these platforms are explicitly recognised under the new VBER as hybrid platforms,²⁹⁸ but also the recently introduced Digital Markets Act specifically addresses such scenario. Following the above section on the DMA, in terms of dual role this Regulation introduces further obligations for certain digital platforms, such as the use of professional users' data when the gatekeeper competes with them on its own products under Art. 6(2) DMA or the ranking their own services or products more favourably than those of third parties under Art. 6(5) DMA.

Furthermore, the growth on online sales has also led to a change in consumer behaviour, with consumers increasingly integrating offline with online channels, such as online marketplaces, price comparison tools and search engines.²⁹⁹ The Impact Assessment also recognises that there has already been an initial response to this wider features of the digital market in enforcement practice of regulatory authorities at both national and EU level.³⁰⁰ In addition, there has been a particular response also in the case law on vertical restraints of online sales via digital marketplaces.³⁰¹

In the light of these developments, the evaluation has shown that certain aspects of the Vertical Block Exemption Regulation no longer adequately reflected the evolving business landscape. The Commission highlighted also the paradoxical situation that the increase in dual distribution practices and retail parity obligations, while potentially

²⁹⁶ Commission, Evaluation of the Vertical Block Exemption Regulation, 2020, SWD(2020) 172 final, Section 3.1.

²⁹⁷ See also Regulation (EU) 2022/720, Art. 2(6).

²⁹⁸ Ibid.

²⁹⁹ See also Commission, Support studies for the evaluation of the VBER – Support study and study on consumer purchasing behaviour in Europe – Final report, 2020, Section 3.3.9.

³⁰⁰ Commission, Evaluation of the Vertical Block Exemption Regulation, 2020, SWD(2020) 172 final, Sections 5.1.3 and 5.1.4.

³⁰¹ Commission, Impact Assessment Report accompanying the draft VBER and Vertical Guidelines, Staff working document 2022/139, pg. 10.

raising competition concerns in certain scenarios, benefitted under the previous regime from the safe harbour provided by the Vertical Block Exemption Regulation. The most prominent example of this being price parity clauses – meaning the most favoured nation clauses defined above - which under the previous version of the Block Exemption Regulation were all automatically exempted. On this point, in the last years there has been a particular increase in the enforcement of price parity clauses set by online platforms in relation to the terms offered on any third competing platforms,³⁰² the most prominent examples for the e-commerce being the case of Amazon³⁰³ and of Booking.com. The latter in particular led to an interesting debate within the EU judicial system and will thus be object of analysis in the next chapter. It is noteworthy to anticipate how the final legal classification for price parity provisions is that, under the current regime, the cross-platform retail parity obligations - so called wide parity clauses - have to be individually assess under Art. 101 TFEU.³⁰⁴ This is another example of how the updated VBER recognises the digital environment and introduces legislative solutions for it.

Another change within the updated VBER stems from the consideration that the growth of e-commerce has disrupted the balance between online sales and traditional brick-and-mortar retail channels, as it is now the latter, which often face higher costs, that may need support to remain competitive.³⁰⁵ The updated Vertical Guidelines therefore clarify that suppliers have the flexibility to establish different wholesale prices for the same distributor's online and offline sales.³⁰⁶

4.3.3. The role of online platforms

As mentioned above, online platforms play an important role in the digital world, especially in e-commerce. It has also been noted how these platforms, alongside the traditional members of the distribution chain, offer their intermediation services to conclude transactions between different groups of users.³⁰⁷

³⁰² Commission, Explanatory note on the new Vertical Block Exemption Regulation and Vertical Guidelines.

³⁰³ Bundeskartellamt, Press release, 2013, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/27_08_2013_Amazon-Preisparit%C3%A4t.html?nn=48888

³⁰⁴ Regulation (EU) 2022/720, Article 5(d).

³⁰⁵ Commission, Impact Assessment Report accompanying the draft VBER and Vertical Guidelines, 2022/139, pg. 11.

³⁰⁶ Guidelines on Vertical Restraints (2022/C 248/01), para 209.

³⁰⁷ See Section 2.2.1.

In this regards it should be reminded how the Vertical Block Exemption only applies to vertical agreements between companies operating at different levels of the production or distribution chain. The legislation mainly covers traditional two- or three-tier distribution systems where a supplier - usually a manufacturer - supplies goods or services to different buyers – usually retailers. Within this framework, the roles of "supplier" and "buyer" are typically well defined, while the role of a possible "intermediary" is not explicitly identified even under the new Regulation.³⁰⁸ This question is not only theoretical, but it also bears a practical importance. Determining the level of the distribution chain at which the parties of an agreement operate is crucial for several reasons. First, it has a direct impact on market definition and the calculation of market shares under the Regulation: the determination of market power depends on the delineation of the market in which the party offers its products and services.³⁰⁹ Secondly, the classification of a party as a supplier or buyer may determine whether a restrictive agreement is covered by the exemptions set out in the Block Exemption Regulation. For instance, a restriction on the buyer's ability to set selling prices constitutes a hardcore restriction under Article 4(a) VBER, while scenario where the buyer restricts the supplier's autonomy is not regulated.³¹⁰

4.3.3.1. Online platforms as online intermediation services

When it comes to online platforms, the actual scenario shows how some of these offer the ability to purchase directly from their websites, extending their services to include payment processing and delivery arrangements. This feature is common on platforms such as hotel booking sites, for example Booking.com and HRS. These activities raise important questions about the role of these platforms, whether as mere facilitators or as resellers of the products listed.

In a case involving the booking portal HRS, the Düsseldorf Higher Regional Court examined the platform's imposition of price parity clauses on hotels listed on its website and considered whether the Vertical Block Exemption Regulation was applicable in these circumstances. Although HRS provided intermediation services to hotels, thereby positioning both entities at different levels of the distribution chain, the disputed price parity clauses did not address the conditions for the purchase of intermediation services or their resale by the hotels. At a later stage, the court clarified

³⁰⁸ Mundt, Die neue Vertikal-GVO – Bereit für die Zukunft?, ZVertriebsR, 2022, 205.

³⁰⁹ See also Guidelines on Vertical Restraints (2022/C 248/01), para 67(b).

³¹⁰ Bundeskartellamt, Hintergrundpapier - Arbeitskreis Kartellrecht, 10.10.2019, pg. 7.

its position by applying the Vertical Block Exemption Regulation and classifying the hotel portal not only as an intermediary service provider but also as a “*unechten Handelsvertreter*” (non-genuine commercial agent) of the hotels in the distribution of their rooms.³¹¹ Whilst the classification of such clauses especially in the context of hotel booking will be addressed in the next chapter, this first insight shows the difficulty to address these online platforms and importance of differentiating supplier and buyers alongside the vertical supply chain.

Against this background, an additional category for online platforms providing intermediation services is not foreseen under the VBER Regulation. Instead, the updated Regulation qualifies online platforms under the “traditional” category of suppliers when they provide online intermediation services.³¹² The definition of online intermediation services is provided under Art. 1(1)(e) VBER and it clears any doubts on their possible classification as commercial agents, as under the Guidelines it is recognised how these undertakings generally act as independent economic operators and not as part of the undertakings for which they provide services.³¹³ However, this definition expands – and therefore it does differ - from the one used in the regulatory framework already in force, for instance under the P2B-Regulation.³¹⁴

As a consequence of this classification, restrictions imposed by online intermediation service providers on buyers, such as to the prices, territories or customers for the goods or services concluded on the platforms, ends up being addressed by the rules set out under VBER. For example, an online platform operator cannot impose a fixed or minimum selling price for the transactions carried out on the platform.

A further consideration is that not all companies operating in digital platforms may meet the definition of Article 1(1)(e) VBER. Those that do not meet these criteria may be then classified as either suppliers or buyers for the purposes of the Vertical Block Exemption Regulation. As already stated, the classification of one party under the Regulation could well affect the enforcement of the 30% market share threshold and the application of the prohibitions for hardcore restrictions and excluded restrictions.

³¹¹ OLG Düsseldorf, Beschluss vom 4. Dezember 2017, VI-U (Kart) 5/17, para. 30 ff.

³¹² Regulation (EU) 2022/720, Art. 1(1)(d); see also Guidelines on Vertical Restraints (2022/C 248/01), para 64.

³¹³ Guidelines on Vertical Restraints (2022/C 248/01), para 46.

³¹⁴ Regulation (EU) 2022/720, recital 11.

4.3.3.2. Hybrid platforms

Regarding online platforms is also important to recognise a distinction adopted by the Commission under the new Vertical Block Exemption Regulation. Alongside the above-described platforms that merely promote the products of third parties and that fall under Art. 1(1)(e) VBER - Amazon Marketplace for instance - the Commission took an important decision also concerning the hybrid platforms as defined above.³¹⁵ For those platforms any vertical agreements concluded will not benefit from the Vertical Block Exemption Regulation. This means that agreements in these digital spaces require an individual assessment under Art.101(1) TFEU and an individual exemption may still be possible under Art.101(3) TFEU.

The reasoning for this exclusion derives from the business model of these undertakings, as the Commission supported it by stating how "such providers may have an incentive to favour their own sales and the ability to influence the outcome of competition between undertakings that use their online intermediation services."³¹⁶ However, by bearing in mind that the block exemption only applies where market share is below 30%, the Commission mitigated this exclusion for hybrid platforms with further clarification in its Vertical Guidelines. Firstly, it recognises that "significant anti-competitive effects are improbable if the provider of the online intermediation service lacks market dominance, such as in cases where it has recently entered the market (startup phase)."³¹⁷ Secondly, it indicates that the Commission is unlikely to give precedence to enforcement actions concerning vertical agreements on the provision of online intermediation services when the provider has such hybrid function.³¹⁸

Having reported this last point, it appears important to recall how, while the Guidelines do influence – or even bind as stated above - the Commission's enforcement practice, their direct impact on the daily business of hybrid platforms is likely to be limited. Notably courts, both at EU and national level, are not legally bound by the Guidelines. Therefore, whether an antitrust infringement by such a platform is not a priority for the European Commission will be irrelevant if the company then needs to defend its contractual provision in front of a judge at national or EU level.

³¹⁵See Section 2.2.1.; see also Regulation (EU) 2022/720, Art. 2(6).

³¹⁶ Guidelines on Vertical Restraints (2022/C 248/01), para 105.

³¹⁷ Ibid, para 107.

³¹⁸ Ibid, para 108.

4.4. The definition of the digital market

4.4.1. Defining the market

Another important element in the innovation of the traditional competition law for the digital market is the new revised Market Definition Notice,³¹⁹ which was adopted by the Commission in February 2024, and it marks the first update since its introduction 27 years ago. The market definition serves as a crucial framework for delineating the boundaries of competition between companies and potential competitors within relevant markets. Under EU competition law there is indeed a two-step approach to assessing whether undertakings have or could have market power.

Expanding on the concept introduced above, the first step is to define the relevant market(s), both product and geographic, in which market power may exist. Concerning the relevant product market, from the case law of the Court of Justice – also codified in the Market Notice - it derives how this encompasses all products and services that consumers perceive as interchangeable or substitutable.³²⁰ For the definition of the geographic market the revised Notice the Commission - maintaining the same approach – indicates how it evaluates whether the competitive conditions within a specific area exhibit sufficient uniformity to assess the effects of conduct or concentration, and whether this area can be differentiated from others due to significantly different competitive conditions.³²¹

A useful tool employed by the Commission for the definition of the markets is the so-called Hypothetical Monopolist Test. Under this approach a relevant product market is defined as the smallest group of products in which an hypothetical monopolist would impose and maintain a small but significant and non-transitory price increase (SSNIP), commonly an increase from 5% up to 10% above competitive levels is applied.³²² The second step will be then to assess whether a company or companies actually have market power within these identified markets.³²³ By defining markets, the Commission can assess market shares and thereby gain insight into the degree of market power held by an undertaking. As a consequence, this tool has been an integral part of the

³¹⁹ Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645).

³²⁰ Ibid, para. 11 ff; se e.g. C-307/18 - Case Generics (UK) Ltd v Competition and Markets Authority, para 129 ff.

³²¹ Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645), para. 12(b) and 38.

³²² Whish and Bailey, Competition Law, 2021, pg. 23.

³²³ Ibid.

substantive assessment under Articles 101 and 102 TFEU, as well as in merger control proceedings.

4.4.2. The revised Market Definition Notice

In this context, a key aspect relevant for this study is the guidance provided in 2024 under the new Notice concerning the market definition for multi-sided platforms.³²⁴

It should be recalled the practical consequences deriving from the digital economy. As indicated above, online platforms such as Booking.com, do mostly offer their services without charging the users, these being able to use and navigate the digital platform for free.³²⁵ As a consequence, if the search services are offered for free the traditional hypothetical monopolist test described above cannot find application as there are not prices that can be hypothetical increased. This reasoning was recognised by the Commission in Google Search (Shopping) where it instead applied a different question for the test concerning the protection of the users' data.³²⁶

Against this background, the new Market Definition Notice “takes into account the significant developments of the past twenty years. These include digitalisation and new ways of offering goods and services, as well as the increasingly interconnected and globalised nature of commercial exchanges.”³²⁷ For the definition of the product market the Notice outlines thus the new Commission's approach and indicates the possibility of defining one market for an online platform as a whole or separate markets for each side of the platform. The latter would be the case if the Commission were to find that there are significant differences in the substitution possibilities on the different sides of the platform. This assessment is based on the differences in products for the different user groups, differences in substitution patterns or additional factors such as the extent of multi-homing and the structure of the platform.³²⁸ Under the example of Booking.com, two separate market would mean differentiating between hotels and travellers using the same online platform. Instead, in the event that these conditions are not met, the relevant market is to be defined as a unified entity encompassing both

³²⁴ Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645), paras 94-96.

³²⁵ See above Section 2.2.1.

³²⁶ Commission, Case AT.39740 — Google Search (Shopping), paras 242–246.

³²⁷ Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645), para. 3.

³²⁸ Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645), para 95.

sides of the platforms. This approach codifies the praxis established already in the Mastercard case, where the Commission sustained how there was a product market for the acquisition of payment cards and a separate market for the issuing services.³²⁹

Furthermore, the revised Notice of the Commission also emphasises the importance of taking into account the interconnectedness of the different sides, in particular network effects. This element can be found also under the revised Vertical Block Exemption Regulation, as an individual withdrawal of the exemption under Art. 6 VBER is a possible when the competition in the market for online services is restricted taking into consideration parallel agreements, such as in the case of retail parity obligations.³³⁰

The result of this Notice, as acknowledged by the French competition authority,³³¹ improves guidance and facilitates a better understanding of market dynamics for companies. It also ensures that emerging economic trends, in particular the growth of digital markets, are more effectively taken into account not only in the case law but also in competition assessments. The length of the revised Notice, which has almost doubled from 58 paragraphs in 1997 to 115 paragraphs in 2024, stands as additional evidence of the challenge posed by the adaptation of traditional elements of EU competition law to the evolving dynamics of the digital market.

The practical implications of calculating the market share of the supplier and the retailer in vertical agreements can be seen in the increasing requirements for the agreement to comply with EU competition law. Firstly, in the case of market share up to 5% and with annual EU-wide turnover up to 50 million euros, Article 2(1) of the Annex to the Commission Recommendation indicates how these undertakings fall within the definition of micro, small and medium sized enterprises.³³² As a consequence of this classification, the Commission indicates that agreements between such undertakings are presumed normally to be not capable of affecting trade and therefore will fall outside the scope of application of Art.101 TFEU.³³³ Secondly, from the De Minimis Notice it derives that those vertical agreements with a market share not exceeding 15% will fall outside Art.101 TFEU due to a lack of an appreciable

³²⁹ Commission (COMP/34.579) - Mastercard, paras 257–277.

³³⁰ Guidelines on Vertical Restraints (2022/C 248/01), para 259.

³³¹ Communiqués de presse, The Autorité de la concurrence, Communication sur la définition du marché pertinent, available at: <https://www.autoritedelaconcurrence.fr/fr/communiqués-de-presse/lautorite-de-la-concurrence-se-felicite-de-ladoption-par-la-commission>

³³² European Commission, Recommendation concerning the definition of micro, small and medium-sized enterprises, 2003.

³³³ Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004, para. 50.

restriction of competition, as long as the agreements do not have as their object the prevention, restriction, or distortion of competition.³³⁴ As in the previous case, national competition rules may still however find application.

Thirdly, in cases where the market share is between 15% and 30% the Block Exemption Regulation will find its normal application and therefore exempt that agreement from the application of Art.101 TFEU, provided that not hardcore restriction are foreseen.³³⁵ Fourthly, and lastly, where the market share of each party in vertical agreements exceeds 30%, the VBER Regulation will no longer be applicable and thus only an individual assessment under Art.101 TFEU may be carried out.

³³⁴ European Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), para I.2 and Para II.8.

³³⁵ Regulation (EU) 2022/720, Art.3(1) and Art.3(2).

5. Conclusion

This chapter lies the foundation for the further analysis on the restrictions of online sales in the EU digital market. As an introduction to the discussion, the chosen topic enables to bring forward and examine two general approaches towards the digitalisation of the EU internal market: the innovation of EU competition law on one side and the greater reliance on sectoral regimes on the other.

From the origin of the European project, the creation of a unified internal market has played a pivotal role in the European integration and competition law has been applied to defend and expand it. Initially founded between six countries, with common external trade tariffs and no internal trade barriers, the EU internal market is nowadays the world's third-largest economy, serving around 448 million individuals.³³⁶ Over the last 70 years with the development of the common market also the set of competition rules has evolved in order to break down further internal barriers and respond to new demands. The digitalisation of our economy represents the latest - and probably the greatest - challenge that EU competition has been facing and it requires a deep renovation of the traditional rules until now applied.

A consequent consideration has been whether the existing set of competition rules – framed for an offline market – is sufficiently adequate to regulate also an increasingly digitalised internal market. Alongside the internal innovation of EU competition law, the shift of the economic market towards the online dimension has led therefore to the introduction of a new set of regulatory provisions that share and expand the aims of competition law. As the latest example of the Digital Markets Act shows, the idea of additional antitrust powers for the Commission under the New Competition Tool has been abandoned, and instead sectoral regulations have been introduced.³³⁷

The answer, in terms of EU-level legislation, to address the peculiarities of the online economy seems therefore to swing between strengthening competition law and introducing additional sectoral regulations.

³³⁶ Eurosta, Euroindicators, 2022, available at : <https://ec.europa.eu/eurostat/documents/2995521/14231867/2-31012022-AP-EN.pdf/649f530f-8fdb-3a5e-00b2-a7b51c026ec6>

³³⁷ Commission, Impact assessment Report accompanying the proposed Digital Markets Act, SWD(2020) 364 final; see also M. Motta, M. Peitz, Intervention trigger and underlying theories of harm - Expert advice for the Impact Assessment of a New Competition Tool, 2020, Chapter 2; G. S. Crawford, P. Rey, & M. Schnitzer, An Economic Evaluation of the EC's Proposed "New Competition Tool", 2020, Section V.C.

Chapter 2: Online pricing restrictions

1. Introduction

The previous chapter highlighted how the online environment is particularly prone to market concentration among the few companies already operating in the digital economy. As a result, there has been a strong response from both academia and legal practice. In terms of litigation, recent years have seen a streamlining of enforcement actions by the Commission and the Court of Justice against the dominance of a few, but important, players in the EU digital market. As mentioned in the previous chapter, this enforcement has thus been based on Art. 102 TFEU, which deals with the abuse of a dominant position. However, the previous chapter also showed how, in addition to these notorious disputes, the digitalisation of our economy has not only given rise to the large online companies but has also radically changed the way in which all companies, even small ones, operate in our common market. In terms of competition law, the absence of a dominant position - which is the case for almost all companies operating in the market - does not mean that their practices are exempt from the antitrust rules, as their actions may still fall especially within the scope of application of Article 101 TFEU.

As introduced in the first chapter, it should be noted how Art. 101 TFEU is capable to apply to both horizontal agreements – those between undertakings competing at the same level of the market – and vertical agreements. In contrast to horizontal agreements, vertical agreements are concluded between companies operating at different levels of the market, such as a manufacturer and a supplier or a distributor and a reseller. The Court's historic position in *Costen and Grundig* is worth mentioning, where Grundig and its distributor put forward the interpretation that Article 101 TFEU does not apply to vertical agreements, which could only be scrutinised under Article 102 TFEU. In that landmark judgment the Court strongly rejected such interpretation, stating that "neither the wording of Article 101 TFEU nor of Article 102 TFEU gives any ground for holding that distinct areas of application are to be assigned to each of the two Article according to the level of the of the economy at which the contracting parties operate".³³⁸ Against this background, the following chapters take into consideration the most common type of commercial agreement, notably the vertical agreements.

³³⁸ Cases 56/64 and 58/64 - *Costen and Grundig v Commission*; see also Case 194/14 P *AC-Treuhand v Commission*.

As a background note, expanding on the principle explained in the precedent chapter, a strict application of EU competition law provisions can be reconducted to the imperative objective of EU competition law to defend and expand the EU common market. This objective – often referred as the single market imperative – embraces the idea that the EU is, and it should remain, a single economic area without internal borders or barriers to the free movement of goods or services.³³⁹ For the purpose of an EU unified single market the set of competition rules play a fundamental role, as better formulated by the current Competition Commissioner Vestager: “the founding fathers of Europe understood that there would be no genuine integration without a Single Market – and no functioning Single Market without a central competition authority.” The aim of creating a common market and avoiding the fragmentation of trade within EU Member States is particularly relevant in explaining the strict approach to vertical agreements in the enforcement of Article 101 TFEU. In particular, the Commission has taken actions to defend the single market against agreements and practices aiming to isolate one national market from the rest of the Union. As a practical consequence of this focus of EU courts and authorities on the integration objective, steps have been taken prohibiting conducts that instead, under a competition system outside the European Union, would not have been reached.³⁴⁰ As discussed in the first chapter on the USA, where nowadays antitrust rules lack such integration objective, these vertical restraints are not deemed illegal per se. Despite the aforementioned legislative national initiatives, the case law of the US Supreme Court mandates indeed a case-by-case analysis under the rule of reason, where each restraint is evaluated based on the specific facts of the case.³⁴¹

Within the European Union, however, the centrality of achieving a single market does affect the values of competition provisions. While the Guidelines to the Vertical Block Exemption Regulation recognise that the market position of the single parties needs to be taken into consideration,³⁴² nonetheless they also state that the assessment of vertical restraints under Art. 101(1) TFEU is “important in the context of the wider objective of achieving an integrated internal market”.³⁴³ As a consequence, a particular restraint that would not be considered anticompetitive under the US rule of reason, as dictated

³³⁹ Commission, The European Single Market, available at: https://ec.europa.eu/growth/single-market_en.

³⁴⁰ Whish and Bailey, Competition Law, 2018, pg. 639.

³⁴¹ Case Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 2007.

³⁴² Commission, Guidelines on vertical restraints 2022/C 248/01, para. 125.

³⁴³ Commission, Guidelines on vertical restraints 2022/C 248/01, para. 5.

by the Supreme Court, may instead violate Art. 101 TFEU if it is contrary to the integration of the internal market.³⁴⁴

It follows how the single market imperative is closely linked to all those agreements restricting the territorial – be it online or offline - scope of trade, as these go directly against the cross-border trade of EU Member States. At the same time, there is a less obvious link with vertical agreements involving price restrictions. From this it flows an important distinction between pricing restrictions – assessed under the current chapter - and restrictions of territorial nature, which will be analysed in the next chapter.

³⁴⁴ Todd, Patrick, Vertical Restraints, the Single Market Imperative and UK Competition Policy after Brexit, 2019, pg.6.

1.1. Vertical restrictions in the online sales

The relevance of the internet for the vertical dimension can be better understood if one takes into consideration how the digitalisation of the market has changed the dynamics of the market and how consumers can access and purchase goods and services. With the convenience of accessing goods and services at the click of a button, consumers now have an unprecedented level of choice and accessibility. As highlighted in the previous chapter, the results of the Commission's sector inquiry into e-commerce underline the scale of this change, as nowadays hundreds of millions of people worldwide are choosing to shop online.³⁴⁵

This shift has not only increased consumer's choice but has also created new challenges and opportunities on the other side, notably for the businesses selling online. In the vertical dimension, the traditional chain - where the manufacturer sells the products to either a wholesaler or a retailer who then sells them to the end consumer in a physical store - has been disrupted. There has been in fact a rise in the range of distribution channels available to manufacturers in order to achieve consumers searching online. The Commission in the sector inquiry noted how thanks to the digitalisation also small retailers can, with limited investment and effort, become visible and sell products through third party platforms to a large customer base and across the entire European Union.³⁴⁶ Indeed, the previous chapter has illustrated how manufacturers can nowadays choose to sell their products directly to consumers through their own websites, distribute to retailers that operate both physical stores and online platforms, or sell on online marketplaces and third-party platforms. This diversity of distribution channels gives manufacturers greater flexibility and access to different consumer segments, allowing them to adapt to changing market dynamics and consumer preferences. Ultimately, this leads to allocative efficiency of goods and services, thereby maximizing consumer welfare.

The ease of reaching consumers in today's digitised market can be seen in the case of vertical integration when a producer decides to carry out the sales and distribution functions itself. An example of vertical integration is Apple, which supplies music directly to consumers from its iTunes music website.³⁴⁷ Not only is the vertical integration possible thanks to digital channels - which reach everyone in the world "just a click away" - but it should also be remembered that developments in trade have led

³⁴⁵ See Chapter 1, Section 2.2.

³⁴⁶ Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229, pg. 4.

³⁴⁷ Whish and Bailey, 2021, Chapter 16.

to a significant reduction in costs for companies, which are now able to serve larger geographical markets in terms of shipping goods.

In this context, it is remarkable how online sales have brought products and consumers closer together. This radical modernisation of the economy is however also associated with the emergence of interesting market trends, particularly from a legal perspective. The possibility for producers – or in other words manufacturers – to sell directly through the internet to consumers has meant that they have become increasingly competing with their own independent distributors, especially at price level.³⁴⁸ The traditional model of selling through channels may still exist and will continue to survive, but many companies have discovered the benefits of customers preferring to deal directly with them. An example of this can be seen in Nike's business strategy over the past 10 years: Nike planned already in 2015 to increase its direct-to-consumer sales by a factor of seven - from the current billion-dollar level to over \$7 billion.³⁴⁹ Against this background, the most important consequence in terms of competition has been an increase in the intra-brand competition within the digital market:

As a complementary note In this regard, it should be reminded how inter-brand competition refers to the competition that takes place between suppliers or distributors selling different suppliers' competing products.³⁵⁰ Vertical restraints that reduce inter-brand competition – such exclusive dealing agreements, whereby a dealer agrees not to purchase products from suppliers that are rivals of the manufacturer - may facilitate the softening of competition and collusion between suppliers (or buyers) of competing brands. On the other hand, intra-brand competition takes place between distributors competing to sell the same supplier's products.³⁵¹ Examples are when resellers are restricted to selling the product only in certain areas or are instructed on the pricing of the products. Both of these vertical restrictions are analysed in Chapter 2 and Chapter 3 of this study. Vertical restraints that reduce intra-brand competition are generally less harmful than those that reduce inter-brand competition, because the latter may have the more negative effect on the wider market.

The greater flexibility for producers has also meant an increased implementation of vertical restraints to control the distribution of products and services. Depending on the

³⁴⁸ Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229, Section 3.1 of the Final Report.

³⁴⁹ Nike, Press release, available at: https://s1.q4cdn.com/806093406/files/doc_events/NIKE-Inc-FY16-Investor-Day-Summary-Press-Release-FINAL.pdf.

³⁵⁰ Whish and Bailey, Competition policy and economics, pg. 5.

³⁵¹ Ibid.

business model and strategy, restraints can take different forms, such as price restrictions, marketplace (platform) bans, restrictions on the use of price comparison tools and the exclusion of pure online players from distribution networks.³⁵² Furthermore, the producers have so adapted to the new issues that the digitisation of the market means for the entire vertical chain and taken correspondent measures. As an example, the increase of selective distribution systems – notably where manufacturers set the criteria for retailers to be part of the distribution network and prohibit all sales to unauthorised retailers - has been justified with the manufacturers' will to better control their products once within the vertical distribution on the internet.³⁵³

1.2. Vertical pricing restrictions

In terms of the nature of vertical restraints, there have been important developments in particular with regard to price restrictions. The e-commerce report found that 42% of retailers examined are subject to some form of pricing restrictions.³⁵⁴ The background is that online retailing has increased the possibility to obtain and compare product and price information instantly online, and therefore also switch quickly from one channel to another. On the side of consumers, this has brought mainly benefits, with the possibility to compare not only the online offers, but also for instance take advantages of pre-sale services in the brick-and-mortar shops and then purchase online. On the side of business this is automatically translated in the concern of free riding, which is the practice where certain players incur costs to secure a certain benefit – such as promoting a product - while other entities enjoy that benefit without incurring those costs.³⁵⁵

In economic terms, as introduced in the first chapter, the free rider problem is a form of market failure as an inefficient allocation of goods or services arises. This inefficiency manifests itself when certain individuals benefit disproportionately from a shared resource or bear less than their fair share of the associated costs.³⁵⁶ In the vertical dimension certain restraints are thus implemented in order to address and counter-act the practice of free riding, which otherwise may deter the provision of

³⁵² Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229, pg. 6.

³⁵³ Ibid.

³⁵⁴ Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229, pg. 4.

³⁵⁵ Sebastian Van Baal and Christian Dach, Free riding and customer retention across retailers' channel, in *Journal of Interactive Marketing*, 2005, pg. 75.

³⁵⁶ Kwon-Sik Kim, Seong-ho Jeong, Free Riding without Dead Weight Losses, in *Sustainability*, 2019, pg. 1.

services. This is especially true for more complicated and technological products, where such services at the end are aimed at benefitting consumers and enhancing competition in the relevant product market.

A practical example, which also saw an intense debate at different level within the EU competition system, can be seen in the case of online platforms and the booking of hotels. If an online travel agency or an online platform invests in promoting hotel rooms on its website, but consumers are then confronted with the same rooms available at a lower price when booked directly with the hotel, they may still use the services of the online platform but choose then instead to book the room directly with the hotel. The basic process behind is that nowadays comparing the cost of staying at a particular hotel is straightforward due to the digitalisation of the market. Once customers have chosen the hotel on the online platforms, they could visit the hotel directly and may receive a better price than the one advertised on the platform's website, as the by doing so the hotel can avoid paying the platform fee. Within this scenario of hotel booking platforms, new bookings are likely to generate revenues for both the hoteliers (room price) and the platform (commission fee). The online platform's specific efforts are aimed at increasing bookings by providing good search capabilities and satisfactory customer support.

Against this background it can be better understood the legal issue surrounding vertical restraints against free riding. Their justification lies in the fact that otherwise this phenomenon would discourage the provision of services - in particular pre-sales services by distributors - that ultimately benefit consumers and promote competition in the relevant product market. The legal debate on the possible benefits of pricing restrictions to counter the free-riding in the digital market will thus be further analysed in this chapter.

As demonstrated, the ability to compare prices across multiple online retailers not only stimulates increased competition within the traditional vertical chain, but, more importantly, promotes price transparency. This means that both consumers and companies are able nowadays to monitor pricing more effectively. It does not surprise that the majority of retailers monitor competitors' online prices, as this practice was common also under the traditional bricks and mortar business. However, one should consider how the usage of automated software makes it much easier for all business to adjust their own prices based on competitors' observed prices. Furthermore, pricing software make it possible to detect deviations from 'recommended' retail prices in a matter of seconds, and thus manufacturers are increasingly able to monitor and

influence retailers' pricing.³⁵⁷ The usage and the assessment of pricing algorithms will also be assessed at the end of this chapter.

1.3. Vertical pricing restrictions under Art.101 TFEU

Against the information already provided on the application of the Art.101 TFEU to vertical agreements, under the categories of agreements and concerted practices specifically prohibited by Article 101(1) TFEU there are those which "directly or indirectly fix purchase or selling prices" ex Article 101(1)(a) TFEU.

The Commission and the Courts at EU level consider generally minimum and fixed prices agreements to have as their object the restriction of competition within the meaning of Article 101(1) TFEU. They are seen to have such a high potential for negative effects on competition that they are presumed to fall under Article 101(1) TFEU without the need to prove that they have the effect of restricting competition. This prohibition covers both horizontal and vertical conduct and, although vertical restraints are often considered less dangerous for competition in the internal market, the set of competition rules have been applied with particular rigidity on vertical price-fixing.³⁵⁸

Furthermore, it should be recalled how under Art. 101 TFEU there is the need that the restriction of competition is based on a "agreement" between at least two undertakings in order to be in breach of EU competition law. From this it follows how merely unilateral behaviours might not fulfil such requirement. In terms of pricing restrictions this becomes particularly relevant for the distinction between unilateral pricing policies and restrictive agreements on prices. The rules of EU competition law distinguish indeed between two types of scenarios. On one hand, market participants may unlawfully communicate and agree on certain common behaviours, such as collectively agreeing on prices in explicit collusion. On the other hand, however, the mere parallel behaviour without a common intention would not be sufficient to establish an agreement under the legal perspective of Art. 101 TFEU (tacit collusion).³⁵⁹ In the case law it emerges indeed how EU competition law does not prevent companies from adapting independently to market conditions, as oftens strategies are the normal outcome of

³⁵⁷ Commission, Final report on the E-commerce Sector Inquiry, COM(2017) 229, pg.6; see also Whish and Bailey, 2021, Chapter 16.

³⁵⁸ Andrei Gurin A., Peeperkorn L., Vertical Agreements, in Jonathan Faull and Ali Nikpay , The EC Law of Competition, 2014, para 9.94; see also Detecting resale price maintenance for competition law purposes: Proof-of-concept study, 2023.

³⁵⁹ OECD, Algorithms and Collusion: Competition Policy in the Digital Age, 2017, pg. 19-20.

rational economic behaviour of the undertakings on the market.³⁶⁰ It is in the latter scenario that unilateral pricing policies need to be collocated, as for example, a supplier might independently set a specific price for a product within the vertical chain, which its retailers then adopt without engaging in any agreement. The next section outlines this difference in the specific case of unilateral recommended prices and unlawful resale price maintenance restrictions, taking in consideration the recent proceedings at EU level.

As a final point, it has been already explained how even if an agreement contains a restriction of competition by object, the parties can still try to demonstrate that the conditions of Article 101(3) TFEU are fulfilled.³⁶¹ In the case of resale price maintenance – analysed in the next section - possible benefits include using such restrictions to organize a coordinated short-term low-price campaign, which could promote the product and enhance market competition.³⁶² Furthermore, the Vertical Guidelines recognise that implementing resale price maintenance by the supplier may ensure the provision of pre-sales services, ultimately benefiting consumers.³⁶³ On this last case of efficiencies raising from the pricing restrictions, the issue of free-riding becomes particularly relevant for the digital market and this is thus further analysed in the next section on RPM.

However, overall agreements involving price fixing or similar practices are rarely able to demonstrate sufficient benefits to outweigh the restrictions of competition and therefore to be individually exempted under Article 101(3) TFEU. The reason behind is that such restrictions typically do not show the benefits required under paragraph 3 of Art.101 TFEU. Firstly, they lead to reduced production of goods and services and higher prices, resulting so in an inefficient allocation of resources. Secondly, pricing-setting practices reduce consumer welfare by making the affected goods and services more expensive.

2. Resale price maintenance (RPM)

Within the broad category of pricing restrictions, in the vertical dimension agreements “which, directly or indirectly, have the object of restriction the buyer’s ability to determine its sale price, including those which establish a fixed or minimum sale price

³⁶⁰ C-609/13 P - *Duravit and Others v Commission*, para. 72; see also Weck Thomas, *Algorithms, Collusion and Competition Law*, 2023, pg. 41.

³⁶¹ Guidelines on vertical restraints (2022/C 248/01), para. 181 and 197.

³⁶² Guidelines on vertical restraints (2022/C 248/01), para. 197, lit.(b).

³⁶³ *Ibid*, para. 197, lit.(d).

to be observed by the buyer”³⁶⁴ are called resale price maintenance (RPM). These practices may take the form of a "recommended" retail price, which effectively becomes the price at which retailers must sell the agreed goods or services, or it may take the form of a minimum price below which retailers are not allowed to sell. In this sense, the German vocabulary might give a clearer indication, as it refers to all unlawful pricing by a second-hand “*unzulässige Preisbildung der zweiten Hand*”.³⁶⁵

Resale price maintenance can be achieved both directly and through indirect ways. A manufacturer may directly impose a predetermined minimum price on its distributors, but it may also achieve the same result by indirect means. Within the updated version of the Guidelines several examples of indirect ways to achieve resale price maintenance are provided, as the manufacturer may contractually fix the distribution margin or the maximum level of discounts granted, it may indicate the recommended resale price on the product itself, or it may treat the suspension of deliveries in relation to the observance of that particular price.³⁶⁶ A practical example of indirect resale price maintenance flows from a judicial dispute in Austria, where the national competition authorities analysed non-binding price recommendations in the food distributions, which are generally allowed. However, in that case the NCA recognised how a price recommendation may constitute a concerted practice in violation of Article 101(1) TFEU when the ultimate effect is to indirectly fix prices. The Austrian NCA stated that an obligation from the supplier to buyers to recommend retail prices when reselling to other retailers must be found also in the present case, where a customer – notably SPAR – persuaded the suppliers to impose a certain price level on other customers.³⁶⁷

The line between a recommended resale price and a minimum or fixed resale price is narrow and shaped by the judgments at both national and EU level. The difficulty in drawing a clear distinction between these two categories can be illustrated also in the case of pricing announcements, which can be understood as the unilateral, public exchange of information regarding an undertaking's future market behaviour. Unlike private exchanges of information, which occur directly between businesses, pure announcements involve only public or indirect exchanges of information through publicly accessible means. In this context, the information is equally available to all market participants. Examples include posts on publicly accessible websites, press releases, newsletters, or statements made during public company events. Against this

³⁶⁴ Guidelines on vertical restraints (2022/C 248/01), para. 185.

³⁶⁵ Bechtold, in: EU-Kartellrecht, 2023, Art. 4 para. 7.

³⁶⁶ Guidelines on vertical restraints (2022/C 248/01), para. 47.

³⁶⁷ Kartellobergericht, 16 Ok 2/15b - Molkereiprodukte.

background, the question arises whether a public price announcement by a supplier can be seen merely as a unilateral price recommendation to its retailers or whether it infringes Art. 101 TFEU by constituting a pricing restriction. This challenge of identifying the permissible conduct in this case by an undertaking is highlighted also, outside of the vertical perspective, in the Commission's Horizontal Guidelines. These Guidelines state that depending on the legal and economic context and the objectives pursued by an undertaking, a public announcement that signals the future intentions of the undertaking with regard to key parameters of competition such as prices or quantities may also be considered a restriction by object under Art. 101 TFEU.³⁶⁸

On the difference between merely recommended prices and resale price maintenance, the Court of Justice in a recent proceeding for preliminary ruling had the opportunity to delineate the required concept of agreement in the case of implementation of RPM of a manufacturer to his retailers.³⁶⁹ The questions raised by a Portuguese court in the *Super Bock Bebidas* concerned vertical price-fixing and, more specifically, whether it is necessary to carry out a contextual analysis in order to determine that Art.101 TFEU is fulfilled. The Court emphasises how an agreement under Art.101 TFEU usually arises from the mutual consent of at least two parties, however it also stated how it can be found in situations where one party to a distribution agreement unilaterally expresses an intention and the other party explicitly or implicitly agrees. In particular concerning RPM, if a supplier sets minimum resale prices and the distributors comply by implementing these prices, there is an agreement if the distributors' compliance indicates a common intention.³⁷⁰ Therefore – in line with the case law - the existence of agreement between a supplier and its distributors cannot be inferred from an apparently unilateral act or just the conduct of the supplier. However, an agreement will be found if in the specific circumstances there is even only an indication of tacit acquiescence of more parties. In the case at hand an agreement was found because, even though retailers were complaining about the prices regularly communicated by the supplier, they did not apply other prices on their own and followed instead those indicated.³⁷¹

2.1. RPM in the digital market

³⁶⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), para. 398.

³⁶⁹ Case C-211/22 – *Super Bock*.

³⁷⁰ *Ibid*, para. 53.

³⁷¹ *Ibid*, para 50-52.

The legal classification of certain clauses as a (unlawful) fixation of prices or as a (lawful) mere indication does have an important practical impact, as undertakings are often the subjects to fine for imposing such restrictions.³⁷² This is particularly relevant in the digital market, as the usage of algorithms comes into play. As it will further explain above, these can be defined as “an unambiguous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects. The initial state of the tokens is the input; the final state is the output.”³⁷³ While the mere monitoring of prices, even by means of algorithms, does not constitute resale price maintenance – as also stated under the updated Vertical Guidelines³⁷⁴ - the area of prohibited price fixing will then be reached if the suppliers go beyond simple monitoring and intervene in case of a price reduction.

A prominent example can be seen in the decision of the Commission in the *Asus* case.³⁷⁵ In that occasion *Asus* was found to have engaged in practices aimed at limiting the ability of retailers to set their online resale prices independently and instead was able to keep resale prices stable at the level of the recommended resale prices coming from the manufacturer. The price monitoring activities at national level – specifically in Germany and France - were carried out using a range of technological methods, including the monitoring of price comparison websites and internal software tools. These tools enabled *Asus* to identify retailers selling its products below the desired price level and these had been threatened or sanctioned for not following manufacturers' price demands, including the blocking of supplies. This Decision of the Commission needs to be seen in the context of a wider action against the fixing of online resale prices. In 2018, in four decisions, the electronics manufacturers of *Asus*, *Denon & Marantz*, *Philips* and *Pioneer* were indeed all fined for imposing such fixed or minimum resale prices on their online retailers.³⁷⁶

A first consideration coming from the *Asus* judgment is that it proves how the use of online tools not only brings price transparency – and therefore benefits - to consumers surfing the web, but it also makes price monitoring much easier and more efficient to implement on the part of businesses. Interesting is to notice how the sanctioned manufacturer recognised the impact of price monitoring tools and the possible negative

³⁷² Schultze J-M, Pautke S, Wagener DS, *Vertikal-GVO, Gruppenfreistellungsverordnung für vertikale Vereinbarungen*, 2019, para. 567.

³⁷³ OECD background note to the Roundtable on Algorithms and Collusion, 2017, p. 8.

³⁷⁴ Guidelines on vertical restraints (2022/C 248/01), para. 191.

³⁷⁵ Commission, Case AT.40465 – *Asus*.

³⁷⁶ Commission, Press release, 2018, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601

impact – at least under their perspective – that these could have brought to their business. The aim of the implemented measures was indeed exactly to avoid that retailers would adapt to prices of the lowest-pricing retailers on the internet, generating a wider price decrease in the market.³⁷⁷ These has been also recognised on the side of the Commission, as it acknowledged how “one of the big advantages for consumers of e-commerce is that you can easily compare prices and shop around for the best deals. By stopping retailers from offering lower prices, the four manufacturers denied consumers the full benefits of e-commerce”.³⁷⁸

Furthermore, a central element in this Decision of the Commission has been the fact that the manufacturers, after having detected a deviation from the recommended prices, did actually implement measures. These measures ranged from more “traditional” actions such as the shortage or cut of supply³⁷⁹ or the threat to undercut financial support,³⁸⁰ to more actions aligned to online environment. On this last point, Asus Germany threatened for instance to withdraw permission to use the Asus Online logo from suppliers who refused to match the prices indicated.³⁸¹ This shows how the manufacturers not only recognised the potential of the digital market and used innovative methods to enforce their pricing strategies, but also the retaliatory measures they developed had been adapted to the online commerce.

The implementation of such pricing clauses in the digital market helps to explain the renew interest - within and outside the EU single market - for vertical agreements concerning fixing pricing. Beyond the actions of the Commission, the UK's Competition and Markets Authority (CMA) published an open letter already in 2017 to raise awareness of vertical price-fixing practices, where it reminded both suppliers and resellers how the antitrust authority will take such measures under a scrutiny, and it will focus on tackling anti-competitive practices that undermine the many benefits of e-commerce.³⁸² Interesting to notice how a similar approach has been repropose

³⁷⁷ Commission, Case AT.40465 – Asus, paras. 27, 104.

³⁷⁸ Commission, Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices, 2018, available at: http://europa.eu/rapid/press-release_STATEMENT-18-4665_en.htm

³⁷⁹ Commission, Case AT.40465 – Asus, para. 68.

³⁸⁰ Commission, Case AT.40465 – Asus, para. 92.

³⁸¹ Commission, Case AT.40465 – Asus, paras. 51-54.

³⁸² Competition and Markets Authority, 2017, Restricting resale prices: an open letter to suppliers and resellers, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620454/resale-price-maintenance-open-letter.pdf

the CMA also in 2022, highlighting how the usage of RPM in the online shopping is still a relevant issue.³⁸³

Within the EU single market, the Commission also sees a comeback in the focus on price-fixing agreements, considering that before the decision analysed above, the last action taken at EU level against such measures was in 2003.³⁸⁴ This being said, it should however also be recognised how at national level certain national competition authorities have become over these years more vigilant in the efforts to tackle RPM at vertical level, a prominent example being in Germany the NCA Bundeskartellamt.³⁸⁵

2.1.1. RPM under VBER

Concerning the legal classification of RPM, in its decision on Asus, the Commission emphasised that RPM “is likely to have negative effects, in particular on the price, variety, quantity or quality of choice, quantity or quality of goods and services, that it may be considered redundant [...] to prove that they have actual effects on the market”.³⁸⁶ This is also shown under the current Vertical Block Exemption Regulation, as resale price maintenance clauses are listed as black-clauses and so suppliers must not direct the buyer’s sale price—neither by establishing a fixed price or a minimum sale price.³⁸⁷ As a consequence of this classification, any agreements containing RPM clauses will not benefit from the block exemption.

Under the revised VBER, the attitude towards RPM has not changed, as the wording of Article 4(a) VBER mirrors that of the 2010 Regulation, and - interestingly to notice - this is the only hardcore restriction that has remained unchanged after the 2022 update. The hardcore restriction refers to all vertical agreement limiting the buyer's ability to determine the selling price. This includes to both direct and indirect measures and, as the above case of Asus showed, an example for the latter is the threat of consequence in the case of disobedience on the price indications, including refusal to supply. The scope of application of the hardcore restriction therefore is quite wide, it

³⁸³ Competition and Markets Authority, 2022, available at: <https://competitionandmarkets.blog.gov.uk/2022/07/01/everyone-loses-out-with-resale-price-maintenance/>

³⁸⁴ Case AT.37975 - PO/Yamaha.

³⁸⁵ European Competition Law Review, 2018, nm. 470.

³⁸⁶ Case AT.40465 – Asus, paras 105-107.

³⁸⁷ Commission Regulation (EU) 2022/720, Art. 4(a); see also Guidelines on Vertical Restraints (2022/C 248/01), para 185.

has been notably recognised how such measures must not necessarily concern the price itself or even factors contributing to its determination.³⁸⁸

On the other hand, Article 4(a) VBER specifically addresses and prohibits restrictions only on the buyer's pricing autonomy. As a consequence, restrictions on the supplier's ability to set prices do not fall within the hardcore list of Article 4(a) of the VBER. Under the EU competition regime, such agreements will infringe then Article 101(1) TFEU, but can then normally benefit from the exemption, leaving the rest of the agreement valid.³⁸⁹ Further not being caught under the hardcore restriction of Art. 4(a) VBER are mere exchanges of views on pricing, as long as the buyer's pricing autonomy thereby remains intact. Such conducts can be seen in the praxis when suppliers provide explanations or insights into price recommendations to their retailers, for example by sharing market research results, including price sensitivity analyses.³⁹⁰ The fine line between price fixing and price recommendation – the latter might be brought forward even with substantive evidence and insisting approach – can be in the practice quite difficult to draw. As a practical consequence for business, it can be challenging to express such views without risking falling first outside the Vertical Block Exemption Regulation and then being found in breach of Article 101 TFEU.

The case analysed above of Asus gives hints for further expanding on the prohibition under Art. 4(a) VBER. A literal interpretation of the article shows how all measures would be allowed as long as they do not end up fixing – directly or indirectly – the selling prices and this would apply also to all sort of pressure schemes implemented from the supplier on its retailers. In this context, the question arises whether the supplier could nonetheless decide to terminate the vertical relationship with one of its retailers. The contractual freedom is indeed one of the general principles of Community law, it derives from the freedom of persons to act, and it is inextricably linked to the freedom to conduct a business. The latter freedom to conduct a business is indeed foreseen within the primary law of the Union, specifically under Art. 16 of the EU Charter of Fundamental Rights. Over the years, cases brought before the Court of Justice have rarely resulted in a violation of Article 16. However, these proceedings have provided opportunities to further clarify the content of this provision. The Court has indicated that, while the freedom to conduct a business is not an absolute right, it encompasses three dimensions: the right to engage in an economic or commercial

³⁸⁸ Zöttl, *Vertikal-GVO* in: *Münchener Kommentar zum Wettbewerbsrecht*, vol 1/2, 3rd edn, 2020, Art. 4, para.24.

³⁸⁹ Bechtold, in: *EU-Kartellrecht*, 2023, Art. 4 para. 7 ff.

³⁹⁰ Rohrßen, *Online-Preisbrecher – Wie Markenhersteller damit umgehen*, 2020, pg. 406-407.

activity, freedom of contract, and free competition.³⁹¹ The provision of contractual freedom, embedded within Article 16 of the EU Charter, represents a unique aspect of recognition. For instance, at the national level, most constitutions of EU Member States do not explicitly recognize this right. Instead, they refer to the freedom of economic activities, such as Article 41 of the Italian Constitution.³⁹²

Against this background, the Court has also indicated that when adopting competition decisions, the Commission must take account of the principle of contractual freedom and the freedom to conduct a business.³⁹³ In such cases the supplier is therefore under Art. 101 TFEU completely free to modify his business strategy as it wishes; however, such termination must not be used as a signal to the remaining distributors to maintain prices, as such measure would then be caught by Art. 4(a) VBER.³⁹⁴

In this regard, at national level the Monopolkommission in Germany provided useful clarification on possible cases of RPM that would be prohibited under both VBER and national law. It is interesting to note that there is no need for pressure or incentives from the manufacturer to establish resale price maintenance, as the prohibition can also cover agreements or decisions based on mutual interests between both parties.³⁹⁵ Under the several examples provided, the German advisory body illustrates the possible scenario where manufacturer A and retailers X, Y, and Z may all have an interest in raising the retail price since only a portion of the difference from the previous retail price is intended for price adjustments, with the remaining portion increasing the profit margin. Consequently, they express their willingness to raise their retail price and require that the manufacturer will persuade other retailers to follow.³⁹⁶ In this scenario, despite the lack of unilateral pressure from the supplier, the price fixing element of Art. 4(a) VBER can also be found. Although the Monopolkommission's position explicitly considered only the vertical dimension, these assessments can be translated into a hub-

³⁹¹ See Case T-251/18 - International Forum for Sustainable Underwater Activities (IFSUA) v Council of the European Union, para 149.

³⁹² See also Toggenburg, Gabriel N., *The 16th of All EU-r Rights: the Right to Conduct a Business and How the Charter Contributes*, Eurac Research, 2021.

³⁹³ C-441/07 P – Commission vs. Alrosa, Opinion AG, paras. 225-227; see also Case T-24/90 - Automec v. Commission, para. 51 to 53; Case T-41/96 - Bayer v Commission, para. 180.

³⁹⁴ Bechtold, in: *EU-Kartellrecht*, 2023, Art. 4 para. 7.

³⁹⁵ Monopolkommission, *Hinweise zum Preisbindungsverbot im Bereich des stationären Lebensmitteleinzelhandels*, 2017, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hinweisepapier%20Preisbindung%20im%20Lebensmitteleinzelhandel.pdf?__blob=publicationFile&v=8

³⁹⁶ *Ibid*, pg.17-18.

and-spoke scenario. This refers to a situation where a supplier acts as a 'hub', disseminating information about the future pricing intentions of its retailers (the spokes) in order to facilitate, for example, retail price maintenance. Especially in the digital market, such coordination can be achieved by an online platform acting as a hub, coordinating or enforcing the exchange of information between business users, for example in order to secure certain margins or price levels. The above analysis of the Asus case showed indeed how online platforms can be implemented in order to prevent users from offering lower prices to final consumers.

2.1.2. Exemption under Art.101(3) TFEU

Under the updated Regulation, Article 4 defines the listed restrictions as restrictions of competition by object: “The exemption provided for in Article 2 shall not apply to vertical agreements which ... have as their object ...” any of the restrictions listed therein.” As a consequence such restrictions – under which RPM are included - are presumed under the case law of the EU courts to be in breach of Art.101(1) TFEU without first the need to assess their effects in order to justify their prohibition.³⁹⁷ In this regards, the Court of Justice expressed how hardcore restrictions qualifies as a types of coordination which provide a “sufficient degree of harm to competition that there is no need to examine their effects.”³⁹⁸ Nevertheless - as the updated guidelines also recognise specifically in relation to RPM³⁹⁹ - there is always the possibility of applying for an individual exemption under Art.101(3) TFEU. As indicated in the first chapter, even restrictions by object under Art.101(1) TFEU can in theory satisfy the conditions of paragraph 3, since the EU courts have rejected the possibility of declaring agreements illegal per se.⁴⁰⁰ In this respect, it is worth noting that, even in the case of restrictions by object, it is for the Commission to establish the existence of an infringement pursuant to Art. 101(1) TFEU, as foreseen under Art. 2 of Regulation 1/2003. In practice, this means that, in a first step, it is the Commission that has to bring forward “precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place”.⁴⁰¹ This standard of proof, also referred to by the

³⁹⁷ See e.g C-311/85 - VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten, para. 17.

³⁹⁸ C-373/14 P - Toshiba Corporation v Commission, para. 25.

³⁹⁹ Guidelines on Vertical Restraints (2022/C 248/01), para 195.

⁴⁰⁰ See T-460/13 – Ranbaxy v Commission, para. 228, upheld in C-586/16 P.

⁴⁰¹ Case T-62/98 - Volkswagen AG v Commission, para 43.

Advocate General Kokott as *formelle Beweislast* (evidential burden),⁴⁰² applies both to restrictions by object and restrictions by effect in order to establish an infringement and so impose a sanction.

In particular, as regards the relationship between a restriction by object and a restriction by effect, it should be clarified - in addition to the analysis presented in the first chapter - that for the former types of restrictions it is necessary to examine the precise object of the agreement in the economic context in which it is to be applied.⁴⁰³ That being said, from the case law of the EU Court it emerges how a restriction by object should not be considered as a presumption of effects.⁴⁰⁴ Indeed, this would allow the possibility of avoiding an infringement of Art. 101(1) TFEU by merely showing the absence of any effects, such as in scenarios where the cartel had not been implemented. This would undermine the practical impact of the legal definition of a restriction by object.⁴⁰⁵ Instead, the Court of Justice expects the Commission to demonstrate the harmfulness of the agreement's provisions to competition, thereby making an analysis of its effects unnecessary. As a final point on the assessment of a restriction by object, the Court has indicated that pursuing a legitimate objective does not preclude measures from being classified as a restriction by object under Art. 101(1) TFEU. This element of pursuing a legitimate objective becomes particularly relevant in the next section on the debate around RPM.⁴⁰⁶

As a second step, only once the Commission has sufficiently established the infringement, is it up to the parties concerned to demonstrate the existence of efficiencies pursuant to Art. 101(3) TFEU that outweigh the restrictive effects.⁴⁰⁷ That being said, within the vertical dimension the presence of hardcore restrictions under VBER is a reliable indicator of whether the criteria of Article 101(1) TFEU or Article 101(3) TFEU are fulfilled. An agreement containing one or more hardcore restrictions is likely to fall under Article 101(1) TFEU and is unlikely to satisfy the conditions for

⁴⁰² Opinion, Advocate General, Case C-8/08 T - Mobile Netherlands BV and Others, para 80.

⁴⁰³ C-32/11 - Allianz Hungária Biztosító and Others, para. 33.

⁴⁰⁴ C-8/08 - T-Mobile Netherlands and Others, para. 89.

⁴⁰⁵ Evidence, Proof and Judicial Review in EU Competition Law, Castillo de la Torre, Fernando, Gippini Fournier, Eric, 2024, pg. 22.

⁴⁰⁶ C-228/18 - Budapest Bank and Others, para. 52.

⁴⁰⁷ Andriani Kalintiri, The allocation of the legal burden of proof in Article 101 TFEU cases: A “clear” rule with not-so-clear Implications, Yearbook of European Law, 2015, pg. 232 ff.; see also Fernández Cani, Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment, Journal of European Competition Law & Practice, pg. 448 ff., 2019.

an individual exemption under paragraph 3.⁴⁰⁸ In order to benefit from the exemption, a company must indeed demonstrate the existence of pro-competitive effects, which are likely to result from the inclusion of the hardcore restriction of RPM, in addition to the fulfilment of all other requirements under Art.101(3) TFEU.⁴⁰⁹ The existence of pro-competitive effects linked to the implementation of RPM is analysed in more detail in the specific section below; for example, such efficiencies may arise from encouraging the provision of additional services by retailers to final consumers.

⁴⁰⁸ Guidelines on Vertical Restraints (2022/C 248/01), para 180; see also Rohrßen, VBER 2022: EU Competition Law for Vertical Agreements, 2022, pg. 88.

⁴⁰⁹ Guidelines on Vertical Restraints (2022/C 248/01), para 181-183.

2.2. The debate around RPM

The classification of RPM has been a subject of debates by competition authorities within and outside of the Union. There are still significant differences of opinion on the approach that policy should take on these issues.

Economists - together with the business community - have tended to oppose a strict approach to RPM, highlighting how those clauses are benign and often pro-competitive within the intra-brand competition. As a consequence, it is argued that these clauses should not be illegal *per se*, but that a case-by-case assessment should be conducted each time, balancing potential benefits and anti-competitive effects.⁴¹⁰ On the other side, instead, competition authorities in most jurisdictions have shown a relatively hostile approach towards RPM. In the United Kingdom for instance the Competition and Markets Authority (CMA) has been particularly active against the implementation of resale price maintenance especially in the digital market, and has inflicted several sanctions against the restrictions of prices in the e-commerce for almost the past ten years.⁴¹¹ In addition, the CMA recently imposed a £1.5m sanction on a supplier of domestic light fittings for restricting the level of discounts retailers could offer to customers online.⁴¹² Across the Atlantic, in the United States, RPM have traditionally been considered illegal since the US Supreme Court's decision in *Dr. Miles Med. Co. v. John D. Park & Sons Co.*⁴¹³ However, a change in approach occurred in 2007 when, in the landmark *Leegin* case the Court overturned its longstanding rule of *per se* illegality for RPM agreements and instead adopted a more flexible rule of reason standard.⁴¹⁴ Expanding on the reference in the first chapter, the decision concerned the vertical minimum price agreements between Leegin Creative Leather Products, a manufacturer of women's accessories, with its retailers. These agreements required the retailers to charge no less than certain minimum prices for Leegin products. In the majority opinion written by Justice Anthony Kennedy, the Court found that *Dr Miles'* ruling had erred in treating vertical minimum price agreements between manufacturers and retailers in the same way as horizontal price fixing agreements between sellers.

⁴¹⁰ OECD, Roundtable on Resale Price Maintenance, DAF/COMP(2008)37, 2008, pg.9, available at: <https://www.oecd.org/daf/competition/43835526.pdf>

⁴¹¹ See e.g. CMA, Press release, 2017, available at: <https://www.gov.uk/government/news/fridge-supplier-fined-22-million-for-restricting-online-discounts>; CMA, Press release, 2017, <https://www.gov.uk/government/news/lighting-company-fined-27-million-for-restricting-online-prices>

⁴¹² CMS, Press release, 2022, available at: <https://www.gov.uk/government/news/dar-lighting-fined-after-ignoring-warnings-on-restricting-discounts>

⁴¹³ U.S. Supreme Court, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 1911.

⁴¹⁴ *Case Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 2007.

The Court cited evidence from the economic literature that vertical minimum price agreements are rarely anticompetitive and can often be pro-competitive. The Court acknowledged that in some cases vertical minimum prices may facilitate cartels between manufacturers but held that cases where the price agreements are abused for illegal anti-competitive purposes can be determined on a case-by-case basis under the rule of reason. This approach determines whether a particular RPM agreement unreasonably restricts competition under Section 1 of the Sherman Act and factors such as market dynamics and the historical context of the restraint are weighed to determine its overall effect on competition.⁴¹⁵ Against this background, however, it is worth recalling the abovementioned position of the US legislature at the national level, where, in contrast, specific provisions have been introduced to reject such an approach and instead to classify RPM restrictions as *per se* illegal under national competition law.⁴¹⁶ Following this methodology adopted by the US, also within the European single market there have been pleaders for a change of approach. In particular, Gippini-Fournier, Hearing Officer at the European Commission, highlighted – in the expectation of the Guidelines 2010 on Vertical Restrictions – how within EU competition law there was not a rigid approach such as in the USA. Instead, the system under the Block Exemption and the following Guidelines rejected an illegality *per se* of RPM and recognised even for RPM under Art. 4 of the Block Exemption Regulation the possibility of individual exemption.⁴¹⁷ Furthermore - and more importantly - in his view the new wording adopted under the Guidelines showed an openness of the Commission towards efficiency claims of RPM, such as in the case of the launch of a new product within the market under para. 225.⁴¹⁸ In addition, there does not seem either to be a solid basis in the case law for a presumption that agreements containing hardcore restrictions are unlikely to fulfil the conditions of Article 81(3).⁴¹⁹ These sights can be applied also to the current framework under VBER as, despite the increasing voices for a more lenience towards suppliers since the adoption of the 2010 Block Exemption

⁴¹⁵ S. Umit Kucuk, Harry J.P. Timmermans, Resale Price Maintenance (RPM): The U.S. and E.U. perspectives, *Journal of Retailing and Consumer Services*, Volume 19, Issue 5, 2012, Pages 537-544.

⁴¹⁶ See above, Chapter 1, Section 3.4.3.

⁴¹⁷ Gippini-Fournier, Eric, Resale Price Maintenance in the EU: In Statu Quo Ante Bellum ?, 36th Annual Conference on International Antitrust Law and Policy, 2009, pg. 22.

⁴¹⁸ Guidelines on Vertical Restraints, (2010/C 130/01), para. 225.

⁴¹⁹ *Ibid*, pg. 27

Regulation,⁴²⁰ RPM remains classified as a hardcore restriction, thus falling outside of the safe harbour of the Vertical Block Exemption.

Against this background, the competition law framework within the Union therefore appears to take a middle course, rejecting an automatic illegality of RPM, but at the same time not allowing for a full assessment of the pro- and anti-competitive elements under Article 101(1) TFEU. Within this approach the Commission and the EU courts have maintained a strict view on possible pro-competitive justifications under Art.101(1) TFEU and this is reflected in the rather short step from a hardcore restriction under VBER to a restriction by object under Art.101(1) TFEU.⁴²¹

⁴²⁰ Rohrßen, *Internetvertrieb in der EU 2018 ff. – Online-Vertriebsvorgaben von Asics über BMW bis Coty*, 2017, pg. 281.

⁴²¹ See Guidelines on Vertical Restraints (2022/C 248/01), para. 195.

2.2.1. Restriction by object under Art.101(1) TFEU

In the context of the assessment of RPM as a restriction by object it is interesting to analyse the role played within the case law in the assessment under Article 101(1) TFEU by possible legitimate objectives for vertical restraints.

The first step considers the position taken by the Court of Justice in the *Cartes Bancaires* case, where regarding the pricing restrictions implemented by a group of French banks the Court found that such clauses were not a restriction by object under Art.101(1) TFEU. In the argumentation the Court reminded how restrictions by object can only be found when a measure “reveals a sufficient degree of harm to competition that it may be found that there is no need to examine their effects”⁴²² Concerning the pricing restrictions implemented, the Court stated firstly, how a restriction by object must be interpreted restrictively, indicating how the General Court erred by taking instead a more broader approach on the classification by object.⁴²³ Secondly, and more interesting for this analysis, the Court indicated how such pricing restrictive measures were addressed at combating the phenomenon of free-riding, which by both the Court of Justice and the General Court has been recognised as legitimate objective in that occasion.⁴²⁴

As a second step in the analysis, the case law concerning the International Skating Union (ISU) is taken into account.⁴²⁵ Despite not being related to technology, it still gives a recent example for both the position of the Commission and the one of the EU Courts regarding RPM.⁴²⁶ The case concerned (vertical) agreements between the ISU, the only body recognised by the International Olympic Committee for the sports of speed skating on ice, and its athletes, which were subject to a system of pre-authorisation rules for taking part in sport’s competition. Without analysing the recent interesting judgments delivered by the ECJ concerning the position of sport’s federations under an EU competition perspective,⁴²⁷ relevant for the discussion is the

⁴²² Case C-67/13 P - *Groupement des cartes bancaires (CB) v European Commission*, para. 51.

⁴²³ *Ibid*, para. 57.

⁴²⁴ *Ibid*, para. 75; see also Pablo Ibáñez Colomo, *Restrictions by object in ISU: why has the Commission not drawn the lessons from Cartes Bancaires and Maxima Latvija?*, available at: <https://chillingcompetition.com/2018/04/04/restrictions-by-object-in-isu-why-has-the-commission-not-drawn-the-lessons-from-cartes-bancaires-and-maxima-latvija/>

⁴²⁵ Case AT.40208 - *International Skating Union’s Eligibility rules*.

⁴²⁶ see also Zelger, *Restrictions of EU Competition Law in the Digital Age*, 2023, pg. 34 ff.

⁴²⁷ See Case C-333/21 - *European Superleague Company SL v Fédération internationale de football association (FIFA)*; C-124/21 P - *International Skating Union v European Commission*;

possible justification coming from free-riding of vertical measures restricting competition. In the case at hand, the argument brought forward by ISU - in order to justify the pre-authorisation system implemented vertically between ISU and the single athletes – was indeed that third party organisers of speed skating events would free-ride on the ISU's costs incurred for the administration of the sport.⁴²⁸

While in *Cartes Bancaires* case the Court recognised – in a rather isolated view - the free riding as a legitimate objective already within the analysis of Art.101(1)TFEU,⁴²⁹ in the ISU case the Commission, followed then by the General Court, did not recognise the aim of addressing free-riding as a legitimate objective to be taken into consideration under Art.101(1) TFEU. This needs to be analysed in the context of the *Wouters* doctrine applicable, which removes certain anti-competitive practices from the reach of antitrust rules in those cases where they are necessary means for achieving a legitimate objective. In *Wouters*, the Court examined whether a regulation of the Dutch Bar Association prohibiting partnerships between lawyers and accountants infringed Article 101 TFEU. Although the Court recognised that the restriction had the potential to distort competition, it held that Art. 101(1) TFEU does not automatically prohibit every restriction on the freedom of action of undertakings. Instead, it is necessary to examine the economic and legal context of the decision and this analysis may show that any anti-competitive effects are inherent in the achievement of a legitimate objective (the proportionality test) and do not go beyond what is necessary to achieve that objective (the necessity test). According to this doctrine therefore, non-competitive interests underlying an agreement may lead to an inherent exception to the prohibition of cartels. Therefore, the CJEU takes into account the specific needs of general public interests by excluding related conduct from the scope of Article 101(1) TFEU, instead of dealing with such interests only at the later assessment of Article 101(3) TFEU. Indeed, one of the key issues in case law has been the types of justification that can be applied under this doctrine.⁴³⁰

Against this background, the Commission in ISU stated how the aim of such vertical restrictions was to hinder competition in order to defend *inter alia* the own commercial interests - the investments made by ISU in the organisations of sport's competition – and defined such eligibility rules as a restriction of competition by object under Art.

Case C-680/21 - UL and SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL.

⁴²⁸ Ibid, para. 76.

⁴²⁹ See footnote nm. 387.

⁴³⁰ C-309/99 - *Wouters and Others*, para. 97; see also Case C-519/04 P – *Meca Medina*, para. 42.

101(1) TFEU.⁴³¹ The reasoning behind this position of the Commission lies in the consideration that “the protection of economic and/or financial interests does not, however, constitute a legitimate objective that can justify a restriction of competition.”⁴³² As a consequence, the element of free riding could only be accepted as a mere claim related to the economic efficiencies generated by the ISU rules under therefore should be assessed under Art.101(3) TFEU.⁴³³ The recent judgment of the CJEU on the ISU case sadly does not gives further clarifications on the classification of restrictive measures responding to the free-riding, instead it only refers to “pursuit of one or more legitimate objectives in the public interest which are not *per se* anticompetitive in nature”.⁴³⁴ Within this rather broad position of the Court, it could nonetheless be inferred an opening towards a plausible justification for free-riding. Under the objective of such organisations, legitimate objectives in the public interest can be found, such as promoting sport and training players.⁴³⁵ The restrictive measures at issue, while directly pursuing own economic advantages by restricting, are nonetheless indirectly linked to the public interest, as lower financial contributions due to free-riding will ultimately means less investment in order to achieve the legitimate objective in the public interest.⁴³⁶ However, the Court in ISU did not openly endorse such justifications coming from free-riding, rather focusing on other more general aspects not relevant for this discussion.

This recent case law on vertical restrictions – while being specific for sport’s organisation – reveals nonetheless a general rigidity in the attitude of both the Commission and the Court of Justice towards the classification of restriction by object under Art.101(1) TFEU. In particular, the ISU ruling on the eligibility rules introduces an important limitation to the possible justification as a legitimate objective, namely that only non-economic objectives can be considered. In contrast to the approach often used in the US, where both pro-competitive and anti-competitive factors are assessed, in the EU, elements such as free-riding are thus not normally taken into account when determining whether a measure constitutes a restriction of competition by object under Article 101(1) TFEU.

⁴³¹ Case AT. 40208 -International Skating Union’s Eligibility rules, para. 165.

⁴³² Case AT. 40208 -International Skating Union’s Eligibility rules, para. 220.

⁴³³ Ibid, para. 224.

⁴³⁴ Case C-124/21 P - International Skating Union European Commission, para. 111.

⁴³⁵ See e.g. Article 2(1) of the UEFA Statutes.

⁴³⁶ See also C-333/21 - European Superleague Company, paras 234-237.

These assessments - concerning possible justification for RPM in order to avoid the restriction by object under Art.101(1) TFEU - have been confirmed in the recent judgment of the Court at the start of 2024 exactly on price fixing agreements. In the Lietuvos case, the CJEU had to decide whether a decision of the Lithuanian Chamber of Notaries infringed Article 101 TFEU by fixing methods for calculating the fees charged by notaries in Lithuania.⁴³⁷ In this regard, it should be highlighted that the aforementioned case law related to the Wouters doctrine, including the ISU and the Superleague case, has specifically concerned cases involving rules adopted by an association such as a professional or sporting association that regulate the exercise of a professional activity with the aim of "pursuing certain ethical or principled objectives."⁴³⁸ Against this background, it might have been expected - and this was also the argument put forward by the applicant before the Court - that the Wouters doctrine would also apply to this case. Indeed, the Chamber of Notaries argued that its decision on calculating fees was a decision of a professional association necessary to standardise notarial practice in Lithuania and thus pursued a legitimate aim in the public interest. However, the Court clearly explained how price fixing agreements constitute a restriction of competition by object and as such cannot fulfil the conditions of the Wouters exception under Article 101(1) TFEU.⁴³⁹

Furthermore, the latest position taken by the Court in this case could be applied to the digital market, particularly regarding the practice of RPM implemented by suppliers to their retailers. As indicated above, the imposition of RPM constitutes a hardcore restriction under VBER. This not only means that the agreement falls outside the safe harbour of the Block Exemption, but it also implies that it is likely to be found in breach of Article 101 TFEU as a restriction by object.⁴⁴⁰ Therefore, the position of the Court in Lietuvos seems to exclude for the future proceedings the application of the Wouters doctrine as a possible defence strategy for RPM clauses in the digital market. As a practical consequence, such agreements will require a specific assessment under Article 101 TFEU.

2.2.2. Possible benefits under Art.101(3) TFEU

The second step to be considered in the legal analysis after an infringement of Article 101(1) TFEU is the possible exception under paragraph 3. In the first chapter it has

⁴³⁷ C-128/21 - Lietuvos notarų rūmai and Others.

⁴³⁸ C-333/21 - European Superleague Company, para. 183.

⁴³⁹ Ibid, para. 96.

⁴⁴⁰ See Chapter 1, Section 3.5.

been already analysed indeed how even an agreement considered as restricting competition by object under Art.101(1) TFEU can nonetheless be exempted under Art.101(3) TFEU. The current section thus takes into consideration how the implementation of RPM is capable in certain situations to give rise to efficiencies required for an individual exemption in paragraph 3.

In the Guidelines to the Vertical Block Exemption is indicated how such efficiencies include *inter alia* the provision of RPM for the purpose of enabling pre-sale services for complex products or for coordinated short-term special offer campaigns of two to six weeks, in particular when the supplier applies a uniform distribution format, such as a franchise system.⁴⁴¹ However - as anticipated - an individual exemption under Art.101(3)TFEU for restrictive agreement containing RPM clauses is difficult to achieve.

In Germany, the Bundeskartellamt imposed for instance an important sanction on a vertical agreement concerning the sale of school backpacks for children starting school, as the manufacturers ensured that these products were sold at a fixed price by all its retailers across the country.⁴⁴² In line with the above mentioned case against Asus, the German NCA held that the manufacturer's conduct did not fulfil the conditions set out in Article 101(3) TFEU, as there was no evidence that the imposition of RPM was indispensable to induce retailers to invest in certain promotional activities or pre-sales services or to mitigate the effects of freeriding between online and offline sales channels.

This case law help to explain why national competition authorities within the impact assessment for the updated Vertical Block Exemption indicated how they had limited knowledge of cases where RPM led, or could lead, to efficiency gains; while some NCAs even emphasised that RPM is usually not indispensable to achieve certain efficiencies.⁴⁴³ The position of NCAs in this context highlights also the difficulty of classifying such provisions, particularly in the context of online sales, as evidenced by the fact that the majority of NCAs considered that additional guidance within the revised VBER would be beneficial. In particular, NCAs suggested including more

⁴⁴¹ Guidelines on Vertical Restraints (2022/C 248/01), para 197.

⁴⁴² B10-26/20 (ehemals B2-130/18), 2021, available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B10-26-20.pdf?__blob=publicationFile&v=2

⁴⁴³ Impact assessment for the review of Regulation (EU) No 330/2010 and the related Guidelines on Vertical Restraints.

examples and detailed explanations on how Article 101(3) TFEU could be applied to RPM, in particular to address concerns related to free riding.⁴⁴⁴

The following sections will therefore analyse two possible efficiencies associated with the implementation of RPM, particularly in the online environment: the promotion of additional services and the avoidance of free-riding.

2.2.2.1. Encouraging additional services

On the face of it, resale price maintenance may appear to be inherently detrimental to consumers: RPM ultimately aims to maintain retail prices at a higher level than they would naturally be. This approach, however, only considers the element of the price paid by the end consumer. Beyond this mere quantitative element there are further considerations that needs to be taken into account and which might justify the interest of manufacturers or suppliers to limit the price competition among their resellers.

The first practical implication of RPM is that retailers would be forced to compete on the quality of their offers: since they cannot compete on price, they have to find indeed other ways of attracting customers if they want to remain competitive with other dealers.⁴⁴⁵ These other ways would typically be the offer of additional services to customers, such as pre-sale assistance, that in the praxis is translated in costs in training the staff for guidance and advice on the products, products demonstration and consumer trails. For example, a store might allow customers to try new electronic devices before they buy, ensuring they understand the product's features and benefits. Furthermore, the no price-based competition is not only directed at rival brands, but also at other retailers selling the same brand, so that the incentive through RPM to provide such services can increase both inter-brand and intra-brand competition, as defined above.

In addition to the need to compete on levels other than price, a possible additional factor to be considered in the providence of additional services is the interest of the manufacturer to terminate the vertical relationship with less active retailers. This becomes relevant in the scenario where the retailer sells the product at a higher retail price as a result of RPM agreed with the supplier, but without providing any additional service. This scenario may be beneficial to the retailer in terms of costs saved. However, the manufacturer would have no interest in such a situation, as sales are likely

⁴⁴⁴ Ibid.

⁴⁴⁵ Mart Kneepkens, Resale Price Maintenance: Economics Call for a More Balanced Approach, 28, *European Competition Law Review*, 2007, 656, 658.

to fall rather than rise despite the wholesale prices remaining unchanged.⁴⁴⁶ As a result, the retailer may be under pressure to offer such additional services to customers in order to increase the sales, otherwise, their supply of products from the manufacturer may be at risk of being terminated and, as noted above, this freedom to contract and freedom to conduct a business is at the very heart of the EU's general principles.

⁴⁴⁶ OECD, Roundtable on Resale Price Maintenance, DAF/COMP(2008)37, 2008, pg. 25, available at: <https://www.oecd.org/daf/competition/43835526.pdf>

2.2.2.2. Avoiding free-riding

Closely related to the provision of additional services by retailers there is the argument of combating free-riding, as defined above. This is particularly relevant for restrictions on online sales, as research has shown for years that the practice of free-riding is more prevalent in online sales than in traditional offline markets.⁴⁴⁷

In this regard, it should be considered how retailers in the brick-and-mortar dimension offer a wide range of complementary services, such as fitting rooms, customers' personalised advice or the possibility of testing the product. In addition, these complementary services become even more important for complex and technological products. This can be seen in the pre-sales stage, as these services are almost necessary for advice and quality certification. Furthermore, even after the purchase, brick-and-mortar retailers offer their customers post-sales services such as technical support, maintenance and repair services, which increase customer satisfaction and trust.

Besides this differentiation between online and offline shops, the provision of such additional services does generally drive up the final price of the product offered at the consumer, as within that product the retailer needs to cover also these additional costs.⁴⁴⁸ Considering that neither the initial supplier nor the final consumer is usually able to contract directly for these services, a retailer may find itself in a situation where customers make use of these additional services but then buy the products at lower prices from another retailer, who does not offer the same services and can therefore offer lower prices for the same products.⁴⁴⁹ Specifically for those technological products a concretisation of additional services is in the case of "certification" services. Retailers – both offline and online - often invest significant resources on product selection, focusing on quality and security. This includes rigorous selection processes to ensure that, for instance, only the best products are displayed in their stores. They also may invest significantly in advertising, store ambience and prime locations to build a reputable and upmarket image. These efforts build trust with costumers, who will then associate the retailer's offering with prestige and security of the products displayed. However, without measures such as resale price maintenance, other discounters both online and offline could just replicate the selection of products of the

⁴⁴⁷ Akman, Pinar, Sokol, D. Daniel, *Online RPM and MFN Under Antitrust Law and Economics*, 2016, pg. 137.

⁴⁴⁸ OECD, *Roundtable on Resale Price Maintenance*, DAF/COMP(2008)37, 2008, pg.10, available at: <https://www.oecd.org/daf/competition/43835526.pdf>

⁴⁴⁹ See also Zelger B., *Restrictions of online sales and vertical agreements: Bundeskartellamt vs. Commission? Why Coty and Asics are compatible*. *European Competition Journal*, 2018, pg. 451.

investing retailers, without having to spend any time or financial expenses on the selection and thus exploiting the selections' efforts of the competitors.⁴⁵⁰ In particular, the rise of internet shopping has strengthened the free riding in terms of certification by making the shopping process itself cheaper and easier: now more than ever, customers will search for certain items in reputable, full-service stores and then go online to see if they can purchase there the same items at lower prices. The same mode of free-riding can be observed within the very same digital channels. As further analysed below in the context of the retail parity provision, in the digital market there are also so-called "high cost platforms," which offer services such as quality selection or pre-sale assistance. These need to be contrasted with "low cost platforms," which instead do not provide such services and often compete primarily on prices.⁴⁵¹ In this context, free-riding occurs when users surf on the high-cost platforms, benefit from the products listed and the information and certifications provided, but then complete the purchase on the lower-cost platforms.

As recognised already for the offline economy, the practical consequence of free riding – and therefore a possible justification for RPM in the digital market - is that retailers might be then driven away from providing additional services. The result could inefficiently reduce the level of provision of these services and therefore ultimately harm consumer.⁴⁵² Instead, the provision of RPM makes all prices consistent at retail level, so that customers no longer have a reason to shop at one store rather than another. Against this background, it can be further understood the relevance of free riding especially in the online market, as the internet amplifies this phenomenon and thus has a huge impact on the competition between online retailers and traditional brick-and-mortar stores.⁴⁵³ Specifically in the online environment, the implementation of RPM is therefore seen as a possible justification for provider's concerns about free-riding on both offline and online services.

2.3. Conclusion

⁴⁵⁰ OECD, Roundtable on Resale Price Maintenance, DAF/COMP(2008)37, 2008, pg.27, available at: <https://www.oecd.org/daf/competition/43835526.pdf>

⁴⁵¹ A Report Prepared for the OFT by LEAR – Laboratorio di economia, antitrust, regolamentazione: Can "Fair" Prices be Unfair? A Review of Price Relationship Agreements, 2012, pg. 103.

⁴⁵² Telser, Lester G., Why Should Manufacturers Want Fair Trade?, 1960, Journal of Law and Economics: Vol. 3: No. 1, Article 6, pg. 86 ff.

⁴⁵³ See also Zelger, Restrictions of EU Competition Law in the Digital Age, 2023, pg. 150.

The approach within the EU to resale price maintenance is primarily characterised by a strict position based on presumption that the case for its efficiency is relatively weak and that, instead, RPM itself is not an effective tool for promoting efficiency within the market and ultimately benefit consumers. The debate around the right collocation of the restrictions of RPM has received a new impetus over the years with the digitalisation of the vertical chain, as in particular the increasing use of price monitoring software facilitates price recommendations. The digital development seems only to have further galvanise the focus at both national and EU level against the implementation of such vertical restraints under Art.101(1) TFEU, as the updated Vertical Block Exemption Regulation and the accompanying Guidelines show. It is important to note, however, that this does not preclude the possibility - albeit difficult in practice - of a one-off exemption for RPM under paragraph 3.

It will be interesting to see whether the increased importance of RPM in the digital market, with the internet facilitating the practice of free-riding, will ultimately result also in an increased attention to the justification for these restrictions. A possible greater recognition of such justification could take place inside the EU courts, whereas the Commission has not felt the need to adjust its strict view of RPM used online under the latest version of the Vertical Block Exemption.

3. Retail parity provision

Another category of pricing restrictions in the vertical dimension are the most favoured nation (MFN) clauses or retail parity provisions.

As a terminological note, the notion of “parity provisions” comes from the field of international trade and it refers to those agreements where nation A agrees that it will trade with nation B as favourably as, or even more favourably than, with other nations.⁴⁵⁴ Within the updated Guidelines it is also recognised that parity obligations are sometimes referred to as most-favoured-nation (MFN) clauses or cross-platform parity agreements; although the latter term should be reserved for those parity obligations which oblige the supplier to offer the best term through more than one distribution channel (“cross-platform”).⁴⁵⁵ All these terms refer to the situation when the seller will have to agree to offer the goods or services to another party on conditions that are no less favourable than the conditions offered by the same seller to other parties or via certain other channels. In terms of scope of application, there is an important clarification: if these restrictions are limited to the supplier's own direct sales channels

⁴⁵⁴ Whish and Bailey, *Competition Law*, pg. 682.

⁴⁵⁵ Guidelines on Vertical Restraints (2022/C 248/01), para. 356.

- such its own website or flagship shop - they are known as narrow parity clauses. Instead, if they restrict sales on competing commercial channels - such as other online intermediation services - they are known as across-platform retail parity obligations or wide MFN clauses.

The key formulation used in the Guidelines for these obligations is “at least the same favourable”. These clauses require indeed one party to sell its goods or services to “at least the same favourable conditions” applied to the other party. These conditions can cover various aspects such as price, availability, and conditions of sale. Like the other restrictions listed in Article 5 VBER, these measures may be implemented directly or indirectly, the latter including methods such as introducing price differentials to encourage or discourage suppliers from offering the same favourable terms. Parity provisions can therefore also refer to aspects other than the price; however, the price parity provisions are the most widely used, particularly in the digital market.

3.1. Analysis

Alongside the vertical chain, in the past price parity clauses were mainly found in agreements between two business –such as wholesale price parity clauses - and historically did not see a strong intervention of enforcement by competition authorities. However, the digitalisation of the economy and the growth of e-commerce have brought changes also in the assessment of these restrictions. There has been indeed a noticeable increase in the use of price parity clauses in agreements between suppliers and online platforms, such as retail price parity clauses, as opposed to traditional wholesale price parity clauses.⁴⁵⁶

In the online market parity obligations are placed at a different level in the vertical chain and this also means a shift in their role. The common goal of traditional MFN is ensuring to customers that the price offered them is the best that they will find on the market. However, unlike offline parity provisions clauses - which focus on offering assurances to customers – parity clauses in the digital market primarily serve to provide assurances to distributors, or more precisely, to the online platform, that they won't face undercutting by alternative online channels.⁴⁵⁷ Furthermore, from this different

⁴⁵⁶ Parry Sam, Retail price parity: do we have European consensus at last, or will divergence continue?, *European Competition Review* 2023, pg. 260; see also Akman, P and Sokol, Online RPM and MFN under Antitrust Law and Economics. *Review of Industrial Organization*, 50 (2), 2017, pg. 3.

⁴⁵⁷ Akman, P and Sokol, Online RPM and MFN under Antitrust Law and Economics. *Review of Industrial Organization*, 50 (2), 2017, pg. 9.

position alongside the vertical chain it follows also how online parity clauses differ from parity obligation in the brick-and-mortar dimension in terms of the parties involved. While parity obligations in the traditional economy are found in sales contracts between suppliers and specific customers, these clauses in the digital economy are implemented by platforms acting as intermediaries in two-sided markets, as described above. As a consequence, the primary beneficiary of the pricing agreement between a platform and a supplier is a third party - the consumer - who is not directly involved in parity obligation agreement, whereas under traditional parity obligations the beneficiary of the clause is directly part of the agreement. The difference in terms of impact that these clauses can have when implemented in the online context has been recognised under the new VBER, where the Guidelines highlight how across-platform parity obligations are generally more severe when implemented by online intermediation service.⁴⁵⁸

Within the online environment, the competitive analysis of online parity clauses fundamentally changes, and this affects also the balance between pro- and anti-competitive elements. Therefore, it is not surprising that such restrictions have attracted the attention of competition authorities, leading to enforcement actions - not always consistent - at different levels.

3.1.1. Pro-competitive elements

The most direct and obvious consequence of the obligation to impose price parity clauses is that consumers will have access to lower prices. This primarily benefits consumer welfare by reducing search costs and increasing trust in online sellers, as consumers would be able to obtain the most favourable terms from a seller without having to carry out extensive research into the best available price and without having to engage in lengthy negotiations.⁴⁵⁹ This argument especially applies in the online environment, where consumers surfing the web are so not forced to navigate extensively in order to compare the different prices displayed for the same products, which brings further benefits in terms of consumer welfare.

However, there are also other consequences on the business side. The fact that the product offered by the seller will bear the same price at different retailers may encourage consumers not to hesitate to order - for example, speculating on a possible last-minute offer - thus allowing the business to implement reliable planning and

⁴⁵⁸ Guidelines on Vertical Restraints (2022/C 248/01), para. 362.

⁴⁵⁹ Commission Staff Working Document, Evaluation of the Vertical Block Exemption Regulation, SWD/2020/0172 final, pg. 184.

engage in efficient production.⁴⁶⁰ In addition, there are other arguments for businesses in favour of applying such price restrictions, especially in the digital market. Indeed, as anticipated, the most prominent pro-competitive effect of parity rules is the reduction of free-riding. In a mechanism similar to that of RPM, the imposition of such price restrictions, both at the wholesale level and at the retail level, protects other third parties from free-riding on the investments made by the business.⁴⁶¹ Furthermore, on this assessment of the pro-competitive effects - contrary to the general assumption that the use of price parity clauses avoids price discrimination - it should be recognised that such discrimination can still occur in the online environment. For example, in the online booking sector, Booking.com offers Genius, a loyalty programme for its users based on the number of recent bookings made through the platform. Subscribing users can benefit from lower prices offered by hotels participating in the programme, as the platform does apply a reduction of 10% to the normal prices that the hotel display on the platform.⁴⁶² An important consequence in this context arises from Booking.com's practice of advertising Genius rates on price comparison platforms like Trivago or Kayak.⁴⁶³ By promoting these discounted rates, Booking.com enhances the effect of price discrimination, displaying on the internet rates that are equal to or lower than those on the hotel's own website. From this, it can be seen how such programs effectively nullify the impact of the imposed MFN restrictions and enable price discrimination in the digital market. However, that being said, it should be noted that the scope for implementing such price discrimination in the digital sphere is nevertheless relatively limited, at least in the case of Booking.com. Indeed, the Genius loyalty programme mentioned above includes approximately 360,000 participating hotels out of the total 950,00 listed accommodations on Booking.com.⁴⁶⁴ This may be due to the fact that participation results in the hotel bearing the full cost of the discount offered by the platform. Against this background, the following assessment of the competitive effects of retail parity provisions does not take into account this possibility of price discrimination despite the existence of such price restrictions.

⁴⁶⁰ Wu and John P. Bigelow, Competition and the Most Favoured Nation Clause, CPI Antitrust Chronicle 6, 2012, pg. 6.

⁴⁶¹ Pinar Akman, A Competition Law Assessment of Platform Most-Favoured-Customer Clauses, CCP, 2015, pg. 48

⁴⁶² See Booking.com, Genius, available at: <https://www.booking.com/genius.html>

⁴⁶³ See on this: <https://www.smartpricing.it/en/blog/booking-genius-program>

⁴⁶⁴ Booking.com, Fan Facts, 2023, available at: <https://news.booking.com/fast-facts/#:~:text=Accommodations%3A,and%20territories%20across%20the%20globe>

In order to understand the wider pro-competitive benefits of these parity obligations in the digital economy, it is necessary to place them in the context of online platforms acting as intermediaries. As highlighted in Chapter 1, these online platforms operate mostly as two-sided markets: the platform operator must notably attract both the buyer and sellers to use his services.⁴⁶⁵ The two-sidedness of the platform also means that both groups of users will not be charged the same: the most prominent example - which will be used as a case study - is in the sector of online booking platforms for hotels. Here, the consumer's user group (group 1) is not charged for surfing the platform in search of the best offer, instead a commission will be charged only if and when the customer books the hotel (group 2) on the platform. In the case of Booking.com, the industry leader within the EU digital market, the platform operates on a commission-based business model: under the accommodation agreement signed between the hotel's users (group 2) and the platform, the single hotel will pay a percentage of each booking the customers (group 1) make through the platform. The idea behind this system is that the price set on the platform is the price guests should ultimately pay.⁴⁶⁶ Against this background, there is an increased interest on the part of the hotel's user group to take advantage of the platform only to reach a wider audience, but then to have all bookings made on their own website in order to avoid paying the fee to the platform.⁴⁶⁷ It comes clear how, in a similar process as the one concerning RPM, in the absence of MFN clauses, suppliers such as hoteliers could be tempted to lower prices on their own websites – free-riding on the search and advertising services that the online platform provides - making thus these online platforms such as Booking.com unprofitable. Therefore, MFN clauses prevent this scenario by ensuring that lower prices are offered to end users on online intermediaries' platforms and no better offers can take place somewhere else, including the hotel's own website.

In terms of pro-competitive effects, the avoidance of free-riding on the online platform may therefore stimulate the investments of that platform in order to offer additional and more extensive services to both users' groups. In this regard, following on from the previous section on additional services, in parallel to the so-called "high cost

⁴⁶⁵ See Chapter 1, Section 2.2.1.

⁴⁶⁶ Statement by Booking.com, available at: <https://partner.booking.com/en-gb/help/commission-invoices-tax/commission/understanding-our-commission#:~:text=Booking.com%20works%20on%20a,the%20price%20guests%20should%20pay>

⁴⁶⁷ Paolo Buccirosi, Background Note, OECD Policy Roundtable on Vertical Restraints for Online Sales, 2013, pg. 23 ff.; see also Akman, P and Sokol, Online RPM and MFN under Antitrust Law and Economics. Review of Industrial Organization, 50 (2), 2017, pg. 8.

platforms", which offer services such as quality selection or pre-sale assistance, there are also "low cost platforms", which can charge lower fees because they do not offer any additional service.⁴⁶⁸ In the area of online commerce, the online platform of Amazon.com offers for instance the A-to-z Guarantee, which protects users when they purchase items sold and fulfilled by a third-party seller. This guarantee covers both timely delivery and the condition of the items. If there is a problem, the customer can make a claim directly to Amazon and get an immediate refund.⁴⁶⁹ Furthermore, Amazon.com does generally offer an extensive review system where customers can leave certified feedback and ratings for products and sellers. Instead, a comparable range of additional services may not be available, or may not be as comprehensive, on low-cost platforms, which generally concentrate solely on offering the lowest prices and promote direct consumer purchases. A practical case of this second category of online platforms can be seen with AliExpress' online platform, which is known for offering indeed lower prices compared to the majority of online platforms. The practical use of this lower-cost platform highlights a notable disparity in customer service compared to Amazon: for instance, although AliExpress does claim to offer a buyer protection guarantee, however the procedures and timelines for product returns and reimbursements are frequently lengthy and intricate.⁴⁷⁰

Against this background, if customers use the high cost (but more expensive) platform for their research, but then choose to buy from a low cost, cheaper alternative, the high cost platform won't see a return on its investment on the additional services, such as review systems and after sales assistance.

Similarly, in terms of reputation, if the platform has carefully implemented over time a rigorous seller selection and reliability ratings, it does not want this investment to be used simply to attract consumers who then go elsewhere to buy on lower quality - and

⁴⁶⁸ A Report Prepared for the OFT by LEAR – Laboratorio di economia, antitrust, regolamentazione: Can "Fair" Prices be Unfair? A Review of Price Relationship Agreements, 2012, pg. 103.

⁴⁶⁹ Amazon.com, Customer Services, available at: https://www.google.com/url?sa=t&ret=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewji-bP9n96GAXUT8AIHHepUABYQFnoECB4QAAQ&url=https%3A%2F%2Fwww.amazon.com%2Fgp%2Fhelp%2Fcustomer%2Fdisplay.html%3FnodeId%3D%2F59PXSUWUFR92NUQ&usg=AOvVaw019hc2_QKg8LllkuGCNYjx&opi=89978449

⁴⁷⁰ AliExpress, Help Center, available at: <https://helpcenter.aliexpress.com/s/BuyerHelp?tsuCode=ByrCmn&suid=1030142406160251182102EE922363>

therefore lower cost - platforms.⁴⁷¹ The consequence of this scenario is that there would be no incentive for online platforms to make such investments, which would ultimately lead to a deterioration of the services offered to consumers. Instead, the implementation of MFN clauses to avoid free-riding on other (low-cost) online platforms would guarantee a return on the provision of such additional services and bring pro-competitive effects in terms of product quality and consumer benefits.

3.1.2. Anti-competitive effect

In terms of negative effects on competition, the imposition of parity obligations had already raised concerns in the mortar and brick sector about the creation of a barrier to enter into the market.⁴⁷² These price restrictions prevent indeed potential new entrants in the market to negotiate better terms in order to acquire market share, by for instance offering strategic discounts to consumers. In a market - offline or online – where the suppliers are restricted by parity obligations clauses in contracts with the already established players, they cannot grant favourable terms to smaller competitors or new entrants. As a result, new entrants will not be able to offer better terms than the incumbents and will therefore be unlikely to increase their market share.

From this it follows that in markets where MFN clauses systematically prevent suppliers or distributors from offering better terms to a significant number of the company's main competitors - including potential entrants - they may be used to maintain or increase market power. In addition, the issue of the barrier to entry for new players is directly linked to a restriction in the innovation within the market, as new business ideas and services cannot not be implemented in the market.⁴⁷³ As a result, not only are individual companies negatively affected, but the implementation of such clauses also has a wider negative impact on competition in the market.

Furthermore, parity obligations may reduce the incentive to offer lower prices to potential buyers. As the German competition authority found by analysing the online hotel booking sector, in this context such pricing obligations prevent an online platform from offering a lower commission rate in order to achieve lower prices on its

⁴⁷¹ Pinar Akman, A Competition Law Assessment of Platform Most-Favoured-Customer Clauses, CCP, 2015, pg. 10.

⁴⁷² Ibid, see also Akman, Sokol, Online RPM and MFN under Antitrust Law and Economics. Review of Industrial Organization, 50 (2), 2017, pg. 17.

⁴⁷³ A Report Prepared for the OFT by LEAR – Laboratorio di economia, antitrust, regolamentazione: Can “Fair” Prices be Unfair? A Review of Price Relationship Agreements, 2012, pg. 160.

platform.⁴⁷⁴ The reasoning behind this is that if the commission's fees were reduced, the parity obligations on the sellers – such as hotels - on the platform would force them to adapt and reduce prices on all other platforms, negating any potential increase in sales for the frontrunner online platform. This explains why online platforms with parity obligations have no incentive to reduce commissions.

In addition, this mechanism has another important anti-competitive consequence: a possible increase in prices paid by consumers. Indeed, not only is there no incentive for the platform to offer lower prices, as shown above, but this mechanism actually incentivises the opposite: a platform may have an interest in increasing its commission. This would in fact force the seller to raise prices not only on that platform but also on all other platforms in order to comply with the retail parity obligations.

Taking all these points into account, there is not a single and unified understanding of the pro-competitive and anti-competitive effects of MFN clauses. However, it should be noted that their impact may vary from case to case, as has already been recognised for MFN in the traditional economy, depending on "the characteristics of the market, the specifics of the clause; and the nature of the seller that offers it".⁴⁷⁵ In the digital market the above section has shown the amplification of the effects of such restrictions. As a result, the implementation of MFN in the online environment requires a deeper and different approach than in the traditional economy.⁴⁷⁶

3.2. Case-study: the online hotel booking

As anticipated, over the past decade there has been an ongoing debate about the appropriate assessment of the competitive impact of retail price parity rules. This debate has led to inconsistent enforcement practices across Europe, creating considerable uncertainty as to permissible action. The European enforcement dilemma was driven mostly by enforcement action in the online hotel booking sector— with investigations conducted in several European jurisdictions, including the UK, Germany, Austria, Belgium, Denmark, Switzerland, France, Sweden, Italy, Ireland, the Czech Republic and Hungary.

This needs to be considered into the specific context of this sector. Hotel services can still be sold to end consumers through direct traditional distribution ways, which include telephone, mail, and face-to-face bookings. However greater importance have

⁴⁷⁴ OECD, Hearing on Across Platform Parity Agreements, Note by Germany, 2015, pg. 5.

⁴⁷⁵ Akman, Sokol, Online RPM and MFN under Antitrust Law and Economics, p. 139.

⁴⁷⁶ Ibid, pg. 137.

the online indirect ways, as nowadays booking platforms are the most important distribution channel within the hotel industry. Already in 2015, the German NCA received feedback from the hotels contacted that more than 50% of their bookings were made via online platforms, which played a significantly larger role than traditional travel agencies.⁴⁷⁷ A greater figure at the time had been recognised by the French NCA, where it found how 70% of rooms booked via the internet were made through online booking platforms.⁴⁷⁸

Following on from the above section, online platforms would impose broad MFN clauses requiring the hotels using the platform to offer the rooms on terms at least as favourable as those offered through all other online and offline distribution channels. On the other hand – as previously mentioned – the narrow MFN would mean in this context that hotels are still able to offer better terms and prices to other both online and offline sales channels but would prevent them from offering lower prices on their own website.

The implementation of MFN clauses in this sector has been subject to investigations of the different NCAs at national level, such as in Germany, Italy, Austria and Sweden. The results that came out have been quite contradictory. In particular, this section focuses on the case law in Germany, firstly because the national NCA's position differed from the main understandings of both the Commission and the other NCAs, and secondly because only in Germany the national courts have actually issued rulings on MFN clauses in the online booking platforms.

Within the case study of the hotel booking sector, the following assessment of MFN clauses under the EU competition law will follow two parallel paths: on the one hand, it will analyse the debate on the compatibility of narrow MFN clauses under Art. 101 TFEU and, on the other hand, it will consider the classification of these restrictions as vertical agreements under the VBER. This division and sequence are dictated by developments in both NCAs' enforcement practice and the case law of the courts.

3.2.1. The classification under Art.101(1) TFEU

In 2013, the German Bundeskartellamt - after launching an investigation into the obligations between Hotel Reservation Service Robert Ragge GmbH (HRS) and its hotel partners – considered MFN clauses as a possible hardcore restriction under the

⁴⁷⁷ Bundeskartellamt - B 9-121/13, 2015, BeckRS 2016, 04449, (46).

⁴⁷⁸ Autorité de la concurrence, Press release, available at: https://www.autoritedelaconcurrence.fr/fr/liste-des-decisions-et-avis?id_rub=591&id_article=2460

Vertical Block Exemption Regulation. On this point, ultimately did not have to decide because HRS's market share in the market was found to be over 30% and therefore an exemption under the Block Exemption Regulation was not possible.⁴⁷⁹

Furthermore, and more importantly, the German NCA also launched investigations into similar agreements concluded by booking platforms of Expedia and Booking.com. In that case, the NCA considered that not only the restrictions on offering better prices for hotel rooms on other platforms, but also the restrictions on the hotel's own website, constituted a violation of Article 101(1) TFEU.⁴⁸⁰ On this last point the German NCA took thus a rather strict view, indicating how there is a restriction on competition also under the narrow MFN clauses of online platforms: “The 'best price' clauses barely provide an incentive for the hotels to offer their rooms on a new portal cheaper if they cannot implement these price reductions on their own websites as well. There is no apparent benefit for the consumer.”⁴⁸¹ Under a wider perspective, the undertakings – both Expedia and Booking.com - in response of the investigations by several NCAs in Europe had adapted their business model by implementing only narrow pricing restrictions.⁴⁸² Therefore, in Germany they argued against the decision of the Bundeskartellamt to also sanction the use of narrow MFN. In particular Booking.com based its defence on two arguments. Firstly, it emphasized the pro-competitive nature of free-riding, asserting that it employed narrow price parity clauses to “ensure that consumers don't have to check hundreds of hotel websites to get the best price” and to “achieve advertising efficiencies on behalf of hotels”. Secondly, it highlighted that the German NCAs had neglected to collaborate with the other NCAs and thus had not ensured a consistent application of competition law throughout the EU internal market.

3.2.1.1. Coordinated cross-border investigation

On this second point, it should be indeed noted that the French NCA (Autorité de la concurrence), the Italian NCA (Autorità Garante della Concorrenza e del Mercato), and the Swedish NCA (Konkurrensverket) found in their investigations how broad parity

⁴⁷⁹ Bundeskartellamt - B9-66/10,2013, Rn. 237.

⁴⁸⁰ Bundeskartellamt - B 9-121/13, 2015; Wolf-Posch: Anpassung der Vertikal-GVO an die Anforderungen des Online-Handels, NZKart 2019, 209, 211.

⁴⁸¹ Bundeskartellamt, Press release, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html.

⁴⁸² Autorité de la concurrence, Case 15-D-06; Autorità Garante della Concorrenza e del Mercato, Case I779 B; Konkurrensverket, Case 596/2013.

clauses hindered competition, however they also recognised how narrow MFN had pro-competitive effects and could therefore be justified under Art.101 TFEU.⁴⁸³ For example, in its decision in the Booking.com price parity case, the Italian NCA explained how the introduction of narrow MFN clauses does trigger a competitive process in the relevant market, facilitated by the competitive leverage of the commissions charged.⁴⁸⁴ As a result, Booking.com formally settled a number of investigations against the NCAs by agreeing to remove broad parity clauses from its agreements with hotels. These commitments had been later then applied throughout the entire EU common market, and the same strategy had been implemented by Expedia.⁴⁸⁵ Beyond the implication for the usage of MFN in that specific case, this collaboration is quite interesting for at least two different elements. Firstly, it is a strong example of close cooperation - or rather enhanced cooperation - between different national competition authorities under the European Commission's supervision. It poses indeed a model of an unprecedented way of common investigations between national authorities in close coordination with the Commission in order to obtain similar commitments from an undertaking in all countries involved. This point takes on even greater significance when one considers that, following the conclusion of the above mentioned Booking.com investigations, ten national competition authorities, together with the Commission, carried out a monitoring exercise, culminating in a published report, on the impact of these investigations on online hotel room bookings.⁴⁸⁶ The purpose was exactly to measure the effects of recent changes to the parity clauses used by online platforms in their contracts with hotels across the entire EU common market and this Report had been carried out within the European Competition Network (ECN). It should be recalled that with Regulation 1/2003, EU competition rules started being applied directly at national level by the national competition authorities and in this situation the need for a network to ensure their effective and consistent application has arisen. For this purpose, the ECN brings together the NCAs of all Member States and

⁴⁸³ Ibid.

⁴⁸⁴ Autorità Garante della Concorrenza e del Mercato, Case I779 B, Decision, pg.20, available at: https://www.agcm.it/dotcmsDOC/allegati-news/I779_chiusura.pdf.

⁴⁸⁵ See for Booking.com, Press release, available at: <https://news.booking.com/en/bookingcom-to-amend-parity-provisions-throughout-europe/>;

⁴⁸⁶ Commission, Report on the monitoring exercise carried out in the online hotel Booking sector by EU competition Authorities in 2016, available at: https://competition-policy.ec.europa.eu/document/download/c50b5e61-1ea3-47bc-ac4c-57d35f8f77fa_en?filename=hotel_monitoring_report_en.pdf

over the years their cooperation has been strengthened.⁴⁸⁷ According to the ECN+ Directive, the NCAs can use this platform to exchange information on cases and decisions, to assist each other in investigations by carrying out dawn raids or exchanging evidence, or - as in this case - to carry out parallel market surveillance across the single market.⁴⁸⁸ As a final point, remarking the importance of this specific cooperation on Booking.com, this Report on the hotel booking sector has been the most recent one that has been carried out at EU and national level within the ECN.

Secondly, it should be recognised how the actions of these three NCAs had a wider impact beyond the respective national borders, as both Booking.com and Expedia not only agreed to drop their wide MFN clauses in the countries where they were under investigation, but their commitment have been then implemented in all jurisdictions within the EU internal market. On the contrary, it is interesting to note that outside of the EU common market—where EU competition law is not applicable—Booking.com did not extend its commitments following the above investigations of the NCAs.⁴⁸⁹ The reason behind might be found in the fact that at the time – specifically from 2013 to 2017 - countries outside the EU generally did not impose restrictions on MFN clauses, with the notable exception of Australia, banning wide MFN clauses as well.⁴⁹⁰

3.2.1.2. The treatment of narrow MFN in Germany

Returning to the above judicial proceeding in Germany, it is evident - in light of the findings of this joint investigation - why Booking.com decided to appeal against the German NCA's decision to sanction the implementation of narrow MFN clauses. The issue was referred to the regional court, which ruled on the matter in 2019, aligning its assessment with the broader direction established at European level and thus allowing at least narrow MFN clauses.⁴⁹¹ The Court's decision is based on the results of a survey of hotels and customers: according to this the clauses are not anti-competitive but rather necessary to ensure a fair and balanced exchange of services between the portal operators and the contracted hotels. The narrow MFN clauses prevent indeed unfair

⁴⁸⁷ Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03).

⁴⁸⁸ Directive (EU) 2019/1.

⁴⁸⁹ Booking.com, Press release, 2015, available at: <https://news.booking.com/en/bookingcom-to-amend-parity-provisions-throughout-europe/>

⁴⁹⁰ Ennis Sean, Ivaldi Marc and Lagos Vicente, Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change, 2022, pg. 8.

⁴⁹¹ OLG Düsseldorf, Beschluss v. 4.06.2019, VI-Kart 2/16 (V) – Enge Bestpreisklausel II.

redirection of customer bookings and ensure that customers who have selected a hotel through the online platform are then not redirected to the hotel's website by lower room prices or better contractual conditions offered on the portal operator's booking website. From this argumentation it follows how the court accepted the free-riding argument, which had been already recognised by the other NCAs and was also brought forwards by the undertaking in front of the regional court.

However, from a closer analysis of the decision, it emerges how actually the German court followed a different path in order to achieve the same solution recognised by the other NCAs. The argumentation needs to be read in connection with the previous section on the correct collocation under Art.101 TFEU of justifications for pricing restrictions.⁴⁹² Notably the NCAs, including the Bundeskartellamt, considered the MFN as a restriction of competition under Art.101(1) TFEU, but then examined whether the restriction could be exempted under Article 101(3) TFEU on the basis for instance of free-riding issues.⁴⁹³ The court of Dusseldorf does not mention the possibility of the single case exemption under paragraph 3 of Art.101 TFEU, but instead it considers the free-riding argument already under the assessment under paragraph 1. This follows from the consideration of MFN as necessary measures (*notwendige Nebenabrede*) in order to enable the actual agreement to be implemented, in other words being considered as ancillary restrictions under EU competition law.⁴⁹⁴ The Court embraced so the position of the undertakings, who argued how narrow MFN clauses are objectively necessary for their business model and thus these restrictions are strictly indispensable to the implementation of the online booking platforms. As a consequence of this different path, the narrow MFN of online platforms does not even constitute a restriction of competition under Article 101(1) TFEU. As a further consequence, the classification of MFN clauses as ancillary restrictions does reduce the importance of market shares. By considering how these restrictions - at least in the form of narrow MFN - are objectively necessary for their business model, Article 101(1) TFEU is not infringed regardless of the market shares of the companies involved. However, as will be shown, this approach does not appear to have been followed up at either national or EU level. According to Article 5(1)(d) of the Block Exemption Regulation, and more explicitly in the Guidelines at paragraph 359, narrow MFN clauses may benefit from the safe harbour of the Regulation if the thresholds are

⁴⁹² See Section 2.2.1.

⁴⁹³ BKartA, Entscheidung v. 22.12.2015, B9-121/13, pg. 6.

⁴⁹⁴ OLG Düsseldorf, Beschluss v. 4.06.2019, VI-Kart 2/16 (V) – Enge Bestpreisklausel II, Rn. 69.

met. If these thresholds are not met, the clauses fall within the scope of Article 101(1) TFEU.

As a final passage concerning the legal dispute on narrow MFN in Germany, the last decision on the matter has been delivered by the German Federal Court of Justice in 2021. In that occasion the Bundesgerichtshof (BGH) quashed the decision of the lower court and dismissed so Booking.com's appeal against the prohibition imposed by the German NCA.⁴⁹⁵ The BGH rejected the view of the regional court of Düsseldorf that the narrow MFN clauses are necessary ancillary restraints for the performance of the intermediary service of the online platform and criticises the systematic approach of the judge in Düsseldorf. Indeed, the BGH states that the purpose of a restriction – in this case ensuring adequate remuneration for the platform service by solving the problem of free-riding - can only be taken into account when examining the conditions for an exemption under Article 101(3) TFEU.⁴⁹⁶

Furthermore, the German Federal Court denied a possible exemption also under paragraph 3, as it considers that the single requirements are not met. Without repeating the criteria indicated above, the judgment recognised how there is indeed an efficiency advantage coming from online platforms as a wider audience can reach the single hotel.⁴⁹⁷ However, it also highlighted that the decisive factor is whether “concrete efficiency gains are not achievable without the restraint of competition”.⁴⁹⁸ In this regards the BGH noted how Booking.com was able to further strengthen its market position at national level although the undertaking had no longer applied narrow MFN clause since February 2016.⁴⁹⁹ The consequence that is implied is that for the online platform of Booking.com such clauses are not necessary in order to obtain the efficiency gains. Furthermore, the Court found that the other requirements of Article 101(3) TFEU, namely the improvement of the production or distribution of goods or the promotion of technical or economic progress, were also not achieved through narrow MFN.⁵⁰⁰ According to the Bundesgerichtshof, the free-rider problem did not appear to seriously compromise the business model offered on the platform. On the other hand, narrow MFN clauses lead to significant efficiency losses which cannot be

⁴⁹⁵ Bundesgerichtshof, 18.05.2021 - KVR 54/20, English version available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/BGH_Entscheidung_Booking_EN.pdf?__blob=publicationFile&v=1.

⁴⁹⁶ Ibid, para. 19.

⁴⁹⁷ Ibid, para. 58.

⁴⁹⁸ Ibid, para. 60.

⁴⁹⁹ Ibid, paras. 62-64.

⁵⁰⁰ Ibid, para. 57 ff.

justified by the mere possibility for Booking.com to use increased profits to improve its services.⁵⁰¹ Consequently, narrow MFN clauses implemented by Booking.com on its platform do constitute a restriction of competition under Art.101(1) TFEU and cannot be individually exempted under paragraph 3.

As a final note, which also leads to the next section, the court in this occasion did, however, not explicitly rule out the possibility – provided that the market shares are fulfilled - that narrow MFN clauses could constitute a vertical agreement falling within the scope of the exemption of the Vertical Block Exemption Regulation.⁵⁰²

3.2.2. Classification under VBER

An important element on the debate concerning MFN clauses in the hotel booking online sector is also whether these MFN clauses agreed between online platforms and hotels operating on the platform constitute vertical agreements within the meaning of Article 2(1), Article 1(1)(a) VBER. It should be indeed noted how this classification under the Block Exemption depends on whether VBER applies also to restrictions imposed by intermediary players on their suppliers and customers. If such clauses were held inapplicable, restrictions imposed by intermediaries would be subject to significantly stricter rules than those applicable to the same type of pricing restrictions imposed in direct relationships between suppliers and customers.⁵⁰³

Within the above mentioned case law on the booking sector, the classification of MFN clauses in the hotel sector as vertical agreements had not been subject to judicial review until 2017. The practical reason – which also justifies the order adopted in this chapter - is that the Block Exemption Regulation did not apply in the proceedings against Booking and HRS due to their high market shares. It was only later in the German decision on Expedia's MFNs – with a market share below 30% - that a court had the opportunity to classify the MFNs as vertical agreements to which the VBER can be applied.⁵⁰⁴

3.2.2.1. Scope of application of VBER

As indicated in the first chapter, there are several requirements that needs to be fulfilled under Art.1 lit.a VBER in order for an agreement to fall within the scope of application

⁵⁰¹ Ibid, para. 87.

⁵⁰² Ibid, paras. 19 and 50.

⁵⁰³ Wolf-Posch: Anpassung der Vertikal-GVO an die Anforderungen des Online-Handels (NZKart 2019, 209), 211.

⁵⁰⁴ OLG Düsseldorf, Urt. v. 04.12.2017, Rs. VI-U (Kart) 5/17 - Zulässigkeit Bestpreisklauseln Expedia, BeckRS2017, Rn. 19 ff.

of the Vertical Block Exemption Regulation.⁵⁰⁵ The most challenging one for MFN restrictions implemented by online hotel booking platforms is the necessity of an inherent link between the vertical relationship and the restrictive agreement in question.⁵⁰⁶ Indeed, MFN clauses actually regulate the conditions for the sale of hotel rooms, but not the conditions for the provision of intermediation services by the online platform. As a result, doubts have been raised as to whether these clauses only affect the relationship between hotels and final consumers.⁵⁰⁷

Following the judicial proceedings at national level against the online platform of Expedia, the argumentation developed by the Regional Court of Düsseldorf recognised how within the online platform there are two relationships of exchange: on the one hand the vertical agreement concerning the intermediation service offered by the platform to its hotels; and on the other hand, the relationship between the groups of hotels and the groups of travellers.⁵⁰⁸ Within the first relationship, the prerequisite under Art.1 (a) VBER that the agreement must regulate the content of the conditions of purchase, sale or resale is given: the agreement of MFN by the hotels concerns the conditions for the purchase of the intermediary service offered on the online platform. In the second relationship, which concerns the selling of the hotel's room to consumers, the requirement for the application of VBER would be that the online platform and users must be in a vertical relationship. However, the vertical relationship can only be seen between the hoteliers and the consumers, while the online platform is not involved in this vertical relationship, but rather has an intermediary position in relation to the consumers.⁵⁰⁹ As a consequence, the German court held in the occasion – although being a proceeding for interim relief - how MFN on hotel booking platforms could not be considered as block exempted under VBER.⁵¹⁰

In the later development, in 2017 the same Higher Regional Court of Düsseldorf recognised instead how under Article 1(1)(h) VBER – under the updated Regulation Article 1(1)(k) VBER - "buyer" of a product within a vertical relationship also includes

⁵⁰⁵ Chapter 1, Section 4.3.1.

⁵⁰⁶ Walter, *Die Preisbindung der zweiten Hand*, 2017, S. 313.

⁵⁰⁷ see also Wolf-Posch, *Neue Entwicklungen zu Bestpreisklauseln von Online-Hotelportalen*, *ÖZK* 2015, 101.

⁵⁰⁸ OLG Düsseldorf, *Urt. v. 04.05.2016, Rs. VI-Kart 1/16 (V) - enge Bestpreisklausel*, *NZKart* 2016.

⁵⁰⁹ OLG Düsseldorf, *Urt. v. 04.05.2016, Rs. VI-Kart 1/16 (V) - enge Bestpreisklausel*, *NZKart* 2016, 292 ff.

⁵¹⁰ OLG Düsseldorf, *Urt. v. 04.05.2016, Rs. VI-Kart 1/16 (V) - Zulässigkeit Bestpreisklauseln Booking*, *BeckRS* 2016, 100542016, (291).

undertakings selling the product on behalf of another undertaking.⁵¹¹ The German court explained in that occasion how from this wording an intermediary party can be classified as the buyer of the service – in this case study the selling of the accommodation - without actually being part of the exchange relationship with the final consumers. This therefore allows to establish an inherent link between providing MFN clauses and selling hotel rooms to final consumers; and therefore, it opens the block exemption of such clauses under VBER.

Against this background, before 2017 the exemption of MFN clauses for the online booking platforms of Booking.com and HRS has been excluded due to their market share. As a practical consequence, MFN wide and narrow clauses could further be implemented on the platform of Expedia, whereas the same pricing restrictions had been forbidden on the other online platforms, as showed above.

From this it follows how the market share plays a pivotal role in the applicability of such pricing restrictions, as only in online platforms with high market shares are these MFN clauses considered to be potentially anti-competitive due to the impact of their agreement.⁵¹² However, it should be recognised once again how the specific characteristics of the digital market could put into question these assessments. Within these two-sided online platforms, the correct market definition - especially for the product market – is quite challenging. Furthermore, the value provided by the market shares in an online platform should be considered alongside other factors, because within these platform other elements such as number of users, page visits or number of internet researches also have a huge impact on their position on the market. That being said, in the years after these judgments there has been a recognition of these further elements: the Commission included them for the definition of the product market in its enforcement's practice.⁵¹³ Furthermore, also under the revised market definition Notice – as highlighted above – is indicated how elements closely linked to the digital economy, such as the network effects, are to be taken into consideration.

As a final note, the update under the new VBER ended the above highlighted doubts concerning a possible subsumption of MFN restrictions as vertical agreements, providing even extensive indication on how to implement them within the scope of application of the Block Exemption Regulation, as later it will be discussed.

⁵¹¹ OLG Düsseldorf, Urt. v. 04.12.2017, Rs. VI-U (Kart) 5/17 - Zulässigkeit Bestpreisklauseln Expedia, BeckRS2017, Rn. 23.

⁵¹² Kumkar, Online-Märkte und Wettbewerbsrecht, 2017, pg. 185.

⁵¹³ Case AT.39740 - Google Search (Shopping), para. 275 ff.

3.2.2.2. Classification as a hardcore restriction

Considered how already in 2017 MFN clauses have been classified as vertical restrictions, the assessment of these clauses in the judicial proceeding against Expedia also allows to analyse the argumentation behind a possible classification as hardcore restriction under VBER.

The German Court in 2017 based its rejection of MFN as a hardcore restriction under Art. 4(a) VBER on the fundamental differentiation between first- or second-hand price fixing (*Preisbindungen der ersten oder zweiten Hand*).⁵¹⁴ First-hand price maintenance applies to the supplier, when his freedom to set prices is restricted by the buyer's specifications. Instead, second-hand price maintenances -which fall under Art. 4(a) VBER - have an impact only in a second phase within the vertical chain, as the buyer's freedom to set prices is restricted by the supplier's impositions. The MFN clauses only restrict the hotels' freedom as supplier of hotel services to differentiate prices between the different distribution channels. Therefore, they qualify as first-hand price fixing agreements and as such are not affecting the freedom of the online platform as a buyer to set prices within vertical chain.⁵¹⁵ The court further indicated how this applies regardless of the fact that the online platform must offer the rooms at the prices ultimately set by the hotel.

In other words, considering the system of two relationships within the booking platforms showed above, within the first transaction the single hotel is categorised - in the reasoning of the court - as the supplier of the accommodation's service and the platform operator as the purchaser of the service, which means that Art. 4(a) is not applicable. If one were to consider instead the object of the relationship the intermediate service offered by the online platform, then the hotel is the customer, and the platform will be classified as the provider. However, this intermediary service does not see then a resell to the end customers, as the usage of the platform is free of charge. Following from the wording of the provision, the court therefore indicated that, as a restriction only of the supplier's freedom to set prices, MFN clauses do not qualify under Art. 4(a) VBER.

Without analysing into details the consequence of this interpretation endorsed by the court of Düsseldorf, at the time this reasoning led indeed to intensive debates. Possible solutions proposed concerned an extensive interpretation of Art. 4(a) VBER in order to

⁵¹⁴OLG Düsseldorf, Urt. v. 04.12.2017, Rs. VI-U (Kart) 5/17 - Zulässigkeit Bestpreisklauseln Expedia, BeckRS2017, Rn. 40.

⁵¹⁵ Ibid.

cover also MFN used on online platforms, or even the addition of a further category of hardcore restriction.⁵¹⁶ The next section sets out how the update of the VBER has provided welcome clarification on this issue.

3.2.2.3. The updated VBER

The update of the Regulation and the accompanying Guidelines in 2022 provided a good opportunity for the Commission to address the treatment MFN clauses by online platforms, in particular whether and under what conditions they would benefit of the exemption under the Block Exemption Regulation. In addition, this gave the opportunity for further clarification of the assessment of those restrictions under Art.101 TFEU.

The 2022 Vertical Block Exemption Regulation indeed introduces for the first time an explicit reference to MFN implemented in the online platforms and – while not inserting any new hardcore restriction under Art. 4 VBER – it introduces under Art. 5(1)(d) VBER an exclusion of across-platform retail parity obligations from the safe harbour of VBER. The benefit is therefore removed only for those MFN clauses imposed by operators of online platforms - including price comparison websites and online marketplaces - in relation to the terms and conditions offered on other rival online platforms (also called wide retail parity obligations or wide MFN).⁵¹⁷ The accompanying Guidelines further clarifies that under this definition fall both direct and indirect restrictions, regardless of whether the obligation to offer the same price is the result of pressure or incentives, such as the offer of better visibility on the platform or differential pricing according to the willingness of the buyer of the online intermediation services to offer the goods or services on competing platforms.⁵¹⁸

This provision on wide MFN has been added with further references to the digital market, notably Art. 1(1)(e) VBER for the definition of online intermediation service, and it reflects once again the greater role recognised under the new VBER for the digital economy. The classification of these MFN clauses under the excluded restrictions ex Art. 5 VBER rather than in the list of hardcore restrictions, means that the inclusion of this type of clauses does not exclude the rest of the agreement ex Art. 4 VBER from the safe harbour of the Regulation, and that this type of MFN clauses is not presumed to be unlawful and has to be individually assessed under Art. 101 TFEU.

⁵¹⁶ Kumkar, *Online-Märkte und Wettbewerbsrecht*, 2017, S. 246; see also Walter, *Die Preisbindung der zweiten Hand*, 2017, S. 305.

⁵¹⁷ Guidelines on Vertical Restraints (2022/C 248/01), para. 358.

⁵¹⁸ *Ibid*, para 253.

In particular, while across-platform retail parity obligations are considered excluded restrictions under Art. 5 VBER and thus do not benefit from the VBER's safe harbour, as excluded restrictions under VBER there is no presumption that they automatically fall within the scope of Article 101(1) TFEU or fail to satisfy the conditions of Article 101(3) TFEU.⁵¹⁹ On the other hand, all other MFN clauses implemented by online platforms, in particular narrow MFN clauses, continue to enjoy the block exemption of VBER.

The update of the Regulation recognises the intense debate showed above across the competition authorities and courts at national level concerning the right treatment of these clauses. This is also evident from the evaluation carried out for the 2022 VBER, where NCAs expressed concerns about the divergent treatment of MFN clauses in the internal market, as demonstrated above by the different approaches of the German Bundeskartellamt and the other NCAs to narrow MFN clauses.⁵²⁰ In addition, in line with the requests coming from the NCAs, the updated Regulation provides guidance also for the individual assessment of MFN clauses under Art.101 TFEU, which does apply also for those online platforms above 30% of the market share such as Booking.com. The update Guidance indicates indeed that narrow MFN, although enjoying the benefit of the block exemption, can nonetheless in a concentrated market led to higher prices and softening of competition between the providers of online services.⁵²¹

Concerning the assessment under Art.101(3) TFEU, the Guidelines follows the general understating of the previous years and recognises how under paragraph 3 of Art.101 TFEU the free-riding could be a justification for these restrictions.⁵²² However, it should be also noted how the possibility is given that the block exemption for narrow MFN may also be withdrawn in those cases where the efficiencies rising from their implementation are limited or the clauses are not necessary in order to achieve these efficiencies.⁵²³ Interesting to notice how with the latter possibility the Guidance actually seems to acknowledge the argumentation above described of the Bundesgerichtshof: the element of free-riding may justify the implementation of narrow MFN by online platforms, but the Court found that these clauses were not

⁵¹⁹ Ibid, para 246.

⁵²⁰ Commission staff working document evaluation of the Vertical Block Exemption Regulation, SWD(2020) 172 final, pg. 184.

⁵²¹ Guidelines on Vertical Restraints (2022/C 248/01), paras. 370-371.

⁵²² Ibid, para 373.

⁵²³ Ibid, para 374.

necessary for Booking.com to achieve the efficiencies and thus failed to meet the requirements of Article 101(3) TFEU.

In conclusion, the right treatment of MFN clauses in the digital economy has given rise over the last decade of an intense debate, fuelled by contradicting position taken across the different authorities. The most prominent example can be found the judicial assessment of the narrow MFN clauses in the hotel booking platform carried out in the different instances within the German judicial system. As a result, there has been a degree of legal uncertainty on the part of business regarding such restrictions in the EU digital market, and therefore there was a need to intervene with EU-wide harmonised legislation on the matter. The current VBER and Guidelines recognise this issue and provide guidance on the assessment of these restrictions both within and outside the safe harbour of the Block Exemption.

3.2.2.4. Regulations

The interplay between the application of competition law and sectoral regulation, highlighted in the title of the study, can also be seen in the debate around the price parity provisions on online platforms.

Prior to the update of the 2022 Block Exemption Regulation, there were indeed unilateral legislative initiatives at national level to regulate the use of these price restrictions on online hotel booking platforms. In particular, this has been the case for France, Belgium, Italy and Austria. In the latter Member State under Section 1 and Paragraph 32 of the Annex to the *Bundesgesetz gegen den unlauteren Wettbewerb* (UWG) (Commercial Practices Act) all MFN clauses – both narrow and wide – are unfair and thus void agreements.⁵²⁴ Furthermore, in 2017 under the *Legge annuale per il mercato e la concorrenza* (Competition Degree) Italy also banned all forms of price-parity clauses implemented by the online platforms.⁵²⁵ Interesting is to notice how in both these countries the legislator contradicted the results of the previous assessments conducted by their respective national competition authorities, as illustrated above, where instead it had been recognised the compatibility of narrow MFN clauses by online hotel booking platforms with both national and EU competition law. These legislative initiatives have been justified at national level with the necessity to protect the smaller hotels within the digital market, whereas no additional arguments have been brought to suggest a different assessment as the one previously carried out by the NCAs.

⁵²⁴ § 1 Bundesgesetz gegen den unlauteren Wettbewerb (UWG) i.V.m.Nr. 32 Anhang zum UWG.

⁵²⁵ Legge annuale per il mercato e la concorrenza, 04/08/2017 n° 124, Art. 50.

On this last point noteworthy to mention is a study conducted by the European Commission in 2022 on hotel distribution practices.⁵²⁶ The survey between hotels in the different Member States found that, years after the implementation of these national legislative bans, there has been for instance no significant change in hotel distribution practices in Austria compared to the other Member States covered by the study. Furthermore, the study of the Commission indicates there has been little to no change in the distribution of hotel accommodation across the EU since 2016. In particular, commission rates paid by hotels to online travel agencies - such as Booking.com - appear to have remained stable or even fallen slightly, and the degree of differentiation in room prices and availability between different channels has decreased.⁵²⁷ Against such findings it appears thus difficult years after their implementation of the legislative initiatives to find the reason behind the need to prohibit also narrow MFN clauses, while these findings seems to actually support the previous position taken by the NCAs. This raises the question - now more than before with the updated VBER 2022 - of whether the prohibition under national law of the implementation of narrow MFN clauses by online hotel booking platforms is contrary to EU law, as these unilateral national measures could be challenged as a restriction on the provision of services.⁵²⁸ The assessment of the impact of a national initiative over MFN clauses on online platforms becomes again relevant in connection with the newest regulatory provisions adopted under the Digital Market Act. Under this Regulation it is indeed prohibited for the undertakings designed as gatekeepers to prevent "business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper".⁵²⁹ In this regard it is interesting to notice how the implementation of the DMA has transformed the above theoretical assessments into relevant practical issues. The recent status of Booking.com as a gatekeeper for its online intermediation services

⁵²⁶ Commission, Market study on the distribution of hotel accommodation in the EU, COMP/2020/OP/002.

⁵²⁷ Commission, Market study on the distribution of hotel accommodation in the EU, COMP/2020/OP/002 pg. 73.

⁵²⁸ Monti, Augenhöfer, Consumer Choice and Fair Competition on the Digital Single Market in the Areas of Air Transportation and Accommodation, 2018, p. 21.

⁵²⁹ Regulation (EU) 2022/1925, Art. 5(3).

makes the undertaking subject to the prohibition under Art. 5 (3) DMA.⁵³⁰ The consequence is that the online platform is obliged, after the compliance period, to remove all MFN clauses on its platform.

Firstly, in terms of narrow MFN, the obligation for Booking.com does contradict the above-mentioned assessments carried out by both the Commission and NCAs. Secondly, in terms of wide MFN at least, the new obligation under the DMA does bring to interesting consequences. National competition authorities have indeed recently opened investigations against Booking.com into a possible violation of competition law due to the implementation of pricing restrictions in the form of MFN. In particular, the Italian NCA sustains that the platform is granting to the hotels that join the Preferred Partner Programme advantages in terms of visibility of their own offerings in the search results, in exchange for the commitment to offer “competitive” prices on its platform, in other words: wide MFN clauses.⁵³¹ Following the analysis in the first chapter on the nature of the DMA, it should be noted how this situation would lead to a double proceeding for the very same conduct. From the end of the compliance period, Booking.com's use of MFN will be indeed subject to enforcement under the sectoral regime of the DMA, while national competition authorities will still be able to continue to investigate and sanction the same restriction, as under Article 1(6) DMA its application does not prejudice national competition rules. In other words, price restrictions in the form of broad MFN clauses currently fall within the scope of EU competition law until 12 December 2024. After that date, with the end of the six months compliance period ex Art. 3(10) DMA, they will also fall within the scope of the sectoral regulation of Art. 5(3) DMA.

⁵³⁰ Commission, Press release, available at: https://digital-markets-act.ec.europa.eu/booking-bytedance-and-x-notify-their-potential-gatekeeper-status-commission-under-digital-markets-2024-03-01_en

⁵³¹ AGCM, Press release, 2024, available at: <https://en.agcm.it/en/media/press-releases/2024/3/A558>

4. Algorithms

The last section of this chapter will focus on the implementation of automated software alongside the vertical chain in the digital market. In the previous sections it has been indeed highlighted how the enforcement of pricing restrictions on online sales is heavily enhanced by the possibility deriving from these programs. As anticipated above, the definition of algorithm, at least the one adopted by the Organisation for Economic Co-operation and Development (OECD) in 2017, can be summarise as: “an unambiguous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects. The initial state of the tokens is the input; the final state is the output.”⁵³² While this definition is certainly broad and covers all types of automated programmes, a simplified classification can be made based on their purpose. There are algorithms designed to search for information or products (e.g. on Booking.com or Amazon), algorithms designed to recommend certain information or products (e.g. on Spotify and Netflix), or algorithms designed to execute transactions and distribute supply and demand (e.g. on Uber).⁵³³

Especially relevant for this chapter on the pricing restrictions, algorithms are also introduced to observe and monitor the behaviour and strategic decisions of competitors in the market on elements such as prices and products offered. As a consequence, a further distinction should be made regarding the implementation of algorithms related to prices. Firstly, and most commonly used, there are algorithms that monitor other firms' prices (price monitoring algorithms). Secondly, there can be found algorithms that recommend or automatically set a price based on market conditions such as demand or timing (dynamic pricing algorithms). Thirdly, there are those algorithms that tailor prices to specific individuals based on their characteristics (personalised pricing algorithms).⁵³⁴ There are several market researches that shows especially the importance of the first two categories of price tracking algorithms, with for instance an estimate of 1,800 companies globally using the pricing algorithms in the business-to-business relationship in 2020.⁵³⁵ These two applications of pricing algorithms are therefore considered further in the next sections.

⁵³² OECD background note to the Roundtable on Algorithms and Collusion, 2017, pg. 8.

⁵³³ Authority for Consumers and Markets, 2020, pg. 5, available at: <https://www.acm.nl/sites/default/files/documents/position-paper-oversight-of-algorithms.pdf>

⁵³⁴ OECD, Algorithmic Competition, OECD Competition Policy Roundtable Background, 2023, pg. 6.

⁵³⁵ Gartner, Market guide for B2B price optimization and management software, 2022, pg. 5, available at: <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/deloitte-analytics/deloitte-nl-amc-market-guide-for-b2b.pdf>

Despite the different applications listed, all types of algorithms see as their common basic element the process and use of high quantity of data in order to provide in a limited timeframe certain solution. In connection to this, it important to recognise – before analysing the issue associated with pricing restrictions - how the implementation of algorithms can be used to bring several efficiencies into the market. On the side of the businesses, algorithms help to optimise prices and quantities, among other things. In the tourism industry for example, the pricing algorithms can dynamically adjust prices for seats and rooms based on changing market conditions.⁵³⁶ Similarly, in e-commerce, many online retailers use software to monitor competitors' prices and adjust their own accordingly. In addition, algorithms also improve the quality of products and services, for example by improving search results or providing personalised product recommendations while surfing on online marketplaces.

On the other side, also consumers benefit from algorithms. They enjoy reduced search and transaction costs, as comparison portals enable them to compare numerous products and services and choose the best offer, such as Skyscanner in the airfield industry.⁵³⁷ On this point, price comparison websites allow consumers to instantly compare prices across a range of goods and services, while price monitoring tools can alert customers when prices are particularly low. These software are even being used for product recognition to help consumers find exactly what they are looking for.⁵³⁸ Furthermore, algorithms do also reduce information asymmetries between companies and customers and between different groups of customers, making it harder thus for companies to discriminate unfairly. This increased market transparency also fosters competition between companies, which indirectly benefits consumers by driving down prices and improving service quality.

In this context, however, it is also worth noting how the use of pricing algorithms can affect the implementation of price restrictions in online sales, as anticipated earlier in this chapter. This impact is further assessed in the next section.

4.1. The impact on pricing restrictions

⁵³⁶ Descamps, A., Algorithms and competition: the latest theory and evidence, *Competition Law Journal* 20(1), 2021, pp. 35-36.

⁵³⁷ Assad S., Autonomous algorithmic collusion: Economic research and policy implications, *Oxford Review of Economic Policy* 37(3), 2021, pp. 459-478.

⁵³⁸ See on this Meta, How AI makes online shopping easier for everyone, 2021, available at: <https://tech.facebook.com/artificial-intelligence/2021/6/how-ai-makes-online-shopping-easier-for-everyone/>

With regard to the effect that the implementation of algorithms can have on price restrictions - in particular resale price maintenance - in the digital market, the Eturas case provides interesting practical implications. This judgment of the Court of Justice concerned the online booking system of Eturas, which allowed more than 30 Lithuanian travel agencies to present their services and offers in a uniform way.⁵³⁹ This system enabled Eturas to implement a uniform 3% discount cap on services and offers available through its online booking platform. Prior to implementation, Eturas communicated this discount cap via the booking system's internal messaging service. As a consequence, every travel agency in the Eturas network received a message informing them of the 3% mutual discount cap. It is important to note for the later analysis that the behaviour in question was fully automated within the online platform. Theoretically, a change of the discount by the travel agents was still possible, however, that change would have required additional technical actions or intervention.⁵⁴⁰ In this context the issue was raised whether the terms of use of the platform did enable the participant to reach a “concurrence of wills” without the need of a direct exchange. On this the Court indicated that actual knowledge by the parties was required for an infringement to exist. While the transmission of the message by Eturas alone was not sufficient to give rise to a presumption of knowledge, this could instead be inferred from “objective and consistent” indicia.⁵⁴¹ In the case of online platforms, the Court indicated how such presumption of awareness rises once communication has been issued to the users.

Besides these aspects related to the establishment of an agreement under Art. 101 TFEU, this case raises additional difficulties—building on the assessments carried out above on resale price maintenance—in defining the line between a mere (lawful) recommended price and an unlawful binding pricing restriction. On the platform of Eturas the automatic system indicating the specific discount cap limited the discount rates that could be offered to the clients of the travel agencies to 3%. The above assessments of the judgment have indicated how, at least theoretically, was possible for the single travel agencies to deviate from this “recommended” price, however above it has been also indicated how the deviating would have required additional technical actions or intervention. In addition, the way in which the price was communicated, as described above, meant that the individual travel agency was also aware that all other

⁵³⁹ Case C-74/14 - Eturas and Others.

⁵⁴⁰ Ibid, para 43

⁵⁴¹ Ibid, para 45.

participating agencies on the platform would apply that price. In this context, it has subsequently been established in another case outside the EU internal market how such form of recommended prices can constitute an unlawful restriction of competition. In that case the Federal Supreme Court of Switzerland assessed the conditions under which such recommended price implemented by the supplier Pfizer AG on its distributors through electronic means qualify as an unlawful vertical agreement restraining competition.⁵⁴² In particular, it is interesting to note that the distributors of Pfizer could still (theoretically) manually change the price indicated online and that the supplier Pfizer did not exert any pressure for the distributors to adhere to the recommended price. The parallels with the Eturas case above are quite significant, and even the Swiss court relied on the Eturas case in its assessment to show how the way in which Pfizer's recommended prices were implemented by the distributors ultimately meant that they did not have an independent pricing policy.⁵⁴³

Returning to the implications of the Eturas case under EU competition law, it becomes evident that recommended prices implemented in the digital market could easily surpass the threshold of a mere price recommendation and be regarded as having the same effect as binding price indications. In particular, such pricing recommendations can be seen as indirect measures that ultimately fix or limit the buyer's ability to determine the selling price. Under the updated Vertical Block Exemption Regulation these qualify as hardcore restrictions under Article 4(a) VBER. Interestingly, the accompanying guidelines specifically mention the scenario of indirect means of achieving resale parity provisions through the granting of rebates or reimbursement of advertising costs.⁵⁴⁴ Consequently, such digital communications of prices from a supplier along its vertical chain could be classified as retail parity provisions and thus be found in breach of Article 101(1)(a) TFEU.

Furthermore, these implications are reinforced by the fact that the use of algorithms makes it possible within the digital market to detect deviations from recommended retail prices in a matter of seconds. As shown above in the Asus case on RPM, manufacturers are therefore increasingly able to monitor and influence retailers' pricing and eventually impose measures.⁵⁴⁵ On this last point the next section does further consider the implications of price monitoring algorithms over pricing restrictions. Overall, this proves how the distinction between recommended prices and illegal price-

⁵⁴² Federal Supreme Court of Switzerland, Judgment 2C_149/2018, 2021,

⁵⁴³ Federal Supreme Court of Switzerland, Judgment 2C_149/2018, 2021, para. 5.3.5.

⁵⁴⁴ Guidelines on Vertical Restraints (2022/C 248/01), para. 187.

⁵⁴⁵ See section 2.1.

fixing agreements becomes blurred in the digital world, especially due to the implementation of algorithms.

4.2. Pricing algorithms

The following sections examine the impact of implementing algorithms especially on pricing strategies in the online environment. Building on the introductory analysis of the various implications of algorithms, this section delves deeper in the use of algorithms for observing competitors' prices (price monitoring) automatically setting prices based on market conditions such as demand or timing (dynamic pricing algorithms).

4.2.1. Price monitoring algorithms

Concerning specifically the first category of price monitoring algorithms, the section on resale price maintenance already introduced the topic by referring to the *Asus* case.⁵⁴⁶ Expanding on the analysis in the previous section - similar to the *Eturas* case - in *Asus* the technology was ultimately used by the four manufacturers to automatically adjust retail prices for several products. The algorithms enabled the manufacturers to effectively monitor retailers' prices and were used to implement the pricing strategy and so keep the prices in the European markets at a minimum level. The practical operation of this system can be seen, for example, in the specific case of *Philips*. From the Commission's decision it emerged how in France the undertaking established a comprehensive retail price monitoring system by collecting on a daily basis price information for each retailer and sharing it with relevant employees. In the event that retailers were to sell below the recommended price, *Philips* instructed employees to immediately ask those retailers to raise their prices.⁵⁴⁷ Another practical example can be seen in the case of the undertaking *Asus*. In the German market, in addition to monitoring retail prices through price comparison websites, *Asus* also used internal price monitoring algorithms to identify retailers selling its products below the recommended price. An internal watch list monitored retailers' selling prices, with a mechanism that immediately flagged online retailers selling below the recommended price.⁵⁴⁸

⁵⁴⁶ See Chapter 2, Section 2.1.

⁵⁴⁷ Case AT. 40181 – *Philip*, paras. 34-45.

⁵⁴⁸ Case AT. 40465 – *Asus*, para 27.

At hand of the Asus case, there are several aspects that need to be considered for the implementation of RPM in the online environment. As already stated above, the adopting of price tracking algorithms is allowed as it does not constitute resale price maintenance. The Commission, however, noted in its Algorithms Report that “algorithm-enabled price monitoring does not constitute an RPM offence as such but forms part of the RPM infringement, as it contributes to the effectiveness of the RPM”.⁵⁴⁹ This has to be understood in the context of online retailers using pricing algorithms that constantly monitor the prices set by their competitors. As a result, if one retailer offers different prices than its competitors, this has a knock-on effect, prompting other competitors to adjust their prices accordingly.⁵⁵⁰ In this context, Philips and Pioneer show that many retailers closely monitor retail prices in online transactions and react quickly to price competition. In the case of Pioneer, it was specifically revealed that many retailers use software known as "spiders" to track other companies' retail prices and automatically adjust their own prices to match the lowest.⁵⁵¹

As recognised by Commissioner Vestager, by targeting specific low-cost retailers the four manufacturers in that occasion were so able to influence the pricing strategies of other online retailers. It comes thus clearer how that price restrictions imposed on low-price online retailers in this case did end up reaching a wider impact on overall online prices for the relevant products.⁵⁵² In addition to these price-monitoring algorithms, manufacturers had other approaches to ensure retailers comply with recommended prices. For example, D&M, Pioneer, and ASUS used price comparison websites to monitor retail prices.⁵⁵³ Overall therefore the effectiveness of such RPM clauses sees an exponential increase in the digital market through the use of price monitoring algorithms.

On the other side, however, it could be also argued for an actual narrower impact of resale price maintenance through the usage of pricing monitoring algorithms. Firstly, it is interesting to note that, according to the European Commission's fact-finding

⁵⁴⁹ OECD, Algorithms and Collusion - Note from the European Union, DAF/COMP/WD(2017)12.

⁵⁵⁰ Commission, Statement by Commissioner Vestager on Commission decision to impose fines on four consumer electronics manufacturers for fixing online resale prices, 2018, available at: http://europa.eu/rapid/press-release_STATEMENT-18-4665_en.htm

⁵⁵¹ Case AT. 40182 – Pioneer, para 136.

⁵⁵² See also Commission, Press release, 2018, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601

⁵⁵³ Case AT. 40465 – Asus, paras 27 and 33.

report, the most common way for manufacturers to monitor recommended prices is not by using price monitoring software, but actually by manually monitoring websites.⁵⁵⁴ Secondly, as mentioned above, Philips collected prices from its retailers' websites on a daily basis, but this was actually done manually by receiving information about low priced retailers from other retailers. Thirdly, and most importantly, as described in the above section on RPM, the basic mechanism of such systems is that the retailers will adjust their pricing software to match - or even undercut - the lowest price available in the market.⁵⁵⁵ Therefore, if a manufacturer fails to persuade even a single low-price retailer to raise its prices, the overall aim to avoid price erosion cannot be achieved, as this single retailer would then affect all other price tracking algorithms.⁵⁵⁶ This assessment is also supported by the approach taken by the Commission in its Algorithms Report, where it recognised that “when retailer A adheres to fixed or minimum resale prices (RPM) and is being monitored by retailer B using algorithms, retailer B *only may* match A’s price.”⁵⁵⁷ From this it can be inferred that, especially in those markets particularly competitive and fragmented, a manufacturer's success in persuading all but one retailer to raise their prices may therefore not stop price erosion across the entire network.

Despite the latter view, however, the cases of Asus and the other three electronic manufacturers highlighted how the concerns on pricing algorithms expressed by the Commission in its Report to the OECD already in 2017 found an immediate realisation within the European market.⁵⁵⁸ Indeed in the following years – alongside the digitalisation of the market - there has been a renewed focus by the Commission against such price restrictions.⁵⁵⁹

In conclusion, the above section has highlighted how the implementation and enforcement of pricing restrictions, especially RPM, through algorithms appears to do have severe consequences on the competition on pricing in the digital market. First, the

⁵⁵⁴ Commission, Final Report on the E-commerce Sector Inquiry’ (2017) SWD (2017) 154 final, para. 577.

⁵⁵⁵ See Chapter 2, Section 2.1.

⁵⁵⁶ See also European Competition Law Review, 2018, nm. 470.

⁵⁵⁷ Commission Report, 2017, Algorithms and Collusion - Note from the European Union, DAF/COMP/WD(2017)12, para. 16, emphasis added.

⁵⁵⁸ See also Van Uytsel Steven, Mehra Salil, and Uemura Yoshiteru, Algorithms, Collusion and Competition Law, 2023, pg. 198 ff.

⁵⁵⁹ Marc Israel, Jacquelyn MacLennan and Jan Jeram, Vertical Restraints in an Online World: Competition Authorities Gear up their Enforcement Approach in the Digital Economy, 2019, Competition Law Journal 17, 19.

use of price monitoring algorithms in RPM can undoubtedly enhance the effectiveness of such a price restriction by making it easier and faster to detect deviations from (at least only in theory) recommended prices. In addition, the widespread use by retailers of software that monitors online prices and automatically adapts to competitors' prices creates the risk that pricing under RPM can spread to the entire relevant online market.

4.2.2. Dynamic pricing

The other application of algorithms in online pricing considered is dynamic pricing. These are algorithms that allow prices to adapt more quickly and efficiently to changing market conditions. Dynamic pricing will typically lead to higher prices when demand is high (or supply is low) and lower prices when demand is low (or supply is high), compared to a situation where instead prices change less frequently and manually.⁵⁶⁰ In the literature there are arguments to support how such dynamic pricing – by effectively balancing supply and demand – do indeed lead to efficiencies. For instance, the introduction of dynamic algorithmic pricing in the home delivery sector of the food industry has been examined. Findings indicate that while these pricing algorithms initially cause significant short-term price volatility, they ultimately lead to a decrease in average prices. More efficient pricing thus allows optimal use of capacity and reduces various forms of waste or other resources, thereby promoting efficiency in the market and ultimately lower prices for consumers.⁵⁶¹

In this regard, it becomes relevant also the latest position of the Commission. In a written answer given to a parliamentary question on behalf of the Commission, Commissioner for Justice Reynders acknowledged that practices such as dynamic pricing are not prohibited by EU law, as they fall within the economic freedom of companies. From his answer in July 2023, it also emerged regarding legal proceedings how “there is at this stage no precedent in EU competition law regarding so-called dynamic pricing”.⁵⁶²

Alongside these recognised efficiencies and the apparent compliance with the system of EU competition law, however, the heavy implementation of dynamic pricing over the last years has sparked concerns in certain commercial sectors.⁵⁶³ The case of the

⁵⁶⁰ OECD, Algorithmic competition – Note by Norway, 2023, pg. 3.

⁵⁶¹ MacKay, A., Svartbäck, D. and Ekholm, A. G., Dynamic Pricing and Demand Volatility: Evidence from Restaurant Food Delivery, 2022, pg. 8 ff.

⁵⁶² European Parliament, Parliamentary question, E-002400/2023(ASW), 2023.

⁵⁶³ See also Botta, M. and K. Wiedemann, To discriminate or not to discriminate? Personalised pricing in online markets as exploitative abuse of dominance, European Journal of Law and Economics 50, 2020, p. 400 ff.

online selling of airplane tickets is here considered due to the recent development in terms of national legislation. The practice of dynamic pricing - also called revenue management⁵⁶⁴ - is indeed particularly relevant for businesses with a fixed quantity of goods and low marginal costs. This is the case when production capacity is fixed in advance and the goods expire at a certain point in time. These criteria are applicable to airlines: schedules and aircraft are predetermined, marginal costs are low, and the value of a seat drops to zero after departure.⁵⁶⁵ In addition, within this industry, low-cost carriers use a simpler dynamic pricing structure than traditional airlines. The latter implement complex price discrimination techniques based on different fare classes, discount systems with limited access and customer loyalty schemes.⁵⁶⁶ In contrast, low-cost airlines - Ryanair being the most prominent example in the European market - base their dynamic pricing mainly on the expected demand and the timing of purchase. On the element of the timing of purchase, Ryanair usually offers a limited number of cheaper seats, and as these sell out, the prices of the remaining fares increase. These customers, who are aware of timing options, can thus book their tickets in advance to secure a low price. Instead, Ryanair benefits from last-minute bookings by business travellers, who are willing to pay higher prices due to their time constraints.⁵⁶⁷

4.2.2.1. The approach of the Italian legislator

Concerning the other main factor of the supply demand for low-cost airlines, the development at national level in Italy offers a prominent case study. The Italian national competition authority (AGCM) launched an inquiry in 2022 to determine whether the main airlines in the Italian market – notably Ryanair, Wizz Air, EasyJet and Ita - had engaged in illegal coordination through algorithms in the dynamic pricing of their tickets, in breach of Article 101 TFEU.⁵⁶⁸ The proceeding was opened in respect of an

⁵⁶⁴ See on this Kramer A., Friesen M., Shelton T. Are airline passengers ready for personalized dynamic pricing? A study of German consumers, Quinta Consulting, 2017.

⁵⁶⁵ Alfonso, The pricing strategy of Ryanair, In: *Airline Industry: Strategies, Operations and Safety*, 2010, pg. 132.

⁵⁶⁶ Ibid.

⁵⁶⁷ Numanoglu Hilal, Strategic pricing practices: Ryanair example, DIEM, 2019, pg 77; see also Cohen M. C., Jacquillat A., Serpa J. C., Benborhoum M., *Managing Airfares Under Competition: Insights from a Field Experiment*. Management Science, 2023, pg. 6081 ff.

⁵⁶⁸ Autorita' Garante della Concorrenza e del Mercato, Procedimento I863, Prezzo biglietti aerei da e per la Sicilia nel periodo natalizio, 2022, available at: [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/EA131DE0E183BC70C1258925004D308C/\\$File/p30408.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/EA131DE0E183BC70C1258925004D308C/$File/p30408.pdf)

increase in fares on routes to the island of Sicily during the Christmas period. However, the NCA - operating with the “traditional” instrument of competition law - ultimately had to determine that "there is no evidence of collusion among airlines regarding high flight prices."⁵⁶⁹

Against the difficulty to establish a collusion through dynamic pricing algorithms, the national legislator intervened in 2023 on the activities of the Italian NCA. Under the so-called Asset Decree it enabled the authority, if an investigative inquiry reveals competition problems in a given market that harm consumers, to “impose on the undertakings concerned, in compliance with the principles of the European Union legal framework and after consulting the market, any necessary and proportionate structural or behavioural measures in order to eliminate distortions of competition”.⁵⁷⁰ Initially, the proposed legislation also included a price cap on flights, which was subsequently withdrawn. The latter measure and its compatibility of this EU law is not considered here as it is beyond the scope of this study. Nevertheless, several consequences can be drawn from the legislative intervention that are relevant for this analysis in terms of competition law.

Firstly, in terms of powers, the NCA's instruments have been extended with the new legislation. It is true that already under the previous regime the authority had the power to carry out general investigative inquiries whenever there were concerns over possible restriction of competition on the market. However, such investigations could only lead to the publication of reports or the issuing of recommendations. Instead, under the current regime, the Italian AGCM can impose "any necessary and proportionate structural or behavioural measures to eliminate distortions of competition," regardless of whether there is an actual or even merely hypothetical violation of competition rules by these companies. In addition, if the companies do not comply with the measures imposed, they can be directly sanctioned as if they had committed an antitrust violation.⁵⁷¹ From this, it can be inferred how the competition authority has gained what can be seen as important additional powers in terms of regulation and sanctioning. The absence of a (even hypothetical) breach of national or EU competition law does

⁵⁶⁹ Autorita' Garante della Concorrenza e del Mercato, Procedimento I863, Prezzo biglietti aerei da e per la Sicilia nel periodo natalizio, 2023, available at: [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/819269EC8527BB50C1258A980051304B/\\$File/p31014.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/819269EC8527BB50C1258A980051304B/$File/p31014.pdf)

⁵⁷⁰ Decreto-Legge 10 agosto 2023, come convertito con modificazioni dalla L. 9 ottobre 2023, n. 136, Art. 1(5).

⁵⁷¹ See on this Decreto-Legge 10 agosto 2023, come convertito con modificazioni dalla L. 9 ottobre 2023, n. 136, Art. 1(6).

greatly increase the discretion available to NCA.⁵⁷² This becomes even more relevant when one considers that, although these powers were initially introduced by the legislator only for the air transport sector, they have since been extended to all sectors. Following a judicial decision in 2024, it was indeed clarified that the ratio behind the legislative intervention is to ensure competition in markets where the competitive confrontation between economic operators is weakened to the detriment of consumers. Against this background, it would therefore be inappropriate to limit the NCA's investigative powers to a specific sector of the market for two main reasons: firstly, it would create unequal treatment between operators in the air transport sector and those in other sectors of the economy; secondly, it would undermine the purpose of Decree-Law 103/2023, which is ultimately to protect all consumers.⁵⁷³ As a consequence, therefore, the above indicated enhance powers have to be extended to all commercial sectors.

Against this background, it should be recognised, however, how such added regulatory powers are in line with other national competition authorities. Indeed, in Germany the legislation has been recently amended as well, and currently it provides the national Bundeskartellamt with new interventions instrument for the protection of free and fair competition.⁵⁷⁴ In future, the German NCA will so be able to take targeted measures to eliminate or remedy "significant and persistent distortions of competition" identified during merely sector enquiries. However, the German legislation - although criticised by both economic operators and academics⁵⁷⁵ - provides comprehensive definitions and clarifications of what can be considered as a distortion of competition and, more importantly, what measures the German NCA can take.⁵⁷⁶

Instead, the intervention of the legislator in Italy has left doubt concerning the types of measures that the NCA can adopt following such investigations. The modality and contents of the legislation leave space to the future possibility for the Italian NCA to exercise penetrating powers of investigation and sanction in the absence of a prior allegation of unlawful conduct, without however having any applicable legislative

⁵⁷² Anitec-Assinform, Risposta alla Consultazione pubblica, 4 aprile 2024, pg.6, available at: https://www.agcm.it/dotcmsdoc/consultazioni/AnitecAssinform_4_aprile_2024.pdf

⁵⁷³ Consiglio di Stato, Parere n. 61 del 29 gennaio 2024; see also DLA Piper, Antitrust Bites – Newsletter, 2024, available at: <https://www.dlapiper.com/it-it/insights/publications/antitrust-bites/2024/antitrust-bites-february>

⁵⁷⁴ Gesetz gegen Wettbewerbsbeschränkungen (GWB), § 32 ff.

⁵⁷⁵ See e.g. Bundesrechtsanwaltskammer, Stellungnahme Nr. 28/2023, Juni 2023, Wettbewerbsdurchsetzungsgesetz / 11. GWB-Novelle.

⁵⁷⁶ Ibid, § 32f Abs. 3 S. 6 GWB.

framework of substantive and procedural rules. The counter proof of this problematic can be seen in the recent public consultation concluded by the same NCA, which concerned exactly the implementation of these additional powers.⁵⁷⁷ Concerns remain, however, regarding the exercise of these additional powers by the Italian AGCM. It should be considered how in Germany the applicable rules and procedures derive from the legislative process and are defined by national law, as indicated above. In Italy, on the other hand, these rules are being developed through a public consultation and are to be relegated to the soft law instrument of a communication from the same competition authority.

A second element that derives from the intervention of the Italian legislator in 2023 concerns directly the implementation of algorithms in the air transport industry. The above-mentioned Asset Decree did introduce a prohibition in the usage of algorithms in order to set ticket's prices based on web profiling or the device model used.⁵⁷⁸ Following the failed attempt to address the issue through the traditional powers of the NCA in 2022, this added provision reflects the legislator's intention to directly regulate the use of algorithms in the airlines sector. It highlights thus the recurring pattern of this study where regulatory provisions, specifically for technological developments, are introduced after initial competition law enforcement efforts.

Furthermore, a provision likely to have a greater impact on restricting competition through algorithms is the assignment to the NCA to verify the existence of concerted practices, not only those arising from agreements between natural persons, but also those implemented by algorithms, whether commissioned by individuals or resulting from practices of abuse of a dominant position.⁵⁷⁹ The practical relevance of this last provision can be seen in the recent investigation of the Italian NCA on the use of pricing algorithms in passenger air transport on routes between the Italian peninsula and the main islands.⁵⁸⁰ As the title of the investigation already gives away, this action is a follow-up to the attempt in 2022 to curb rising fares on routes to the Italian islands. While the scope of the investigation is the same as before, in terms of procedural consequences this creates, however, a unprecedented situation. The conclusion of the investigation does enable the Italian AGCM to implement for the first time the new

⁵⁷⁷ Autorita' Garante della Concorrenza e del Mercato, Consultazione pubblica, 2024, available at: <https://www.agcm.it/dotcmsdoc/consultazioni/p31091s.pdf>

⁵⁷⁸ Decreto-Legge 10 agosto 2023, come convertito con modificazioni dalla L. 9 ottobre 2023, n. 136, Art. 1(3).

⁵⁷⁹ Ibid, Art.1(5)(c).

⁵⁸⁰ Autorita' Garante della Concorrenza e del Mercato, Press release, 2023, available at: <https://www.agcm.it/media/comunicati-stampa/2023/11/IC56>

regulatory and sanctioning powers derived from the Assets Decree 2023. Considering the timing, shortly after the decree was enacted, and the text of the decision, which directly refers to the 2023 legislation,⁵⁸¹ this sanctioning scenario appears to be indeed highly likely. It will be therefore interesting to observe how these powers are implemented in the practice in the absence of a defined procedural framework.

⁵⁸¹ Autorita' Garante della Concorrenza e del Mercato, Delibera, 2023, available at: <https://www.agcm.it/dotcmsdoc/allegati-news/IC56%20avvio%20proc.pdf>

5. Conclusion

This second part builds up on the foundations laid down in the first chapter on the EU digital market and analyses how price restrictions are implemented along the vertical chain. The updated Vertical Block Exemption Regulation and the accompanying Guidelines have introduced specific elements for the treatment of distribution agreements and related price restrictions.

The Commission has recognised how the growing importance of selling online has enabled an increased presence of manufacturers at the retail level who are now able to directly reach the consumers. In fact, digitalisation has led businesses to take measures to control the distribution of products and the prices at which they are sold, once they have been distributed on the internet. The case of resale price maintenance shows how the classification of such restrictions needs to take into account the additional elements arising from this online environment which, such as in the case of free-riding, could alter the balance of their effects on competition.

In addition, the long-running case study of the online hotel booking sector provides a useful and comprehensive example for analysing the different assessments of MFN restrictions. The 2022 update of the Vertical Block Exemption Regulation acknowledges this intense debate between competition authorities and courts across the Union and aims to provide a uniform solution for the treatment of such clauses. However, the developments regarding the enforcement of MFN restrictions on the largest online platforms remain open, as the regulatory regime of the Digital Markets Act introduces an additional, apparently conflicting, instrument to address these issues. Furthermore, as indicated in the first chapter, the digital market has also seen the emergence of new players in the form of online platforms, which has led to tensions between suppliers and newly established platforms such as Booking.com and Amazon for their intermediary services to end consumers. In this regard, the treatment of pricing restrictions such as RPM and MFN shows how the implementation of algorithms further facilitate pricing restrictions in online sales and could exacerbate the anticompetitive impact resulting therefrom. The implementation of these algorithms is indeed particularly relevant to price restrictions and adds complexities to the enforcement of competition provisions, such as between recommended prices and price fixing provisions.

In addition, on the use of algorithms within the EU digital market, the case study of the air transport sector in Italy illustrates how, despite concerns about the modalities chosen, the Italian NCA has been granted unprecedented regulatory powers to address these challenges, shifting so away from competition enforcement. It will be interesting

to see how these measures, along with the added regulatory powers at the EU level, are implemented in the near future and the extent of their impact on market conditions.

Chapter 3: Restrictions on the internet as a sales channel

1. Introduction

The digitalisation of the economy has brought advantages to both consumers and businesses by amplifying their possibility to purchase services and goods through the online channels. The previous chapter has shown how these opportunities in the EU digital market have led to changes in the practices of firms along the vertical chain in implementing price restrictions vis-à-vis both businesses and final consumers. The introduction of new possibility to sell through new online channels has also meant the introduction of new way for undertakings to exercise their commercial interests. Indeed, while the online environment creates ample opportunities, businesses have a – not always legitimate – interest in influencing the way their products are sold within this EU digital market.

Similar to the previous chapter, restrictions can be imposed not only on how prices are set and charged in the online market, but also on the online channels through which certain products and services are sold. Indeed, the first chapter has already shown how the digitalisation has meant the possibility for any business to reach consumers across borders, who are "just a click away". Expanding on this concept, the digitalisation of the commercial chain means, on the one hand, that the products can reach the consumers through multiple channels such as the online platforms or even directly, for example by setting up the manufacturer's own website. On the other hand, it also means that the manufacturer's audience does not know any territorial limits, since, for example, by offering the products on the online platforms, they can (theoretically) be sold throughout the entire common market and even beyond. The possibility offered by the online market to differentiate and expand channels has therefore led to an interest and a greater emphasis on the part of companies to control where and under what conditions these products are sold, for example by imposing a ban on certain websites or online platforms. In this respect, the element of online platforms as central players in the digital chain becomes relevant again.

This question of how far and for what reasons companies can restrict the sale of their products in the digital market has been primarily shaped by the enforcement of EU competition law and will therefore be analysed based on relevant case law. In this context, the new hardcore restraint introduced in 2022 by the Block Exemption Regulation on the "effective use of the internet," which will be analysed below, is of great importance.

In addition to the issues surrounding restrictions over the use of the internet as a sales channel, where the courts and subsequently the Commission have intervened in applying and amending competition provisions, another significant element is the

restriction of cross-border sales: the practice of geo-blocking. As introduced in the first chapter, this refers to the barriers many consumers face when attempting to purchase goods or services online from retailers in another Member State. Geo-blocking occurs specifically when a website identifies the consumer's geographical location and, directly or indirectly, blocks the purchase for reasons related to the consumer's nationality, place of residence, or place of establishment. In this regard, the Commission intervened specifically, alongside the traditional enforcement of EU competition law, with a regulatory framework, the most important piece of which is the Geo-Blocking Regulation of 2018.⁵⁸² The introduced Regulation addresses unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence, or place of establishment within the EU internal market. The second half of the chapter addresses the content of these regulatory provisions and specifically examines how the Geo-Blocking Regulation fits with the enforcement of competition rules, with the Canal+ and Valve cases serving as the latest indications. However, it should be also considered that, as a sector specific regulation, the 2018 Regulation addresses only certain sectoral practices. In this context, it is interesting to analyse its impact on the EU digital market and the potential to extend its principles to all commercial relations, an important example being the evaluation carried out in recent years on the exemption from the Geo-Blocking Regulation for the audio-video sector.

2. Restrictions to sell online

With regard to the first issue mentioned, restrictions on the territorial scope of sales online, the problem was initially addressed, and partly regulated, by judicial decisions at both national and EU level. The reason behind it is that there has been, also in this regard, a lack of clear indication at EU level concerning the restrictions on the use of the internet. Similar to the restrictions on pricing, the lack of specific recognition of online sales also created uncertainty about the way in which businesses - especially manufacturers - could control their products once within the commercial chain. The latest version of the Vertical Block Exemption Regulation not only does specifically address this issue, but it acknowledges its centrality by adding even an additional hardcore restriction concerning the use of the internet. A critical analysis of the current set of rules must begin with an examination of previous case law, as its reasoning has been then largely codified in 2022 into the Block Exemption Regulation.

⁵⁸² Regulation (EU) 2018/302.

2.1. Bans on online distribution

As an introduction, it should be noted that a manufacturer's prohibition of its distributors from using the Internet for sales purposes constitutes the greatest possible restriction on the distributor's sales within the digitalised economy. These restrictions are, in principle, a restriction on resale, which affects intra-brand competition between dealers of the same brand, both on the Internet and in stationary stores.

The issue had been firstly addressed by the Court of Justice in the Pierre Fabre case.⁵⁸³

Pierre Fabre as a French company manufactured and sold cosmetics and personal care products under high-end brands such as Avène or Ducray through a number of subsidiaries. These products were sold mainly through pharmacies in France and in other EU Member States. The general conditions for the distribution and sale of these products were that sales must take place exclusively in a physical space where a qualified pharmacist is present. The practical consequence was thus the impossibility to carry out sales in the online environment. The Court indicated in that occasion how such a *de facto* ban on online sales does infringe Art.101(1) TFEU as a restriction by object. In particular, it was recognised that this contractual clause significantly reduces the ability of an authorised distributor to sell the contractual products to customers outside its designated territory or area of activity. Consequently, it is likely to restrict competition in that sector.⁵⁸⁴ A possible justification for the restriction within a selective distribution system was not found in this case, as the Court stated that this cannot arise from “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”.⁵⁸⁵ In addition, it also indicated – in one single line of argumentation - how the aim of maintaining a prestigious image is not a legitimate aim for restricting competition in a selective distribution system.⁵⁸⁶

On this last point, the requirements for a possible justification of such restrictions have been developed by the Court of Justice in the Metro judgment.⁵⁸⁷ The Metro case did not directly address the online distribution, but it is nonetheless relevant as it established the criteria that need to be met in order to qualify a distribution agreement as a purely qualitative selective distribution system which falls outside the scope of

⁵⁸³ C-439/09 - Pierre Fabre Dermo-Cosmétique.

⁵⁸⁴ Ibid, para. 38.

⁵⁸⁵ Ibid, para 44.

⁵⁸⁶ C-439/09 - Pierre Fabre Dermo-Cosmétique, para. 20.

⁵⁸⁷ C- 26/76 - Metro SB-Großmärkte v Commission.

Art. 101(1) TFEU. The issues at the time routed around the refusal of the manufacturer SABA to appoint METRO as a wholesaler because it did not meet the relevant criteria within the selective distribution system. Against this background, Commission found how found that SABA's distribution system did not infringe Article 101 TFEU. Subsequently, in dismissing Metro's appeal, the Court of Justice set out the conditions which a selective distribution system must satisfy in order to be regarded as 'purely qualitative'. Retailers must be selected on the basis of objective criteria of a qualitative nature and in a uniform manner and must not go beyond what is necessary to maintain the qualitative system. In addition, and more importantly for this analysis, there is the need that the characteristics of the product necessitate such a network in order to preserve quality and ensure proper use.

Against this case law, in the subsequent Pierre Fabre case, on the classification of the distribution agreement as a restriction by object, the Court simply stated that lack of the requirement under Metro of an objective justification for the distribution agreement means that the prohibition amounts to a restriction by object of Art. 101(1) TFEU.⁵⁸⁸ The Court arrived at such conclusion merely indicating that the requirements developed under the Metro doctrine for a justification were not met in that case, as specifically due to the characteristics of the product a restriction in the online distribution was not necessary for preserving an image of prestige.⁵⁸⁹ From the following case law of the Court it emerges how, instead, a restriction is necessary to protect products the brand image of which is particularly important, such as luxury products.⁵⁹⁰ In the Coty case, for instance, the Court recognised indeed how such a restriction on distribution is possible when it pursues the legitimate aim of preserving the luxury image of certain high-class products of luxury nature.⁵⁹¹ While the Coty judgment will be analysed below in the context of prohibiting third-party platforms on the internet, it is relevant here as the Court in its case law seems to distinguish based on the nature of the product: restrictions on online sales in the context of selective distribution are justified in order to preserve the image of products of luxury nature, but not for other types of products. The consequence is that despite pursuing the same aim—namely preserving the product's image—the assessment of the legitimacy of that aim does diverge based solely on the product's nature. For non-luxury products such restrictions on the distribution on the internet are – at least according to the Court - not

⁵⁸⁸ C-439/09 - Pierre Fabre Dermo-Cosmétique, para. 39.

⁵⁸⁹ See also Case 26/76 - Metro SB-Großmärkte v Commission, para. 20.

⁵⁹⁰ C-99/79 - Lancôme SA etc v Etos BV; see also Whish and Bailey, Competition Law, pg. 675.

⁵⁹¹ See on this C-230/16 - Coty Germany GmbH v Parfümerie Akzente GmbH, para. 32.

necessary due to the characteristics of the product and thus they infringe competition by their very nature as a restriction by object.

By adopting such a distinction between the assessments in *Pierre Fabre* and *Coty*, the Court opened the door to interpretive issues around the right classification of luxury good. Indeed, in the subsequent *Coty* judgment, the Court clarified that its findings in *Pierre Fabre* did not undermine the permissibility of a selective distribution system for luxury goods. According to the Court in *Coty*, its previous position – which rejected a compatibility with Art.101 TFEU – concerned solely the aim of preserving the prestigious image of the goods in question in that single case and the related justification for an absolute ban on internet sales. As a consequence, those findings in *Pierre Fabre* did not address the compatibility with Art.101 of selective distribution systems in general.⁵⁹² Following on from this additional argumentation in *Coty*, it has been asserted that the line of distinction can be drawn in that the *Pierre Fabre* case was about preserving an image of high prestige brands - but not of products of luxury nature - whereas the later *Coty* case was about products considered to be of luxury nature.⁵⁹³ In any event, it should be also noted that the attempted justification in the former case was for an absolute ban on all online sales, whereas the lawful measures adopted in *Coty* were limited to a ban on online platforms, which will be specifically assessed in the next section.

A more extensive and explicit reasoning on this differentiation could be seen in the Advocate General's opinion in *Coty*. The Opinion - which is an independent position on the case that the judges may consider for the final judgment⁵⁹⁴- suggested that the justification should apply to selective distribution systems designed to maintain the luxury image of both 'luxury' and 'quality' products. Indeed, according to Advocate General Wahl, the decisive factor is the need for the network to preserve the prestige image of the product.⁵⁹⁵ In addition, the Opinion also suggested to expand the justification for all brands, not just for products of luxury nature. However, although these indications would have undoubtedly offered valuable guidance and greater legal clarity, the Court did not endorse them. As a result, the precise definition of the "luxury product" requirement remains open to speculation. For businesses engaged in online sales, this has led to practical difficulties and legal uncertainty regarding whether their

⁵⁹² C-230/16 - *Coty Germany GmbH v Parfümerie Azande GmbH*, para. 34.

⁵⁹³ Zelger, *Restrictions of EU Competition Law in the Digital Age*, 2023, pg. 163.

⁵⁹⁴ Article 19(2) TEU ; Article 252 TFEU.

⁵⁹⁵ AG, Opinion, C-230/16 - *Coty Germany GmbH v Parfümerie Akzente GmbH*, para. 92.

contracts include luxury products and can therefore impose bans on certain online platforms.⁵⁹⁶

This issue is not further analysed in terms of judicial assessment, as the current version of VBER has fulfilled its role in providing guidance and has put an end to such legal uncertainties. Indeed, the later section will show how the Commission with the current Block Exemption Regulation rejected this seemingly dubious distinction, and the current safe harbour provisions of the Regulation recognise the legitimacy of preserving a product's image for all, not just for products of luxury nature.⁵⁹⁷

Beyond this distinction based purely on the nature of the product, a critical analysis of the Pierre Fabre judgment could nevertheless argue that the restriction by object under Art. 101 TFEU should never be treated as an automatic result of a certain conduct. A selective distribution system should not be deemed to infringe competition by object merely because it fails to meet the rather strict requirements set out in the Metro case law, which is exactly the process suggested by the Court in Pierre Fabre.⁵⁹⁸ Instead, in line with the case law of the very same Court of Justice, the economic and legal context in which these restrictions are being implemented should also be considered at this stage.⁵⁹⁹ This assessment is particularly relevant for practices in the digital environment. Indeed, the aforementioned argument on free-riding concerns becomes pertinent here: in the Cartes Bancaires case the Court explicitly recognised that concerns over free-ridings represent a legitimate aim when assessing a restriction by object in the digital market.⁶⁰⁰ From this it follows how it seems more appropriate for a ban on online activities to not automatically be deemed an infringement by object under Art. 101(1) TFEU, following an unsuccessful justification under the Metro criteria. Instead, if the distribution agreement is caught by Art. 101 TFEU, it is advisable to take into account additional elements arising from the broader legal and economic context of the restriction in question.

On a second level, the Pierre Fabre case also offers useful insights on the possible classification of online sales under the Vertical Block Exemption Regulation. In Pierre

⁵⁹⁶ See for instance, Kluwer Competition Law Blog, The Coty Exception: A Luxury for a Selected Few?, available at: <https://competitionlawblog.kluwercompetitionlaw.com/2017/12/15/coty-exception-luxury-selected/>

⁵⁹⁷ See on ban on online marketplace: Guidelines on Vertical Restraints (2022/C 248/01), para. 334.

⁵⁹⁸ C-439/09 - Pierre Fabre Dermo-Cosmétique, para. 39.

⁵⁹⁹ C-179/16 - F. Hoffmann-La Roche Ltd, Roche SpA, Novartis AG, Novartis Farma SpA, para. 79.

⁶⁰⁰ Chapter 2, Section 2.2.1.

Fabre, already at the national level, the national competition authority did indicate that the practice of prohibiting internet sales, although not explicitly mentioned under the then applicable VBER Regulation 2790/1999, needs to be considered as equivalent to a ban on both active and passive sales. Consequently, the practice were to fall under Article 4(c) of the Block Exemption Regulation at the time, which excluded from the safe harbour of the Regulation restrictions on active or passive sales by members of a selective distribution system.⁶⁰¹ Instead, the manufacturer Pierre Fabre argued that an internet ban should be considered equivalent to a prohibition on distributors operating from an unauthorised place of business and, as such, should not be considered a hardcore restriction under Art. 4 of the Regulation. The Court of Justice on this issue did explicitly pose the question on whether the internet can be – under an extensive interpretation – considered as a physical area where sales are concluded directly and thus a ban would only amount to a passive restriction.⁶⁰² Ultimately, however, it followed the position above indicated of the NCA and considered the internet ban as a hardcore restriction, thus denying the block exemption.⁶⁰³ The reasoning behind is that an undertaking has in any case the possibility of an exemption under Art.101(3)TFEU and therefore such an extensive interpretation of a physical store under the Block Exemption Regulation cannot be adopted.

In this regard, interesting is to highlight the changed approach under the current VBER concerning the definition of online sales. While the Commission explicitly defined the online sales as passive sales, it also recognised how certain activities, such as offering an online shop with a domain name or language options which vary from those commonly used in the distributor’s trading area, do count as a form of active sales.⁶⁰⁴ As a consequence, the suppliers have now more possibilities to restrict the online sales of their retailers within (legitimate) selective distribution system. Nonetheless, as will be shown below, measures such as those implemented by Pierre Fabre would still fall outside the safe harbour under the current regime and would even find an explicit hardcore restriction under Article 4(e). Anticipating the later analysis, the Commission indicates how this new hardcore restriction finds application also in cases where the agreement prohibits *de facto* the use of the internet.⁶⁰⁵ This specification resembles exactly this scenario in Pierre Fabre, where the internet sales were not directly banned

⁶⁰¹ C-439/09 - Pierre Fabre Dermo-Cosmétique, para. 20.

⁶⁰² Ibid, para. 56.

⁶⁰³ Ibid, para. 54.

⁶⁰⁴ Commission Regulation (EU) 2022/720, Art. 1(1)(1).

⁶⁰⁵ Guidelines on Vertical Restraints (2022/C 248/01), para. 203.

as a means of selling, but a physical presence was required, meaning a *de facto* impossibility to sell online.

As a complementary note, it should be mentioned how a restriction or total ban on the use of the internet within the vertical chain can be also indirectly achieved through the practice of dual pricing. As defined both under the previous VBER and also under the current version, this is an agreement whereby the retailer must pay the manufacturer a higher price for products resold online than for those sold in brick-and-mortar stores.⁶⁰⁶ These dual pricing systems can also be implemented in a more subtle way through sales-related discounts or retroactive bonus payments (so-called kickback payments).⁶⁰⁷ The purpose of dual pricing is to limit the accessibility of retailers to internet customers and incentivise, or reward, an appropriate level of investments in the physical sales.⁶⁰⁸ In extreme cases, it can, however, make the share of internet sales so unprofitable that it effectively excludes, or discourages, retailers from setting up or expanding their sales over the internet, thus *de facto* imposing an absolute ban on online sales.

The dual pricing does provide an excellent example of how the legislator recognised the growing importance of the online sales and thus changed its approach. It should be indeed noted that under the previous VBER dual pricing qualified as a hardcore restriction.⁶⁰⁹ This provision under VBER 2010 reflected the importance attached to online sales as a means of achieving the internal market, as the Commission stated: "The Internet is a powerful tool to reach a greater number and variety of customers than traditional sales methods ...".⁶¹⁰ The underlying principle under the previous hardcore restriction for dual pricing was clear: restrictions that limit the distributor's access to a greater number and variety of customers can not be accepted under EU competition law and thus fall within Art.101(1) TFEU. Indeed, when the previous VBER came into force, online sales were a new sales channel that needed to be protected over traditional sales.

However, it is clear from the above chapters that the commercial landscape has changed dramatically over the last 12 years, and even more so since the pandemic. As a consequence, it is not surprising that the Commission under the revised VBER has

⁶⁰⁶ Guidelines on Vertical Restraints (2022/C 248/01), para. 209, see also previous Guidelines 2010, para. 52(d).

⁶⁰⁷ Bundeskartellamt, B5-100/09 – Garmin; see also Pautke/Billinger, ZWeR 2016, pg. 40- 43.

⁶⁰⁸ Guidelines on Vertical Restraints (2022/C 248/01), para. 209.

⁶⁰⁹ Guidelines on Vertical Restraints (2010/C 130/01), para. 64, para. 52.

⁶¹⁰ Ibid, para. 52.

switched position on this issue: in contrast to the VBER 2010 such price differentiation is now exempted, provided it does not have the object to restrict the effective use of the internet by the distributors.⁶¹¹ As indicated under the updated Guidelines, the practice of dual pricing will now benefit from the safe harbour as long as the restriction is designed to encourage or reward an appropriate level of investment both online and offline. In this context, it is noteworthy to highlight that the free-riding problem mentioned above has been acknowledged and recognised by the legislator. Indeed, the practice of dual pricing allows to incentivise investment in marketing and customer support of physical retailers, who are able to see a return on these investments in the different price charged in online shops.⁶¹²

2.2. Third-party platforms bans

The second important step developed within the case law of the EU Courts on the use of internet for sales has been in the Coty case.⁶¹³ The proceeding in Coty concerned an appeal to the Oberlandesgericht (Higher Regional Court) of Frankfurt am Main against a restriction preventing luxury goods from being sold on third-party platforms, including Amazon Germany. Coty, a German manufacturer of luxury cosmetics, sold its products through a selective distribution system and Parfümerie Akzente, one of the authorised distributors, sold Coty's products through various channels, including its own online shop and Amazon Germany. However, in a move that underscores the growing importance of the digital economy, Coty decided to update the terms of its selective distribution system. This revision allowed authorized distributors to sell online exclusively through "electronic shop windows." As a consequence, sales through third party platforms not authorised by Coty, such as online marketplaces like Amazon.com, became prohibited. Coty justified the updated policy with the necessity to protect the luxury nature of its cosmetics products. As mentioned above, at the time no explicit provision addressed online sales and thus, due to uncertainty about the legitimacy of such restrictions, the German Court referred the question to the Court in Luxembourg.

2.2.1. Compatibility with Art.101(1) TFEU

The Court of Justice clarified that the use of selective distribution systems for products with a luxury image is – even after the above mentioned Pierre Fabre judgment –

⁶¹¹ Guidelines on Vertical Restraints (2022/C 248/01), para. 209.

⁶¹² Rohrßen, VBER 2022: EU Competition Law for Vertical Agreements, pg. 124.

⁶¹³ C-230/16 - Coty Germany GmbH v Parfümerie Akzente GmbH.

permitted under Article 101 TFEU. As anticipated in the previous section, the Court justified this restriction by recognising that consumers of luxury goods associate them with a particular “aura of luxury” which distinguishes them from similar goods.⁶¹⁴ Consequently, any “impairment” of that aura is likely to affect the actual quality of the products. In this regard, the characteristics and conditions of selective distribution systems can help to preserve the quality of luxury products and ensure their proper use. In taking this position, the Court in *Coty* incidentally addressed doubts raised by the rather superficial passage in the *Pierre Fabre* judgment concerning the aim of preserving a product's image and provided so clarifications related to the category of luxury products.

Against this background, in this judgment the Court upheld the prohibition of internet sales through third-party platforms such as Amazon as a proportionate means of promoting competition. In its reasoning, the Court noted that *Coty*'s resellers were selected on the basis of objective criteria of a qualitative nature, established uniformly for all potential resellers and applied in a non-discriminatory manner.⁶¹⁵ In addition, within such a qualitative distribution system, a prohibition on online sales via recognisable third-party platforms does not go beyond what is necessary to protect the luxury image of the product and is also appropriate to achieve the overall object of the selective system to protect the luxury image of the product.⁶¹⁶ As a consequence, the ban on online platforms is also a proportionate measure and thus, under the above mentioned *Metro* criteria, is to be held compatible with Art.101(1) TFEU.

As anticipated, the judgment provided at the time long-awaited legal certainty for manufacturers who distribute their goods through a selective distribution system and for their authorised dealers. It is particularly welcome that the Court has affirmed the principle that protecting the luxury image in order to preserve product quality is permissible within a selective distribution system, thus removing - at least for clearly identified luxury products - the legal uncertainty created by the *Pierre Fabre* judgment. However, despite reaching a reasonable solution, the reasoning used by the Court to justify such results remains open to criticism.

In this respect, a comprehensive assessment of the position of the Court of Justice allowing online platform bans – which has been then codified under the current VBER - needs to take into account the wider context of alternative assessments conducted by

⁶¹⁴ See also AG Opinion, C-230/16 - *Coty Germany GmbH v Parfümerie Akzente GmbH*.

⁶¹⁵ *Ibid*, para. 36.

⁶¹⁶ *Ibid*, paras. 42-58.

national courts and competition authorities at the time. For instance, in Germany the Bundeskartellamt had taken a much stricter stance against any possible restriction implemented by the manufacturer Adidas over sales of its distributors via digital platforms.⁶¹⁷ The national NCA had considered such restrictions as not necessary if "as a milder means there is the possibility of establishing specific rules for dealing with the contractual products".⁶¹⁸ This reflected the positions already taken in several judgments in Germany, where judges emphasised the need to consider the compatibility of absolute bans on online platforms under the general principle of proportionality. This means that equally effective, and less intrusive measures, need to be also considered. According to the case law at national level, such more proportionate measures would be, for instance, to restrict sales on online platforms under the form of individual offers directed to consumers, while still allowing distributors to conduct sales via so-called dealer shops.⁶¹⁹

Against this background of alternative assessments on platform bans, a detailed analysis of the Coty judgment indicates that the requirement under the Metro criteria regarding the necessity of the restriction—specifically, a general prohibition on all online platforms—is the weakest part of the argumentation. The Court of Justice, in support of the necessity of the measure, emphasised in its judgment the lack of a direct control of the manufacturer in the digital environment when products are available on third-party platforms, in contrast to when they are offered on retailers' own online shops. According to the Court, control over sales is the core objective of a selective distribution system and therefore plays a fundamental role in justifying the necessity of such restriction.⁶²⁰ While the latter statement may be true, it should be, however, recognised that the manufacturer does not lose control of the products even if they are sold through online platforms.

The reason indicated by the Court for the lack of control is that the manufacturer does have a contractual link with the single retailer, whereas this is not the case in relation to the third online platform, meaning that the manufacturer or supplier is prevented "from being able to require, from those third-party platforms, compliance with the quality conditions that it has imposed on its authorised distributors."⁶²¹ Against this rather formal and narrow view, it should be argued that the products on third party

⁶¹⁷ Bundeskartellamt, Az. B3-137/12 – Adidas.

⁶¹⁸ Ibid, pg. 4.

⁶¹⁹ OLG Karlsruhe, 25.11.2009 - 6 U 47/08 Kart.

⁶²⁰ C-230/16 - Coty Germany GmbH v Parfümerie Akzente GmbH, para. 44.

⁶²¹ Ibid, para. 48.

online platforms are still offered by the selected distributors with whom the manufacturer has a contractual relationship. It is precisely because of this contractual relationship that the manufacturer retains the possibility of acting against its distributors in the event of an inadequate presentation or damage to the image of the products on the platform.⁶²² From this, it follows how the main argument used in the *Coty* case to justify the necessity for the distributional restrictions does not appear, at best, substantiated.

In addition to the reasoning behind the need to ban online platforms, the practical consequences of the Court's position must also be considered. The *Coty* judgment found online platform bans to be compatible with Article 101(1) TFEU and this has the consequence that there is no need for the safe harbour of the Vertical Block Exemption Regulation. Therefore, an assessment as a hardcore restriction under Article 4(c) VBER is no longer necessary. Moreover, even in cases where the block exemption does not find application, for instance due to the exceeding thresholds, this compatibility with Art.101(1) TFEU also removes the need for the balancing exercise required for an individual exemption under Article 101(3) TFEU.⁶²³ By justifying third-party platform bans as compatible restrictions with Article 101(1) TFEU under the *Metro* criteria, the full assessment of the pro- and anti-competitive aspects is so effectively precluded. Therefore, the view of online platform bans as permissible and lawful qualitative selective distribution systems leads to important different procedural analysis under competition law.

Concluding, according to these remarks of the *Coty* judgment, online platform bans do not appear to be necessary - within the meaning developed under the *Metro* doctrine - to protect the product image, as milder means are often available to achieve the very same objective. A blanket prohibition on selling on any third-party platforms therefore cannot be a justified restriction of a distribution system under Art.101(1) TFEU and, under a procedural perspective, it also leads to a distortive and too favourable analysis under EU competition law.

⁶²² Teichmann, *Die Reformbedürftigkeit der Vertikal-GVO am Beispiel von Plattformverboten und Preisparitätsklauseln*, 2020, pg.111; see also Kumkar, *Zur Zulässigkeit pauschaler Plattformverbote im Internetvertrieb von Luxuswaren*, ZWeR 2018, 129 ff.

⁶²³ Mäger/von Schreitter: *Vertikale Wettbewerbsbeschränkungen und das Internet: Schutz des Verbrauchers oder Behinderung effizienter Vertriebsstrukturen?* NZKart, 2015, pg. 68.

2.2.2. Block exemption under VBER

Furthermore, and more importantly for this analysis, the judgment in *Coty* provided also guidance on how to approach online marketplace bans where the Metro criteria are not met, and thus Article 101(1) TFEU finds application.⁶²⁴ In particular, the question was raised as to whether such third platform prohibition clauses could benefit from the safe harbour of the block exemption. First, unlike in the *Pierre Fabre* case, these restrictions do not exclude online sales altogether. Instead, they restrict only certain specific types of internet sales, while still allowing sales through individual web shops of the selected distributor or unidentified third party platforms. Second, according to the Court, it is not possible to distinguish the group of "third-party platform customers" from other online customers in general, which the next paragraph will show is relevant under Article 4(c) VBER. On this the Court reached the same conclusion of the Advocate General Wahl⁶²⁵ in his Opinion and the Commission in the sector enquiry, both of which considered platform bans to be in principle permissible.⁶²⁶ In terms of argumentation, interesting to notice is that the Court followed entirely the position of the lower national judge, where a possible infringement of Art. 4 had been rejected with the argumentation that the platform customers could still be reached by retailers via other channels on the Internet.⁶²⁷

From this argumentation adopted by the Court in *Coty*, it follows that third-party platform bans can not be considered a restriction on the customer group within the meaning of Art. 4(b) of the 2010 Vertical Block Exemption Regulation, nor a restriction on active or passive sales within a selective distribution system under Art. 4(c). Before the explicit treatment of platforms bans had been introduced under the current Block Exemption – as the next section shows - is it noteworthy to analyse the argumentation of the Court on the interpretation of the at the time applicable Art. 4(c)VBER, which concerns the prohibition of restricting active or passive sales. For this provision it should be noted how the standard for the fulfilment is relatively broad: while for Art. 4(b) VBER it is required a complete exclusion in the sense of a sales prohibition, under Article 4(c) VBER it is sufficient if the sale online is merely made more difficult.⁶²⁸

⁶²⁴ *Ibid*, paras 60 ff.

⁶²⁵ Opinion, AG, C-230/16 – *Coty Germany*, paras 123 ss.

⁶²⁶ European Commission, E-commerce Sector Inquiry, para. 41.

⁶²⁷ OLG Frankfurt a.M. Az. 11 U 96/14 – *Depotkosmetik II*; see also Teichmann, *Die Reformbedürftigkeit der Vertikal-GVO am Beispiel von Plattformverboten und Preisparitätsklauseln*, 2020, pg. 127.

⁶²⁸ *Jestaedt/Zöttl*, *MüKo Bd. 1 EU-Wettbewerbsrecht*, Art. 4 GVO Nr. 330/2010, para. 127.

This provision is indeed intended to protect the selective distribution members from any sales restriction in order to maintain the remaining competition.⁶²⁹

Against this background, the argumentation of the Court in *Coty* does not seem, however, to acknowledge this stricter interpretation. As indicated above, the Court makes reference to the fact that other shops on the internet are still accessible. While this may be sufficient under Art. 4(b) to exclude a hardcore restriction, it cannot apply to Art. 4(c). Otherwise, any blanket platform ban would, in principle, be block exempted, as access through the company's own website would still be available. The Court, by adopting such a broad interpretation of Art. 4(c) VBER, ultimately contradicted also its own approach. In the *Pierre Fabre* judgment, the same Court of Justice rightly indicated in fact that the Vertical Block Exemption Regulation should be interpreted narrowly, considered the possibility of a single-case exemption under Art. 101(3) TFEU.⁶³⁰ Furthermore, beyond the question of interpretation, the possibility of a blanket ban on all platforms has been recognised as not being necessary to protect the image of a product.⁶³¹ Indeed, such bans fail to recognise the already above mentioned difference in the digital market between high-level and lower-level online platforms.⁶³² A general ban would also cover high-level platforms, which, as later will be shown, have been recognised to be able to preserve the product's image. Interestingly, this argument remains relevant under the current VBER rules and will therefore be addressed below. Against this background, it follows how the argumentation adopted by the Court concerning third-platform bans under the Block Exemption Regulation applicable at the time raises, especially regarding the rejection of a hardcore restriction under Art. 4(c) VBER, several doubts.

As a final point, it is worth emphasising the particular relevance to this study of the above conducted critical analysis of the reasoning of the Court of Justice in both the *Pierre Fabre* and *Coty* cases. The Court's case law has indeed influenced the current provisions of the Block Exemption Regulation and, in some cases, the solutions adopted by the Court have been directly implemented by the Commission in the current Regulation. As the next section shows, this has been the case for the ban on online

⁶²⁹ Baron, *Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann*, Art. 4 Vert-GVO, 2020, para. 305, 314; see also Teichmann, *Die Reformbedürftigkeit der Vertikal-GVO am Beispiel von Plattformverboten und Preisparitätsklauseln*, 2020, pg. 133.

⁶³⁰ C-439/09 - *Pierre Fabre Dermo-Cosmétique*, para. 57.

⁶³¹ Teichmann, *Die Reformbedürftigkeit der Vertikal-GVO am Beispiel von Plattformverboten und Preisparitätsklauseln*, 2020, pg. 133.

⁶³² Chapter 2, Section 3.1.1.

platforms and for measures prohibiting *de facto* the use of the internet as a sales channel.

2.3. The added provisions under the new VBER

2.3.1. New hardcore restriction

As anticipated, the updated VBER for the first time explicitly recognise the digital environment and the commercial relations on it. The most important innovation in this regard is the introduction of a completely new hardcore restriction under Art. 4(e) VBER: the effective use of the internet of the buyer cannot be directly or indirectly prevented from the supplier. This marks an important development, as the above sections have demonstrated how restrictions in the online environment have until this point been interpreted—albeit with difficulties—against provisions originally formulated for the brick-and-mortar dimension.

The prohibition of Art. 4(e) VBER covers both direct and indirect measures aimed at preventing the use of the digital market. As a consequence of the above-mentioned Pierre Fabre case law, the restriction must not prevent the effective use of the Internet for advertising or sales, either legally or *de facto*.⁶³³ The accompanying Guidelines also offers several examples of possible *de facto* – in other terms indirect - obligations which may result in the hardcore restriction. For instance, indicating how that is the case when requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's territory or to sell the contract goods or services only in a physical space or in the physical presence of specialised personnel.⁶³⁴ The latter example resamples the specific restriction that in the case of Pierre Fabre was imposed on the retailers and thus it shows the influence of the Court's position on the current framework of rules. The former example, instead, emerges directly from Art. 5 of the Geo-Blocking Regulation, as explicitly mentioned in the Guidelines. While the geo-blocking practice is subject of discussion below, it highlights at this point once again the strict interplay within the digital market between the competition provisions and sectoral regulations.

The added hardcore restriction under Article 4(e) VBER encompasses so measures that directly or indirectly lead to a restriction on the use of the internet. However, this restriction must also concern the "effective use", meaning that for the hardcore restriction to find application it should also be assessed whether the single obligation

⁶³³ Guidelines on Vertical Restraints (2022/C 248/01), para. 203.

⁶³⁴ *Ibid*, para. 206.

on the buyer effectively limits the use the digital market. The introduction of such a general term, without a specific definition, could lead to interpretative issues as to what restrictions, other than then the obvious ones, prevent the effective use of the Internet. On this, it could be argued that such legal uncertainty for the determination of a restriction goes against the very purpose of a block exemption under EU competition law, which is notably to provide an automatic safe harbour for businesses from Art.101(1) TFEU, without the need for an individual assessment. However, a more comprehensive analysis of VBER requires Art. 4(e) VBER to be read in conjunction with Recital 15 of the Regulation. The latter provision states that the element of the effective use must be assessed solely on the basis of the content and context of the restriction, while the market-specific circumstances or individual characteristics of the parties shall not be considered. This specification means that an effects analysis on the parties involved is not necessary for the definition of “effective use”. Against the above mentioned aim of the block exemption, it appears therefore appropriate that certain individual specific factors, such as whether distributors primarily sell on online platforms, do not ultimately influence the determination of what constitutes effective use of the internet within a vertical agreement.⁶³⁵

Furthermore, while Recital 15 of the Regulation could suggest a wide interpretation of the scope of application of this effective use requirement, the Guidelines, instead, do restrict its application by indicating how restrictions “generally do not have such an object where the buyer remains free to operate its own online stores”.⁶³⁶ Interesting to notice how, also in this case, the content introduced by the Commission stems directly from the above mentioned case law, in this case specifically from Coty.⁶³⁷ Furthermore, the Guidelines also provide additional assistance with an extensive list of restrictions on online sales that might benefit from the safe harbour. Within the listed cases there is also a ban on third-party online platform, which will be assessed immediately below. In conclusion, the extensive list of examples for Article 4(e) VBER provided in the Guidelines suggests that the wording chosen for this additional hardcore restriction was expected by the Commission to lead to interpretation problems. Despite this guidance, it remains open how effectively these examples will ensure that the block exemption's aim of providing legal certainty for distribution agreements is maintained regarding the restriction on the effective use of the internet.

⁶³⁵ See also Rohrßen, VBER 2022: EU Competition Law for Vertical Agreements, pg. 121.

⁶³⁶ Guidelines on Vertical Restraints (2022/C 248/01), para. 208.

⁶³⁷ C-230/16 - Coty Germany GmbH v Parfümerie Akzente GmbH, paras 64 – 69.

2.3.2. Exemption for online marketplace bans

The novelties concerning the digital environment within the updated Vertical Block Exemption Regulation are not limited to the prohibition under Art. 4(e), but the hardcore restriction also foresees the important possibility for an exemption ex Art. 4(e)(i) for “other restrictions of online sales”. Under this exemption the Regulation allows in particular agreements prohibiting sales over online marketplaces, such as Amazon.com or Ebay.⁶³⁸ As anticipated, the Commission has on this point acknowledged the assessments conducted by in the aforementioned case law of Coty and incorporated them into the block exemption. In particular, the parallelism with the Coty judgment emerges looking into the argumentation behind this exemption endorsed by the Commission, as it is indicated how “a buyer may still sell the contract goods or services via its own online store and other online channel”.⁶³⁹ This has the welcomed consequence of ending the debate around potentially conflicting judgments on platform bans, thereby increasing legal certainty for businesses.

Following on from the Court’s position analysed above, the current VBER not only clarifies how platform bans can be exempted, but it also extends this exemption beyond the mere luxury products, as the Guidelines no longer distinguish based on the type of products sold.⁶⁴⁰ This extension must be read in light of the above criticisms regarding the position of the Court of Justice, which, in its case law justified restrictions under Art.101(1) TFEU of qualitative selective systems by adopting a questionable separation concerning the aim of preserving the product’s image between luxury and non-luxury products. The position adopted by the Commission - despite operating at the different level of the block-exemption – provides for a uniform exemption for such platforms bans under the VBER, regardless of the type of product subject of the restrictive agreement.

In this context, it is important to remember that online marketplace bans may already fall outside the scope of Article 101 TFEU if selective distribution complies with the criteria developed under the Metro judgment, as discussed in the above case analysis. Alternatively, if these criteria are not met, such bans might fall within Article 101(1) TFEU, but could still be block exempted under the current version of the VBER. While the above case law operated at this first level, considering the compatibility of the platform ban with Art.101(1) TFEU, the introduced exemption under the current VBER

⁶³⁸ Guidelines on Vertical Restraints (2022/C 248/01), para. 208.

⁶³⁹ Ibid. para. 336.

⁶⁴⁰ Ibid, paras 208 and 335.

does operate at a second stage under Art.101(1) TFEU, providing a block exemption for such platform bans. Therefore, despite acting as an exemption under Art.101(3) TFEU, the exemption under the VBER nonetheless achieves the result that this study has suggested above for the justification under Art.101(1) TFEU: it allows suppliers to defend the product's image not only in the case of luxury products, but also under any other circumstances.⁶⁴¹

Furthermore, from a strict interpretation of current set of rules, it emerges the possible scenario where a platforms ban can not be regarded as benefitting from the exclusion from the hardcore restriction of Art. 4(e) VBER. In the Guidelines the formulation is: "online marketplaces *can* in principle benefit from the exemption of Art. 2(1)".⁶⁴² Indeed from the same paragraph it emerges how the exemption will take place as long as other online sales channels, including an own online store, are available as means of internet sales to the buyer. In this context, the requirement of the effective use of the internet would be guaranteed and thus the hardcore restriction finds not application. However, there could be well situations where this is not the case. For instance, a buyer operates a brick-and-mortar shop with an accompanying website for online orders, but then relies solely on online platforms like Amazon.com or eBay for order collection and shipping. This scenario is indeed not too far from reality for many small retailers. Online platforms not only provide additional assistance with shipping services and logistics, but also attract consumers who prefer buying on larger platforms due to the security they offer in terms of product quality and return policies.⁶⁴³ In addition, larger platforms can offer extensive membership programs, such as Amazon Prime, which provide customers with additional benefits like free shipping and faster delivery when purchasing products that might be available elsewhere. As a result, within the online market, larger and well-known online platforms are more attractive to consumers than the individual websites of a particular shop.

In such a scenario, a ban on the use of online platforms would effectively foreclose all online sales channels for the buyer, limiting its website on publicity for its in-person shop. Consequently, in line with the formulation adopted in the Guidelines, the restrictive agreement would have the object of preventing the effective use of the

⁶⁴¹ See above, Section 2.1.

⁶⁴² Guidelines on Vertical Restraints (2022/C 248/01), para. 336.

⁶⁴³ The 2022 Amazon Consumer Behavior Report, Feedvisor, 2022, available at: <https://fv.feedvisor.com/rs/656-BMZ-780/images/2022-Amazon-Consumer-Behavior-Report.pdf>

internet as a sales channel, thereby being classified under the hardcore restriction of Article 4(e) VBER and not benefitting from the exemption under Art. 4(e)(i) VBER. As a final point, while it is to welcome the end on the differentiation between luxury and non-luxury products, the updated VBER still retains what seems to be another dubious position adopted by the Court. According to the Court in the Coty case, the restriction on sales over online platform is necessary to protect the product's image. While the current set of rules recognises the legitimacy of such aim to all product categories, the Commission still adheres to the initial premise of the Court: sales through online platforms can lead to a deterioration of the product's image. Therefore, following on from the above critical assessment of this judgment on the lack of differentiation between high-level and low-level platforms, the above argumentation is still relevant under the updated set of rules.⁶⁴⁴ On this point, it could be argued that such a broad statement is too superficial. Indeed, it cannot be assumed that sales on all online platforms are detrimental to the "prestigious aura" of a product. Instead, it should be noted how high-level platforms, such as Amazon or Ebay, are in a position to ensure an appropriate product presentation that does not differ from the one provided directly by retailers or the very own brand shops. Notably the lack of a notable difference has been also explicitly recognised for Amazon and Ebay within the German case law.⁶⁴⁵ As a result, the premises on which the judges in Coty based their assessments no longer appear to be valid. Nevertheless, these premises have been incorporated into the current VBER. In light of the increasing consumer trust in major online platforms, mentioned earlier, the assumption that every product offered on such platforms experiences a deterioration of its image does not accurately reflect the reality of online transactions. Rather than allowing a blanket ban on all online marketplaces for distributors under Article 4(e)(i) VBER, such a ban should be excluded specifically for high-level online platforms, as the aim of preserving the product's image would not be compromised in those scenarios.

⁶⁴⁴ See Chapter 3, Section 2.2.2.

⁶⁴⁵ LG Berlin, 16 O 287/08 - eBay-Verbot, GRUR-RR 2009, S. 115.

3. Restrictions to buy cross-border (geo-blocking)

As an introductory note to the second topic of this final chapter, it is important to recognise how the digitalisation of the market provides the opportunity to acquire products and goods across national borders, potentially reaching, and being reached, by a borderless audience of customers. In this respect, a shift in the focus of the analysis of restrictions in place could be useful.

While the previous sections primarily examined the perspective of the companies imposing these restrictions, this last section will concentrate on the other main element in any online purchase: the consumer. Just as the internet enables businesses to increase their online sales, it also gives every user the potential to buy from any seller active in the digital market. Against this background, however, in this study there has been also the occasion to demonstrate how the reality within the EU internal market is different: the distribution of products often remains territorially limited, meaning that these are not supplied – at least not under the same conditions - to all Member States.⁶⁴⁶

Indeed, already in 2017, the Commission found that only 19% of consumers made online purchases from another EU country and only 9% of companies used to sell across borders. In addition, it was found that more than one third of all websites within the EU common market refused to sell cross borders. As anticipated in the first chapter, it is in this scenario that it was decided – alongside the traditional enforcement of EU competition law - to specifically act at regulatory level in order to prohibit the unjustified practice of geo-blocking and other forms of discrimination based on the consumer's nationality, place of residence or establishment within the internal market.⁶⁴⁷

It appears straightforward how such practices go against everything the European project stands for: dividing the market for businesses and allowing discriminating against EU citizens. In particular, in terms of EU competition law, in the first chapter the aim and the importance of the market integration has been in depth analysed and it is clear that it has a direct link with territorial restrictions.⁶⁴⁸ Expanding on this analysis in the first chapter, the primary objective of the original EEC Treaty was to eliminate barriers to trade between Member States, such as tariffs, quotas, and measures having equivalent effect. It has also been highlighted that, alongside the evolving objectives

⁶⁴⁶ Monopolkommission, Wettbewerbspolitik: Herausforderung digitale Märkte – Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB – Kurzfassung, available at: https://www.monopolkommission.de/images/PDF/SG/SG68/S68_Kurzfassung.pdf

⁶⁴⁷ Regulation (EU) 2018/302.

⁶⁴⁸ Chapter 1, Section 3.1.1.

of competition law, a central aim from the start has been to integrate the individual national economies. The opportunities provided by the internet and online channels have indeed the potential to strengthen the EU single market and ensure a truly unified market across all Member States through digital means.

Against this background, it deserves the special attention for territorial restraints within EU law and in particular under EU competition law. A first fundamental acknowledgment can be traced back to the Court of Justice in the *Consten-Grundig* case of 1964, at a time when most of the competition provision and case law at EU level had yet to be established.⁶⁴⁹ The case concerned an infringement of the competition rules of the EEC Treaty by an exclusive distribution agreement. The Court ruled that an exclusive distribution agreement appointing Consten, a French company, as the exclusive distributor in France for Grundig, based in Germany, was incompatible with the current Article 101(1) TFEU. On that occasion, it was found that an agreement between producers and distributors which tended to re-establish national divisions in trade between Member States was liable to frustrate the most fundamental objectives of the Community: the achievement of a unified common market.⁶⁵⁰ These assessments of territorial restraints against the integration objective of the Treaties did then eventually guide the development of competition law in the following decades and shape so the case law of the Court. Furthermore, an important implication of this centrality of the common market under EU competition law is that market integration is an independent objective under Articles 101 and 102 TFEU. As a consequence, a breach of these provisions can be found even if anticompetitive effects are unlikely or if the practice is unlikely to harm the competitive process or consumer welfare.⁶⁵¹ In particular, as it will be shown below in a practical example, the contractual agreements imposing geo-blocking are liable to be found in breach of Art.101 TFEU and the Vertical Block Exemption Regulation.

Following from the analysis on the objectives of EU competition law in the first chapter, the aim of these provisions is to protect not only the interests of competitors and consumers but primarily the market structure and, consequently, competition itself.⁶⁵² Above it has been also highlighted how this trace a fundamental difference with the objectives of sectoral regulation, meaning that the latter will find application also

⁶⁴⁹ Cases 56 and 58-64 - *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*.

⁶⁵⁰ *Ibid*, para 340.

⁶⁵¹ *Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P - GlaxoSmithKline Services Unlimited v Commission of the European Communities*, para. 63-64.

⁶⁵² See Chapter 1, Section 3.2.

in situations where there is not a distortion to competition within the internal market.⁶⁵³ In this context, the examples of territorial restraints and the introduction of the Geo-Blocking Regulation suggest the possibility of pursuing additional objectives beyond those outlined in competition law provisions.

⁶⁵³ See Chapter 1, Section 3.2.2.2.

3.1. The practice of geo-blocking

3.1.1. The sectoral Geo-Blocking Regulation

The Geo-Blocking Regulation had been introduced in 2018 and under this regulation geo-blocking is specifically defined as the practice which occurs when online sellers apply barriers and impose restrictions to consumers on the basis of their nationality or place of residence.⁶⁵⁴ These "other forms" can be described under the broad term of "geo-discrimination." Examples include denying access to websites from other Member States or, when access is granted, preventing customers from abroad from finalising their purchases or requiring them to pay with a debit or credit card from a specific country.⁶⁵⁵ In terms of application, the Regulation covers both business-to-consumer and business-to-business transactions. A "trader" is any natural or legal person, whether private or public, who acts for purposes relating to the trade and business.⁶⁵⁶ In addition, the Regulation applies to all traders who offer their goods or services to customers in the EU, whether the trader is established in a Member State or in a third country.⁶⁵⁷ The central requirement is that goods or services to customers in the EU market, not whether the trader themselves are established in the EU. Interesting is to notice how this definition of trader – by being used within a sectoral regulation - reflects the one used in most EU consumer law, such as under the Consumer rights Directive.⁶⁵⁸ Although comparable to the traditional and more general notion of undertaking under EU competition law, the concept of trader is more appropriate to the online environment as for instance it has been explicitly foreseen for online platforms.⁶⁵⁹

These actors, as defined in the Regulation, have been since 2018 subjected to important prohibitions. The most important one prohibits providers of online goods and services from restricting customers' access to their "online interfaces".⁶⁶⁰ The latter term refers not only to the websites and online marketplaces, but ex Art. 2(16) also to mobile applications, in other terms apps. This prohibition directly targets the practice of "re-routing", where customers are prevented from accessing a certain version of the

⁶⁵⁴ Regulation (EU) 2018/302, Recital 1.

⁶⁵⁵ Geo-Blocking Regulation – Stumbling Block or Building Block towards the Digital Single Market?, Editions Larcier, 2020, pg. 275 ff.

⁶⁵⁶ Regulation (EU) 2018/302, Art. 2(18).

⁶⁵⁷ Ibid, Recital 17

⁶⁵⁸ Directive 2011/83/EU, Art. 2(2).

⁶⁵⁹ Commission, Communication "A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses", COM(2016) 320 final.

⁶⁶⁰ Regulation (EU) 2018/302, Art. 3.

website and, instead, are being directed towards a trader's website that is different in terms of its layout, language, or other characteristics. The aim of this prohibition is therefore to allow EU consumers access to all different available language versions of a website or other interfaces. However, this obligation does not go as far as requiring traders to provide their website in multiple languages, nor does it allow consumers to demand user manuals or instructions in their own language. It is interesting to note that even if consumers consent to being rerouted, it remains an obligation on the trader to keep the original version of the website available.⁶⁶¹ In addition, it is still permissible for online traders to have different versions of a website with different prices, terms and offers for different countries. However, in that case, the above provision requires that all customers within the EU must be able to buy goods and services from any versions of the website. For example, a trader may sell goods at one price on its German website and at a higher price on its Italian website. The German consumers must, however, then be able to buy the cheaper product from the Italian site. From this example it becomes clearer how the Regulation does not aim to impose additional burdens on the business active in the digital market, but rather the focus is on the position enjoyed by consumers. As the Commission indicated, the ultimate purpose is indeed to allow consumers to "shop like a local" across the entire EU digital market.⁶⁶² The second obligation of the Geo-Blocking Regulation prevents traders in specific situations from applying different contractual conditions based on the consumers' location.⁶⁶³ The most practical implication can be found in the case of the delivery. The trader can no longer deny access to its goods or services when the goods are delivered to a location in a Member State to which the trader offers delivery in its general conditions of access, or when the goods are collected at a location agreed upon between the trader and the customer in a Member State where the trader offers this option under its general conditions. Within this context, it is important to specify how the Regulation does not impose an obligation to cross-border delivery: while traders cannot choose which countries in the EU to sell to, they can decide which countries they are prepared to deliver to.⁶⁶⁴ As a practical consequence, a trader could decide to deliver his product only within the national borders of one Member State; consumers cannot, in fact, demand that the products be delivered throughout the common market. What the

⁶⁶¹ Ibid, Art. 3(2).

⁶⁶² Commission, Press release, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156

⁶⁶³ Regulation (EU) 2018/302, Art. 4.

⁶⁶⁴ Ibid, Recital 28.

Regulation does require, however, is that consumers from abroad should be able to buy and collect the product in the Member State where the trader offers delivery. In particular, if the trader sets up a collection point for the products purchased, this option must be made available to all consumers throughout the EU common market. This shows once again that this sectoral legislation does shift the focus on consumers, who should be protected from unjustified discrimination and should be treated equally. Furthermore, the central element of discrimination against consumers also arises from the fact that the Regulation does not require the trader to harmonise prices or other terms and conditions across Member States, provided that they are offered on a non-discriminatory basis.⁶⁶⁵

The third, and last obligation, concerns the method of payment. According to Art. 5 of the Geo-Blocking Regulation traders must not discriminate against customers by refusing certain transactions, or by applying different conditions or different charges, for reasons linked, *inter alia*, to the location of the payment account, the place of establishment of the payment service provider or the place of issue of the payment instrument. The most practical example is that a trader can no longer discriminate based on the Member State in which the customer's credit card was issued, provided that it accepts payments by that brand of credit card.⁶⁶⁶ However, also regarding this last obligation, there are several conditions that needs to be met in order for it to be implemented, such as authentication requirements are fulfilled and the payments are in a currency that the trader accepts. This reflects the nature of this Regulation, which, as a sector-specific secondary legislation, does not apply indiscriminately to all situations but has, instead, a limited and defined scope of application.

This narrowly defined scope, constrained by various requirements and exceptions, is further reinforced by the important exemptions foreseen. As previously mentioned, the Geo-Blocking Regulation includes indeed several carveout provisions. Consequently, despite its seemingly broad application due to the aforementioned definitions, such as applying to all online interfaces, its practical scope is limited by the exempted categories foreseen under Art. 1(3). The most significant exclusion in this context concerns audiovisual services. These are defined as all electronically supplied audiovisual services, including those whose primary purpose is to provide access to broadcasts of sports events, and which are provided based on exclusive territorial licenses.⁶⁶⁷ The ratio behind this exclusion is that allowing cross-border access to these

⁶⁶⁵ Ibid, Art. 4(2).

⁶⁶⁶ Ibid, Art. 5(1).

⁶⁶⁷ Ibid, Recital 8.

services would disrupt the existing licensing distribution model for TV and films, which typically operates on an exclusive, national basis. This emerged during the legislative process, first within the Commission and then more prominently in the European Parliament.⁶⁶⁸ During the draft of the Regulation the representatives of these sectors expressed indeed strong concerns, arguing that the loss of territorial exclusivity for distributors could undermine the industry. In respect to the exclusion of these sectors, the Regulation - adopted in 2018 - provided for a review of its content after five years, which will be assessed in the below section.

As a last point in terms of contents, which is particularly relevant in the context of this study, the Geo-Blocking Regulation also addresses the agreements restricting active and passive sales.⁶⁶⁹ In particular, while active sales are not prohibited under the Regulation, it is instead foreseen that passive sales restrictions in agreements with traders, which are found to be in contrast with the above prohibitions of the Regulation, are automatically void. As a practical consequence, traders cannot invoke a passive sales restriction in their supply agreement as a reason to refuse a sale.⁶⁷⁰ In other words, all passive sales restrictions falling within the scope of this sectoral regulation are prohibited. This implication must be contrasted with competition law rules, as discussed above, where instead the Vertical Block Exemption Regulation allows the possibility to restrict passive sales in the digital market, as it will be shown below.

On this the strong link between the two sets of rules emerges, making it necessary to first interpret the references across competition law and the provisions of this sectoral regulation in a coherent manner. The update of the Vertical Block Exemption Regulation in 2022 analysed in the precedent chapter shows indeed how the definition of passive sales has been amended, especially in order to address concerns regarding the online market.⁶⁷¹ As indicated above, the current regime does foreseen a narrower definition of passive sales under Art. 1(1)(m) VBER, meaning that for instance offering a website in a specific language or using a domain name corresponding to a certain geographical area are now considered a form of active selling into another territory, which can be subsequently restricted under VBER.⁶⁷² Against this background, the

⁶⁶⁸ See, IRIS Plus, Territoriality and financing of audiovisual works: latest developments, 2019, pg. 33, available at: <https://rm.coe.int/iris-plus-2019-3-territoriality-and-financing-of-audiovisual-works-lat/16809a417c>

⁶⁶⁹ Regulation (EU) 2018/302, Art. 6.

⁶⁷⁰ Ibid, Art. 6(2).

⁶⁷¹ See Chapter 1, Section 4.3.2.

⁶⁷² Regulation (EU), 720/2022, Art. 1(1)(l).

Geo-Blocking Regulation, when prohibiting restrictions on passive sales under Article 6(2), refers to passive sales “within the meaning of Regulation (EU) No 330/2010”. However, this reference should be interpreted under the current regime as referring to the narrower definition of passive sales in Article 1(1)(m) of the latest version of VBER. This interpretation is supported by a systematic analysis of the Geo-Blocking Regulation, which specifies, under both Art. 6 und Recital Nm. 34, that the Regulation should not hinder the application of EU competition rules.⁶⁷³ It is implied so that the Regulation should be interpreted in accordance with the currently applicable rules of competition law. Against this background, it should be noted that the prohibition of passive sales in the Geo-Blocking Regulation refers to sales as defined in Art. 1(1)(m) VBER, such as the offer of goods in an online shop.

Continuing the discussion on this interplay over passive sales restrictions between competition law and sectoral regulation, it should be noted how Art. 6(2) Geo-Blocking Regulation imposes additional prohibitions on undertakings active in the selling online. Specifically on vertical agreements, the sectoral Regulation does not allow for restrictions of passive sales which impose on traders to violate the above described prohibitions, such as a restriction based on the consumer’s location. This is clearly stated also under the recitals of the act, where it is indicated how are in breach of the Regulation any contractual restrictions that prevent a trader from responding to unsolicited requests from customers to sell goods outside the trader's contractually allocated territory on the grounds of the customers' nationality, place of residence or place of establishment.⁶⁷⁴

This needs to be seen in contrast with the rules under the Vertical Block Exemption Regulation, which instead allows such restrictions in certain situations. For instance, Art. 4(b)(ii) VBER indicates how a supplier can restrict, both active and passive, sales of its distributors to unauthorised distributors located into a territory where it operates an exclusive distribution system. In such a scenario, the supplier would therefore be able to impose contractual obligations on its distributors, within the exclusive system, not to engage in online sales in certain territories and such restrictions would benefit from the safe harbour of the Block Exemption. However, as just showed, the same supplier must also comply with the sectoral Regulation on geo-blocking, which instead does not allow for contractual restrictions of passive sales based on the location of the

⁶⁷³ See also Siegert R, Schneider R, in: Bacher K., Hempel R., Rombach P., Wagner-von Papp F., BeckOK Kartellrecht, 2022, Art. 6 Geoblocking-VO, para. 1.

⁶⁷⁴ Regulation (EU) 2018/302, Recital 34.

consumers trying to obtain online goods or services.⁶⁷⁵ From this it appears that in a hypothetical scenario, a supplier within an exclusive distribution system may lawfully under Article 101 TFEU prohibit its distributors from conducting sales into other Member State when these sales are concluded through offline methods, such as in-person meetings or via telephone. Conversely, if the sales are conducted within the digital market, such as through online platforms or websites, these restrictions on passive sales would be found in breach of Article 6 of the Geo-Blocking Regulation and thus be void.

From this example of restrictions on online sales, some interesting consequences for this study can be drawn. Firstly, the example provides a practical application of the relationship between competition rules and sectoral regulation indicated earlier in this study. In the first chapter, it was indeed introduced that sectoral regulations pursue additional objectives besides the objective of maintaining competition in the market. In this case, the sectoral regulation has an additional aim to the mere maintenance of competition on the EU market, namely the unjustified discrimination of EU consumers.⁶⁷⁶ As a result, certain conduct may comply with Articles 101 and 102 TFEU as considered to be pro-competitive, but still be found to be in breach of the sectoral framework, in the above example Art. 6(2) Geo-blocking Regulation. In this regard, the sectoral regime has been defined as overreaching,⁶⁷⁷ as it declares certain conducts, that have already been considered lawful under Article 101 TFEU, illegal *per se* under the Regulation. Instead, the opposite scenario, where a distribution agreement complies with the sectoral regulation but is anti-competitive ex Art. 101 TFEU, is explicitly addressed under Recital 34. Here, the Geo-Blocking Regulation establishes the primacy of competition rules over the sectoral Regulation.

Secondly, from the above analysis based on the rules applicable on restrictions of passive sales it emerges, once again, the strict interconnection between the competition rules and the sectoral regulations in the digital market. In particular, this reinforces the thesis indicated in the title of this study of a constant interplay between the two sets of rules. As just showed, for actors active in the digital market this means that both fields of law need to be considered. However, at least the case of online sales, the practical consequence of this interplay is that the Block Exemption Regulation does not fully

⁶⁷⁵ Siegert R, Schneider R, in: Bacher K., Hempel R., Rombach P., Wagner-von Papp F., BeckOK Kartellrecht, 2022, Art. 6 Geoblocking-VO, para. 2.

⁶⁷⁶ Regulation (EU) 2018/302, Art. 1(1).

⁶⁷⁷ Schmidt-Kessen M., EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs And Benefits Of Partitioning EU's Internal Market, 2019, pg. 570.

achieve its main function of providing legal certainty for businesses engaged in distribution agreements. This is because these businesses adopting distribution agreements across the EU digital market not only have to comply with Art. 101 TFEU, but must also consider the applicable regime of the Geo-Blocking Regulation.

3.1.2. The geo-blocking of audiovisual services

As anticipated, the Geo-Blocking Regulation foresees a review of its contents every 5 years, and this becomes particularly relevant for the excluded categories of electronically supplied audiovisual services providing access to copyright-protected content. Indeed, under Article 9(2) it is indicated that the first short-term review shall be carried out with a particular view to assessing the scope of the Regulation regarding the audiovisual and non-audiovisual sectors excluded from the initial scope in 2018.

3.1.2.1. The focus on geo-blocking practices

As an introduction note, the possible inclusion of these audio-video services within the Regulation needs to be understood within the wider pictures of the increasingly measures adopted against online geo-blocking practices. On the side of the regulatory framework, already in 2018, the Regulation on the cross-border portability of online content services allowed consumers who have subscribed to online content in one Member State to access that content when they are temporarily in another Member State.⁶⁷⁸ In particular, under such Portability Regulation, paid online content service providers are obliged to enable their subscribers with cross-border portability when they travel or temporarily reside in other Member States, at no extra cost. These obligation means that they must provide access to the same content and functionalities as those offered in the subscriber's Member State of residence. The impact of such Regulation can be seen under the latest report on its application, where it emerged how around the half of the interviewed consumers had tried to access their online content services at least once while being temporarily in another Member State and did not encounter issues.⁶⁷⁹ While this Regulation applies only for a limited temporary period—up to 3 weeks and a maximum of 5 times a year—it nonetheless signals an intention from the legislator to end the practice of geo-blocking for online provided audiovisual services. This is particularly significant in the EU digital market, as the

⁶⁷⁸ Regulation (EU) 2017/1128.

⁶⁷⁹ Flash Eurobarometer 477 (Accessing Content Online and Cross-border Portability of Online Content Services, Cross-border Access to Content Online, and Intra-EU Calls), 2019, pg. 41, available at: <https://europa.eu/eurobarometer/surveys/detail/2221>.

Portability Regulation encompasses services that impact average consumers. This includes audio and video content streamed online, such as popular platforms like Netflix or sports channels like DAZN.⁶⁸⁰

On the other side, in enforcing traditional competition rules, the Commission and national competition authorities have actively worked to dismantle geo-blocking practices. In recent years such restrictions have been indeed in the spotlight of public enforcement. In this regard, noteworthy to mention is the decision of the Commission in 2019 to fine Nike 12 million euros for restricting cross-border sales within the common market. In particular, Nike imposed within his distributors system both direct and indirect measures in order to avoid out-of-territory sales by licensees, such as clauses explicitly prohibiting these sales and obligations to refer orders for out-of-territory sales directly to the supplier. The impact of such restrictions was particularly important given that they were imposed on merchandising products, thus affecting to varying degrees famous brands of clubs such as FC Barcelona, Manchester United, Juventus, Inter Milan and AS Roma, as well as national federations such as the French Football Federation.⁶⁸¹ In the context of an increasing focus on competition enforcement in relation to restrictions on cross-border online sales, the following sections analyse recent case law relating to intellectual property rights in the provision of audiovisual services.

Furthermore, a discussion on the possible prohibition of geo-blocking of audiovisual services should take into consideration the assessments already carried out by the EU legislator. In this regard a useful source of information can be found, as is often the case, in an external third-party study submitted to the Commission for the official review of the Geo-Blocking Regulation under Art. 9 of the Regulation. This study aimed at providing an estimation of the impacts of the extension of the scope of the Geo-blocking Regulation to audiovisual services.⁶⁸² Indeed, it is recognised how such an extension could have a significant positive impact on the diversity of audiovisual content, potentially opening up many items to EU consumers, especially in currently

⁶⁸⁰ See DAZN, Enjoy DAZN Content While Traveling: Understanding Our New Portability Features, 2024, available at: <https://daznsupport.zendesk.com/hc/en-be/articles/16194764447517-Enjoy-DAZN-Content-While-Traveling-Understanding-Our-New-Portability-Features>.

⁶⁸¹ Commission, Press release, 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1828

⁶⁸² Commission, Study on the impacts of the extension of the scope of the geo-blocking regulation to audiovisual and non-audiovisual services giving access to copyright protected content, Final report, 2020, available at: <https://data.europa.eu/doi/10.2759/89778>

underserved smaller Member States. In particular, from the study it emerged how the average transaction revenues for online platforms such as Netflix Prime or Amazon Prime would decline, as consumers would be switching to less expensive services cross-border. However, the study also indicated how there would be an increase in the number of overall subscribers across the European market as a response to lower prices available.⁶⁸³

Following such assessments, the Commission published in 2020 the first short-term review of the Geo-Blocking Regulation which looked at the impact of geo-blocking on the EU's digital single market.⁶⁸⁴ In particular, this study explored the potential extension of the Regulation to include certain copyright works. The Commission in that occasion indicated how it was too soon to assess all the direct and indirect effects of the implementation of the current Regulation, while recognising how such extension might potentially bring improvements in terms of availability of contents.⁶⁸⁵ Within this review, the Commission furthermore highlighted the issues linked to a possible expansion of Geo-Blocking Regulation over audio-visual services, the most important one being the copyright provisions that heavily regulate the sector and that hinder cross-over supplience of audiovisual contents.⁶⁸⁶ The problems related to copyright and the licensing system implemented in these sectors will not be further addressed in this study, as they fall outside the scope of the thematic analysis. Instead, the focus is to be maintained on the implemented practices on the digital market and how a possible end to geo-blocking of audiovisual services fits within the EU regulatory and competition framework. These aspects do also play an important role, as the Commission's position in its review of 2020 did acknowledge that, despite the aforementioned copyright issues, geo-blocking practices are also to be attributed to commercial practices implemented by the undertakings that segment the digital single market along national borders.⁶⁸⁷

3.1.2.1.1. The application of competition law

It's interesting to note how in above passage of its assessment of the Geo-Blocking Regulation in 2020 the Commission referred to the 2019 Decision in the Pay-TV case. In that occasion it had been held by the Commission that the contractual provisions

⁶⁸³ Ibid, pg. 173 ff.

⁶⁸⁴ Report from the commission on the first short-term review of the Geo-blocking Regulation, SWD(2020) 294 final.

⁶⁸⁵ Ibid, pg. 13.

⁶⁸⁶ Ibid, pg. 11.

⁶⁸⁷ Ibid, pg.

contained in the licensing agreements between the major US film producers, such as Paramount and Sony, and some European pay-tv undertakings, such as Sky, restricted the ability of broadcasters to accept unsolicited requests - in other terms passive sales - for their pay-TV services from consumers located outside their licensed territory. The Commission viewed these clauses as restricting passive sales and thus as a hardcore restriction under Art.101(1) TFEU.⁶⁸⁸ The proceeding concluded in 2019 with the Commission accepting the commitments of the parties involved. Paramount did first agree to these commitments in 2016, followed by the other studios in following years. These commitments prohibited the parties from implementing contractual clauses that restricted the passive sale of pay-TV subscriptions across borders within the EEA. From this enforcement's actions of the Commission derived important changes within the digital market, as the commitments meant that the parties involved would no longer enforce these restrictions in their agreements. Furthermore, however, the impact went beyond the inter partes effect of these single proceedings. Indeed in 2014, the studio Paramount had already entered into a pay-TV licensing agreement with Groupe Canal+ for the French market under the old terms. Following the commitment decision in 2016, Paramount released Canal+ from the broadcaster obligation and declared that it would no longer adhere to these restricting clauses in the licensing contracts. On this extra processual consequence an interesting case law had then been developed, as Canal+ brought an action for annulment of the Paramount commitment decision ex Art. 263 TFEU.⁶⁸⁹ The action was based on two main arguments: firstly, that the obligations in the license agreement do not restrict competition by object, and secondly, that the Commission exceeded the powers conferred on it by Article 9 of Regulation No. 1/2003 and breached the principle of proportionality. While the latter argument, concerning third-party contractual rights, extends beyond the scope of this study, the former provides further insights into the treatment of geo-blocking practices under EU competition law. Following the case law of the Court of Justice,⁶⁹⁰ the General Court in 2019 upheld indeed the Commission's assessment and stressed that, unlike active sales, passive sales restrictions are to be considered a restriction by object. The reasoning behind is that they create contractual absolute territorial exclusivity, effectively partitioning the single market along national borders and so do "frustrate the Treaty's objective of achieving the integration of those markets through the

⁶⁸⁸ Case AT.40023, Commitment Decision - Cross-border access to pay-TV, 2019.

⁶⁸⁹ Case T-873/16 - Canal+ v. Commission.

⁶⁹⁰ See C-403/08 - Football Association Premier League and Others.

establishment of a single market.”⁶⁹¹ In particular, the later Commission's 2019 Decision regarding the other studios builds on this General Court's reasoning. The Commission clarifies that, while copyright rights themselves are not subject to the prohibitions of Article 101 TFEU, the exercise of those rights may still fall within the prohibitions. This is translated in practice in the fact that, while the mere holding of exclusive rights to broadcast a film within a Member State does not go as far as an infringement by object, agreements designed to prohibit the cross-border provisions of broadcasting services and thus eliminating all cross-border competition between broadcasters are deemed to as a restriction by object of Art.101 TFEU.⁶⁹²

Without going into detail on the issues relating to intellectual property, it is interesting to note that this position of the Court of First Instance, subsequently endorsed by the Commission, draws some important boundaries. In particular, the legality of these copyrights' obligations - even when a premium price is paid by some undertakings in order to gain territorial exclusivity - does no longer seem to be without limits. In this context, the first chapter's discussion on the goal of competition law to achieve and integrate an internal market is fundamental. Both the Court of Justice, through its case law, and the Commission imposed indeed limits on the exercise of these intellectual property rights: they cannot lead to absolute territorial exclusivity that partitions the internal market, as this is ultimately “irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market.”⁶⁹³ This demonstrates that both the Commission and the Court believe that intellectual property rights cannot - and should not - ultimately obstruct the enforcement of competition law. It should be noted that their assessments do not undermine the concept of exclusive licenses, - in this case for the broadcasting of movies - which are therefore recognised as legitimate agreements. However, even if these licenses are crucial for the sector specific business models in broadcasting visual services and are well-remunerated, such as in the case above analysed, they must not contravene the fundamental goal of EU competition law: the creation of a genuinely unified common market.

Furthermore, a comprehensive analysis of this case law should also indicate that the subsequent judgment of the European Court of Justice overturned the first instance decision and that, as a consequence, the Commission had to withdraw its 2019 decision,

⁶⁹¹ Case T-873/16 - Canal+ v. Commission, para. 46.

⁶⁹² Case AT.40023, Commitment Decision, Cross-border access to pay-TV,, para. 67-68.

⁶⁹³ Ibid, para. 73; see also C-403/08 and C-429/08 Football Association Premier League and Others, para. 115; Case T-873/16 Groupe Canal + v Commission, para. 56.

thereby rendering the parties' commitments invalid.⁶⁹⁴ As a result, the above mentioned impact on licensing agreements that restricted cross-border passive sales ceased to exist.

However, looking into the arguments behind this decision, it should be noted how the annulment is not based on a different legal analysis of the compatibility with EU law of these cross-border sales restrictions, but rather is due to the violation of the principle of proportionality and for failing to properly take to account the impact of the commitments on the contractual rights of third parties.⁶⁹⁵ On the contrary, the European Court of Justice, in line with the position taken also by the Advocate General Pitruzzella, confirmed the above assessments of both the Commission and the General Court. The Court in this last judgment in December 2020 indeed indicated that the lower Court did not error in law in its assessments on the licensing agreements. Instead, it confirmed the above analysis by showing that such clauses in licensing agreements, which aim at preventing the cross-border provision of broadcasting services, constitute a restriction of competition under Article 101(1) TFEU, having regard also to the economic and legal context in which they are inserted.⁶⁹⁶

Within the development of competition law enforcement against the geo-blocking of online sales, the latest - and probably most interesting - step can be seen in the judgment of the General Court in the Valve case.⁶⁹⁷ The case stemmed from an investigation by the Commission into bilateral agreements between Valve Corporation, owner of one of the world's largest PC video game distribution platforms "Steam," and five PC video game publishers. The subsequent Decision of the Commission in 2021 found that these agreements restricted passive sales and thus breached Art.101 TFEU.⁶⁹⁸ Specifically, the platform Steam allowed users to directly download or stream PC video games upon authentication. Additionally, it enabled users who purchased PC video games outside of Steam - such as from brick-and-mortar shops or through digital downloads from third-party websites - to activate and play these games on Steam. For this purpose, Valve provided video game publishers with technical means, including "Steam keys," to activate and play games on its platform.

⁶⁹⁴ Case AT. 40023, Cross-border access to pay-TV, Withdrawal of the Commitments Decision.

⁶⁹⁵ C-132/19 P - Canal+ v Commission, para. 115.

⁶⁹⁶ Ibid, para. 54.

⁶⁹⁷ Case T-172/21 - Valve v Commission.

⁶⁹⁸ Cases AT.40413 - Focus Home; Case AT.40414 - Koch Media; Case AT.40420 - ZeniMax; Case AT.40422 - Bandai Namco; Case AT.40424 - Capcom.

The antitrust issue lies in the fact that Valve entered into agreements with five developers over various periods of time between 2010 and 2015 to use the geo-blocking function on the activation keys.⁶⁹⁹ This geo-blocking function consisted in an activation restriction, which allowed the games sold to only be activated within a certain territory. The five publishers provided then those keys to their distributors for the sale and distribution of the PC video games in the Member States concerned. Ultimately, this practice meant that users located outside a designated Member State were prevented from activating a given PC video game with Steam activation keys. Specifically, the practice affected games sold in Eastern Europe, where prices are typically lower compared to countries like Germany or Austria. The restriction of passive sales under Art.101 TFEU became relevant in situations where, for instance, a German consumer purchased a game in Poland at a lower price rate. While the consumer was able to activate the game in Poland, it was then unable to play it within the German territory. As a consequence, these business practices denied European consumers the full benefits of the EU digital market and the ability to shop around between Member States to find the most suitable - often being the cheaper - offer. Following the fines issued by the Commission, the General Court was called to decide on the matter in 2023.⁷⁰⁰ As previously mentioned, this study will focus primarily on the Court's assessment regarding the breach of competition law provisions in the context of copyright-protected content. In this regard, a first interesting point raised by the Court adds important clarification into the debate on the definition of agreements in the online environment under Art.101 TFEU, developed in the previous chapters.⁷⁰¹ The General Court indicated how, contrary to the claim brought forward by the platform Valve, the platform was not merely acting as a service provider with no connection with the restrictive agreements. In fact, the applicant operated the Steam platform, on which the video games at issue were accessible and without which it was not possible to play them. Furthermore, the Steam keys could only be used on that platform. As a result, Valve's position could not be that of an external third party providing only the technological means to the operators, as claimed by the applicant, but rather that of a direct party involved in the restrictive agreements. From this it derives an important clarification for online platforms providing services – even free of charge - to other businesses active on their platforms. The position of the online platform may fall under Article 101 TFEU, even if the restrictions are then

⁶⁹⁹ Cases AT.40413 (Focus Home), para. 86 ff.

⁷⁰⁰ Case T-172/21 - Valve v Commission.

⁷⁰¹ Ibid, para. 41 ff.

implemented by the businesses along their vertical chain and the platform is not acting as a reseller or distributor within that chain. In the case at hand the restricting keys provided by Valve had been indeed sold by the publishers within their own vertical chains, without a direct participation of the platform with third-party distributors. However, the Court rightly indicated how the keys could not be used by the end users without the technical service provided by Valve. The platform therefore “played a central role in the relationship between the publishers and the end users of the Steam video games” and so acted as an operator which was fully part of this economic chain.⁷⁰²

Furthermore, the Court upheld the Commission's assessment that the restriction of passive sales constituted a restriction by object under Article 101(1) TFEU. In this regard, the platform had claimed that the Commission failed to sufficiently consider the novelty of the case and the unprecedented context in which it and the publishers operated.⁷⁰³ The key point here is that, unlike the present case, the previous case law on restrictions of passive sales had been primarily developed in relation to agreements within exclusive distribution or license arrangements. However, the Court in Valve highlighted that it is actually not the existence of an exclusive distribution or license agreement itself that is deemed harmful to competition, “but rather the establishment of contractual obligations or additional measures preventing passive sales and resulting in partitioning of the internal market.”⁷⁰⁴ In this case, the restrictive conduct effectively made it impossible to use Steam keys outside certain countries, resulting in the same effect as restrictions on passive sales within exclusive agreements. This highlights once again the central importance of the objectives of the competition rules discussed in the first chapter. Despite the absence of exclusive or licensing agreements, from this judgment it flows how the Commission is entitled to apply the established case law on passive sales to a third-party platform providing technological services, such as Valve in the case at hand, because the agreements ultimately resulted in a partitioning of the internal market, contrary to the integration objective of the Treaties.

Finally, a second line of development in the application of traditional competition concepts introduced by the Court is on the relationship between Art.101 TFEU and intellectual properties. The Court rejected the claim that the conduct of Valve was not subject to the assessment under the competition provisions due to sectoral specific

⁷⁰² Ibid, para. 51.

⁷⁰³ Ibid, para. 158 ff.

⁷⁰⁴ Ibid, para. 178.

regulation. In particular, it indicated that at the mere fact that recital 29 and Article 6 of the Copyright Directive⁷⁰⁵ provide for the possibility of adopting "technological measures" does not preclude such measures from being scrutinised under Article 101 TFEU.⁷⁰⁶ Additionally, the Court reiterated that copyright protects right holders in commercially exploiting their works through licensing, but it does not go as far as granting them the right to demand the highest possible remuneration or create artificial price differences between partitioned national markets.⁷⁰⁷ Such possibility would be in fact irreconcilable with the fundamental aim of the Treaties, notably the integration of the internal (digital) market. These assessments in the case of Valve indicated that the practise of geo-blocking the Steam keys was not aimed at protecting the publishers' copyright. Instead, it was evidently employed to impede cross border sales and usage of the product, safeguarding so the high royalty amounts collected in those countries where higher prices can be charged.

The Valve judgment brings several important developments into this discussion. The Court not only clarified the position of online platforms providing technological tools, but it also took a step further than in the previous Canal+ case: while copyright grants specific rights under sectoral regulation, such as in this case the Copyright Directive, it does not ultimately exempt holders from competition provisions. As a final point, interesting is to also note the relationship with the developments in the sectoral regulation. The agreements between the platform Valve and the publishers, sanctioned under Article 101 TFEU, would currently breach the Geo-Blocking Regulation, specifically Article 6(2), which addresses restrictions on passive sales based on consumers' geographical locations. However, at a practical level, this legislative development in sector-specific regulation was not relevant to the Court's assessment in this specific case, as the conduct occurred before the Regulation entered into force. Nevertheless, this case law provides valuable insights into the interplay between competition law and sectoral regulation in the digital market, demonstrating that through innovation in the enforcement of competition law, it is possible to target conducts that are also prohibited under specific sectoral regulations.

3.1.2.1.2. The application of the Geo-Blocking Regulation

The above section has thus demonstrated how competition enforcement has increasingly focused on agreements restricting cross-border sales, particularly in light

⁷⁰⁵ Directive (EU) 2019/790.

⁷⁰⁶ Case T-172/21 - Valve v Commission, para. 198.

⁷⁰⁷ C-403/08 and C-429/08 - Football Association Premier League and Others, para. 108 – 115.

of the integration objective of the Treaties. In addition, and in line with the pattern that emerges throughout the study, the other element to be taken into account is the applicable sectoral regulation. Against the background of the introduction of the Geo-blocking Regulation in 2018 and the Commission's first review in 2020 on the possible extension to audiovisual services, it is interesting to consider future legislative developments within the sectoral regulation.

Regarding potential legislative solutions, an interesting position has emerged from the stakeholders involved in the Commission's legislative proposal. Following the 2020 review mentioned above, the Commission has indeed held a series of stakeholder meetings with representatives of the audiovisual sector and consumer organisations. The explicit aim was to identify concrete industry-led solutions to increase the number and diversity of audiovisual works available online in each Member State and to improve consumers access to audiovisual content throughout the Union.⁷⁰⁸ Within this dialogue, the Society for Audiovisual Authors – an umbrella association of European Collective Management Societies representing audiovisual authors - expressed his support for improving the availability and exploitation of audiovisual works across the entire EU. However, it was also stressed how possible future developments should align with the principles of fair and proportionate remuneration for creators and principle of the territoriality of rights, which it is considered the foundation of the European licensing model for audiovisual works.⁷⁰⁹ In terms of legislative amendments, interesting is how the possible solution forward is not actually seen in an extension of the Geo-Blocking Regulation over audiovisual services. The association representing audiovisual authors expressed its opposition to prohibiting restrictions on passive sales of broadcast content. In other words, their position rejected the inclusion of a prohibition under the Geo-Blocking Regulation of agreements restricting consumers from accessing content from abroad, when the licensing agreement stipulates that the content is to be sold only within a certain national territory. Instead, the solution proposed should be based on the principle of proportionate remuneration for creators and should be developed within amendments of the Directive on copyright and related rights in the Digital Single Market (DSM Directive).⁷¹⁰ This copyright

⁷⁰⁸ Cabrera Blázquez F.J., Cappello M., Grece Ch., Simone P., Talavera Milla J., Valais S., Territorialität und Verwertungsfenster im europäischen audiovisuellen Sektor, IRIS Plus, European Audiovisual Observatory, 2023, pg. 50 ff., available at: <https://rm.coe.int/iris-plus-2023-02de/1680abd675>.

⁷⁰⁹ Ibid, pg. 51-52.

⁷¹⁰ Directive (EU) 2019/790.

legislation applies to all copyright holders and copyright users and the most relevant provisions concern new copyrights exceptions and measures to improve licensing practices. According to the position of this stakeholder a possible solution should explore the licensing options provided, amongst others, under Article 9 DSM Directive. This provision requires Member States to ensure that licenses granted under specific conditions allow certain actors, notably cultural heritage institutions as defined in the Directive, to use the contents across the entire EU common market. As stated, the aim of this study is not to analyse the issue of geo-blocking of online content from the perspective of intellectual property law, and thus further considerations will not be discussed here. However, the aforementioned position provides an excellent example of how, despite the complicated system of licensing agreements, a possible solution might lie not in the enforcement of competition rules, but rather in amending sector-specific legislation.

Furthermore, in terms of amendments to sectoral legislation, the recent position of the Committee on the Internal Market and Consumer Protection of the European Parliament seemed to steer towards an expansion of the Geo-Blocking Regulation.⁷¹¹ As a procedural matter under EU law, it should be noted that the European Parliament is only empowered to adopt a resolution requesting the Commission to propose certain legislative measures. It is then up to the Commission, as the sole institution with the right of initiative, to draft and propose the legislation.⁷¹² It is within this context that, first the responsible committee and then the Parliament, acted in 2023 on the possible expansion of the Geo-blocking Regulation over audiovisual services. The parliamentary committee on the Internal Market and Consumer Protection proposed funding a selection of “emblematic European films” to be made available online in all countries and languages through the Creative Europe MEDIA programme. The stance of the Committee went even further, emphasising that “geo-blocking also occurs in the case of audiovisual productions funded or co-funded by the EU MEDIA programme” and so asserting that “whenever EU funds are involved in the financing of audiovisual content, no EU citizen should be deprived of access to it”.⁷¹³ It is interesting to note that the legislator appears to recognise the issues related to territorial restrictions on copyright-protected content, similar to the recognition shown by the Commission and

⁷¹¹ Committee on Internal Market and Consumer Protection, Implementation of the 2018 Geoblocking Regulation in the Digital Single Market, 2023/2019(INI).

⁷¹² Article 17(2) TEU.

⁷¹³ Committee on Internal Market and Consumer Protection, Implementation of the 2018 Geoblocking Regulation in the Digital Single Market, 2023/2019(INI), para. 25.

the Court in the above judicial proceedings. The proposal therefore seeks to circumvent the limitations of copyright based on nationally funded agreements by emphasising that content funded at EU level should be available throughout the EU digital market.

The proposed solution is linked to another aspect highlighted in the legislative proceeding within the Parliament: the situation of linguistic minorities. The position of the Committee, and the later resolution of the Parliament, acknowledged indeed that citizens living in border regions or belonging to linguistic minorities often face difficulties accessing content in their native languages due to geo-blocking, leading so to reduced access to cultural content.⁷¹⁴ A practical example can be observed in the border region of South Tyrol in Italy, where members of the German-speaking minority are unable to legally access certain online broadcast content from public broadcasters in Austria and Germany due to licensing agreements in those countries that do not cover also the Italian territory.⁷¹⁵

Despite not raising particular concerns at national level, the importance of this issue at EU level can be recognised under Article 2 TFEU, which establishes respect for “the rights of persons belonging to minorities” as one of the EU’s founding values. Additionally, Article 3(3) TEU mandates that the Union shall respect its rich cultural and linguistic diversity, a principle further reinforced within the primary law of the Union by Article 22 of the Charter of Fundamental Rights. Against this legal background, the interesting position of the Committee, then adopted by the Parliament, does suggest a so called “South Tyrol Clause.” This calls on the EU Commission to propose concrete solutions for enabling citizens living in border regions or belonging to linguistic minorities to legally access a diverse range of audiovisual content across borders. In particular, the proposition advocates for licensing agreements for audiovisual media— such as films and sports content—to apply to linguistic regions or “clearly definable linguistic minority communities” that share the same language as neighbouring countries. In practice, this means that in border regions such as South Tyrol, the proposed solution would be feasible because it is a geographically well-defined area where a linguistic minority shares the mother language with a neighbouring country. The reasoning behind this proposal acknowledges, as indicated also above for the stakeholders involved by the Commission, the challenges associated with making radical changes to the national licensing systems that regulate audiovisual

⁷¹⁴ European Parliament, Resolution of 13 December 2023 on the implementation of the 2018 Geo-blocking Regulation in the digital single market, 2023/2019(INI), para. 19.

⁷¹⁵ See Minority Safepack Initiative, available at: <http://minority-safepack.eu/main/index>

content across the common market. Therefore, the proposition would avoid altering the fundamental system of licensing agreements and instead foresees tailored solutions for the specific issue related to the linguistic minorities. These identified areas could so be included in the licensing agreements of the directly neighbouring linguistic region and thus allow these linguistic minorities to legally access the broadcasted audiovisual contents.

Beyond this specific solution linked to the linguistic minorities in border regions, however, the final position taken by the European Parliament did not advocate for a revision of the Geo-Blocking Regulation in order to directly include audiovisual services. In its resolution on amendments to the Geo-blocking Regulation, the European Parliament highlighted indeed that such changes could lead to significant revenue losses, jeopardising not only investment in new content, but this could also reduce the number of distribution channels, ultimately driving up prices for consumers.⁷¹⁶ Against such background, the resolution of the Parliament not only dismissed a possible extension of the Regulation, but it included even a specific recital stating that “maintaining geo-blocking for copyrighted works and protected subject matter is one of the major tools for guaranteeing cultural diversity”.⁷¹⁷

3.1.2.1.3. Conclusion

From the above sections it follows how, beyond more practical solutions tailored for border regions, a possible end of the restriction in the geo-blocking practice via sectoral regulation seems difficult to be implemented. While the stakeholder position analysed above suggests a possible way forward by introducing specific exceptions to the licensing system, these measures are still isolated and very limited in scope and cannot therefore be considered as the definitive solution.

It is important to stress how the issue of the inclusion of audiovisual media services within the scope of the Geo-Blocking Regulation does maintain an important role, as the next review is due in 2025. It appears how the approach initially followed by the EU legislator did turn away from competition law and instead adopted a series of secondary legislation designed to eliminate the practice of geo-blocking in the digital market, as this last section showed with both the sectoral legislations of the Portability Regulation and Geo-Blocking Regulation. Nonetheless, as indicated, these are sectoral regulatory frameworks with a limited scope of application, and thus their impact on geo-blocking practices will remain quite moderate. A more effective intervention, in

⁷¹⁶ European Parliament, resolution of 13 December 2023 on the implementation of the 2018 Geo-blocking Regulation in the digital single market, 2023/2019(INI), para. 24.

⁷¹⁷ Ibid, letter I.

terms of sectoral regulation, would be to extend the prohibition to audiovisual services under the Geo-Blocking Regulation, despite the highlighted difficulties related to intellectual property rights. On these issues, the latest judgment in the Valve case demonstrates how such sector-specific elements can not justify a partitioning of the EU single market and thus are found to be incompatible with competition law.

In this context, the question remains open whether future developments will be the result of further judicial assessments of competition enforcement by national and EU courts, as in the recent Valve case, or whether the EU legislator will extend the scope of the geo-blocking regulation to audiovisual services in the next mandate.

4. Conclusion

This last chapter did take into consideration restrictions on the internet as a sales channel. In this context, the lack of explicit provisions addressing the use of the internet as an online channel has meant that a central role have played the judgments handed over the recent years by the Court of Justice. While the judgments of Pierre Fabre and Coty did provide indications on the possible restrictions by the suppliers on the online sales channels, the judges had to rely on provisions originally formulated for the brick-and-mortar scenario. This is also reflected in their argumentation, which in some passages did give raise to some criticisms and interpretative issues. It is not surprising, therefore, that at national level different positions were adopted, as the case of online platform bans in Germany showed. In this context, the 2022 revision of the Vertical Block Exemption Regulation (VBER) aimed to provide businesses with updated guidance on online sales restrictions and to promote a consistent application of competition rules across the single market. The new VBER, together with its accompanying Guidelines, incorporates the guiding principles for the assessment of online restrictions developed by the Court in its case law. However, this alignment also means that some of the criticisms previously directed at the Court's judgments remain pertinent under the current legal framework. Recognising the growing significance of the digital market, the current VBER not only provides explicit guidance on restrictions in the digital environment but also introduces a hardcore restriction concerning specifically the use of the Internet. The impact of this newly introduced hardcore restriction will become clearer in future practical applications, depending largely on how the Commission and EU Courts apply the concept of "effective use of the internet".

Within this chapter on the restraints of online channels, it has also been demonstrated how the emergence and consolidation of the digital market have led to innovations in the control and restriction of sales online. It is in this evolving context that the practice

of geo-blocking has emerged. In terms of sectoral legislation, the fundamental purpose of the adopted Geo-Blocking Regulation is to enable consumers to purchase from websites that do not typically sale to their Member State of residence, under the same sales conditions offered to consumers in the Member States served by the seller. As indicated by the European Commission, the emphasis is therefore not on the businesses themselves, but rather on enhancing a unified online shopping experience for consumers. Ultimately consumers should be able to utilise the internet seamlessly across the single market and shop with the same conditions as if they were local, meaning national, customers.⁷¹⁸ Despite the introduction of the Geo-Blocking Regulation, however, the EU digital market sees still nowadays many restrictions in the provisions of audio and visual services, with consumers being prevented from accessing on a stable basis the services offered beyond their national borders. Against this background, progress has been made both through sectoral regulation and the enforcement of competition law provisions. Beyond some limited, sector specific interventions, the most significant potential development lies in the possible extension of the Geo-Blocking Regulation to include audiovisual services within its scope. In recent years, there have been positions taken within the EU legislative procedure indicating a move in this direction. However, this step has yet to materialise. The reason behind this can be traced back to the licensing system - typically on a national basis - for copyright-protected content. This territorial model is deeply embedded in the business practices of the European audiovisual industry, and the EU legislator has so far shown little inclination to reform it.

In line with the pattern of this study, parallel to these events, another battle was raging in the field of competition law. The judgment of the EU Courts in the Canal+ case did not definitively clarify whether geo-blocking clauses in licensing agreements violate EU competition law, the reason behind it being that the case was decided by means of a commitments Decision.⁷¹⁹ In addition, at a practical level, the commitments agreed had to be ultimately withdrawn. Nonetheless, in the realm of public enforcement, a clearer and more decisive stance emerged with the latest Valve judgment in 2023. The General Court, building on the findings that fell short in the Canal+ case for the reasons mentioned, ultimately clarified that the exercise of intellectual rights deriving from copyright does not confer immunity from competition law scrutiny. This case law confirms that when the conduct of market participants undermines the objective of

⁷¹⁸ Commission, Press release, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_156

⁷¹⁹ C-132/19 P - Canal+ v Commission, para. 54.

market integration, invoking copyright as a sector specific regulatory framework does not exempt such conduct from the Treaty's provisions on competition law. This development clarified the limits of the territoriality principle in copyright law when weighed against the requirements of competition law that prevent absolute territorial protection through geo-blocking. While significant developments have been made in the enforcement of competition law provisions, it is nonetheless important to recognise that, contrary to a sectoral specific provision, the application of EU competition law does not result in a blanket ruling on the unlawfulness of such agreements. Outside the safe harbour of the VBER, each case must be assessed individually by the Commission and the EU courts. This case-by-case approach inevitably leads to legal uncertainty for businesses operating in the digital market and delays the realisation of a fully integrated internal market, ultimately to the detriment of EU consumers.

Overall, the removal of territorial restrictions based on a consumer's location for audiovisual services within the EU digital market continues to face a significant barrier: the principle of territoriality of copyright law. While advancements have been achieved through both secondary legislation and the public enforcement of competition law, this remains an unresolved issue. The EU legislator has yet to take decisive action, although recent developments suggest that the possibility of extending the Geo-blocking Regulation to cover audiovisual services remains under consideration.

Conclusions

The current work identifies the key issues surrounding vertical restrictions on online sales within the European single market. Its primary objective has been to assess the adequacy of the current set of rules for the EU digital market, which is shaped by the evolution of traditional competition law provisions on one hand, and the introduction of targeted regulatory regimes on the other. The analysis has followed a practical approach, examining how the relevant legislation is enforced by competition authorities and interpreted by the competent courts at both national and European levels.

The initial background, necessary to contextualise the phenomenon, outlines the profound changes brought about by digitalisation across the commercial chain. The European internal market has witnessed the entry and rapid growth of new economic players, particularly in the form of online platforms, and the expansion of additional distribution channels available for all market participants. These developments have enabled businesses to engage with online distributors or sell directly to consumers.⁷²⁰

To provide a comprehensive response to the central objective of the research, the analysis begins by examining the legal framework applicable to commercial sales. This involves understanding how the traditional legal system has been structured within the EU internal market and identify the rules originally designed for the offline economy.⁷²¹ Within this framework, the single market imperative embedded in EU competition law emerges and plays a central role when evaluating agreements that restrict cross-border sales. As the title indicates, this analysis of the relevant legal framework is conducted by considering both competition law provisions and the development of specific sectoral regulations.⁷²² From this assessment it emerges how, while both fields of law aim to ensure fair competition within the market, competition law and sectoral regulations differ fundamentally in their methods and objectives. The practical consequence illustrated in the study is that behaviours considered compatible with EU competition provisions are nonetheless prohibited under sectoral regimes, as evidenced under the Digital Markets Act and the Geo-Blocking Regulation.

In terms of the sectoral regulation, the last decade has seen an increasing adoption of provision targeting the online commercial activities, culminating in the Digital Markets Act.⁷²³ This latest piece of regulatory legislation reflects an ongoing shift in the

⁷²⁰ See Chapter 1, Section 2.

⁷²¹ See Chapter 1, Section 3.

⁷²² See Chapter 1, Section 3.2.

⁷²³ See Chapter 1, Section 4.1.1.3.

regulation of the EU digital market –from traditional *ex post* competition enforcement to sector specific *ex ante* regulatory regimes. On the other hand, in terms of competition law, the most significant development concerning the online dimension is encapsulated in the 2022 revision of the Vertical Block Exemption Regulation (VBER), which, for the first time, explicitly addresses online selling and the restrictions associated with it.⁷²⁴

From a practical perspective, analysing the application of these rules to price restraints reveals the challenges that traditional competition law provisions face within the digital market. In the case of resale price maintenance (RPM), the *Asus* judgment shows how the assessment of its impact on competition is significantly shaped by the digital environment, both in terms of pro-competitive and anti-competitive elements.⁷²⁵ Despite these nuanced effects, the position regarding RPM within the VBER remains a rigid presumption of restriction of competition, codified in the hardcore restriction of Article 4(a) VBER. However, this strict prohibition of RPM under Article 101 TFEU appears increasingly inconsistent with the case law developed by the Court of Justice, which has recognised the possibility of justifications under Article 101(3) TFEU. This tension becomes particularly relevant in the digital market, where the phenomenon of free riding may, in the future, prompt a shift in a judicial interpretation towards a more flexible approach to RPM in online settings.⁷²⁶

The need to consider the peculiarities of the digital market, with online platforms as key players, is especially relevant in the context of retail parity provisions (or MFN clauses). The intense debate on their competitive impact has been largely driven by the developments in the online hotel booking sector, where the admissibility of narrow MFN for booking platforms has come under scrutiny. The case study presented in this paper highlights the potential for cross-border competition enforcement among Member States, especially given that large online platforms tend to operate uniformly across the EU digital market, while enforcement practices among NCAs may vary significantly. The focus on narrow MFN demonstrates that the absence of explicit provisions tailored for the online market can lead to inconsistent –at times incoherent – approaches among Member States, as evidenced in Germany regarding the platform of Booking.com.⁷²⁷ The updated VBER therefore introduces welcoming guidance for assessing such restrictions, both within and outside its safe harbour, and appropriately

⁷²⁴ See Chapter 1, Section 4.3.

⁷²⁵ See Chapter 2, Section 2.1.

⁷²⁶ See Chapter 2, Section 2.2.

⁷²⁷ See Chapter 2, Section 3.2.1.

acknowledges their relevance in the digital market. Nonetheless, the debate remains open, as MFN are subject to a different form of scrutiny under the regulatory provisions of the DMA, once again highlighting how sectoral regulation operates alongside competition law in shaping the EU digital market.⁷²⁸

A current analysis of pricing restrictions in the digital market requires taking into account also the use of algorithms, which not only amplify the effects of imposed restraints but also complicate their legal classification, particularly in drawing the line between unilateral recommended prices and price-fixing provisions.⁷²⁹ The challenges of addressing these peculiarities of the digital environment through traditional competition instruments are evident in the Italian air transport sector. Following an initial unsuccessful attempt under competition law, additional sector specific regulatory powers have been introduced in a superficial effort to regulate algorithms pricing practices.⁷³⁰

As new online distribution channels have opened up for both businesses and consumers, the digital market has seen the imposition of additional restrictions on the internet use. Initially, the treatment of these restraints on online sales was shaped by the case law, with the *Pierre Fabre* judgment concerning online distribution bans and the *Coty* judgment addressing third-party platforms bans.⁷³¹ In the absence of specific legislative intervention, authorities and courts have had to rely on antitrust provisions originally designed for traditional brick-and-mortar context to evaluate restrictions on the internet as a sales channel. This approach has inevitably led to interpretative challenges and divergent judicial positions, as exemplified by the German Bundeskartellamt's contrasting assessments of online platforms bans.⁷³²

These judicial findings have been largely codified under the updated VBER, which introduces a new hardcore restriction under the broad concept of the "effective use of the internet" and provides an exemption for bans on online platforms.⁷³³ While the practical application of the former remains to be seen, the latter exemption serves the core function of the Block Exemption Regulation by removing the legal uncertainty created by earlier case law and offering greater clarity for companies engaged in online distribution agreements. However, the current VBER appears to remain rooted in the reasoning developed by the Court of Justice, as it still allows blanket bans to be

⁷²⁸ See Chapter 2, Section 3.2.2.4.

⁷²⁹ See Chapter 2, Section 4.2.1.

⁷³⁰ See Chapter 2, Section 4.2.2.1.

⁷³¹ See Chapter 3, Section 2.

⁷³² See Chapter 3, Section 2.2.1.

⁷³³ See Chapter 3, Section 2.3.

imposed on all online platforms, thereby failing to distinguish between different realities within the digital market.⁷³⁴

The online dimension facilitates the sale of goods and services across national borders, by its very nature creating a single European market. However, its full potential continues to be hindered by restrictive commercial practices such as geo-blocking. These restraints undermine the core objective of market integration and contradict everything the European project stands for: they fragment the internal market along national borders and enable discrimination among EU citizens.⁷³⁵ The Geo-blocking Regulation has been introduced precisely to address this segmentation of the EU digital market. The strength of relying on regulatory provisions lies in their ability to pursue of broader policy objectives and prohibit conduct that may otherwise be permissible under competition law. This is exemplified by Article 6 of the Geo-Blocking Regulation, which restricts online passive sales. Nevertheless, as a regulatory regime, the Regulation is narrow in the scope of application and subject to several exemptions, most notably for EU consumers in relation to audiovisual online services such as films or sports content.

Within this interplay between competition law and sectoral regulation concerning the geo-blocking of online content, competition enforcement has rightly affirmed, most notably in the case *Canal+* and more recently in the *Valve* judgment, that sectoral copyright systems cannot shield companies from the application of competition rules and the overarching imperative of the single market.⁷³⁶ From a regulatory perspective, a plausible path forward to unlock the full potential of the digital market, also for audiovisual services, would derive from an extension of the Geo-Blocking Regulation. Despite some limited solutions aimed at addressing cross-border access in specific regions, such as the proposed South Tyrol clause, a broader consensus at the European level has yet to be reached. This impasse is primarily due to the complexities and sensitivities surrounding national licensing systems for audiovisual content.⁷³⁷

Nevertheless, the recent judicial assessments concerning the segmentation of the internal market caused by intellectual property rights may pave the way for the future European legislator to abolish geo-blocking for audiovisual services, thereby advancing towards a truly unified EU single digital market.

⁷³⁴ See Chapter 3, Section 2.3.2.

⁷³⁵ See Chapter 3, Section 3.1.1.

⁷³⁶ See Chapter 3, Section 3.1.2.1.1.

⁷³⁷ See Chapter 3, Section 3.1.2.1.2.

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