



BRUSSELS À JOUR

E-Commerce Competition – Study Supports Need for a Reform of the Rules

Markus Röhrig and
Lukas Ritzenhoff report on
the latest developments
from the European capital
of competition law.

In the course of the evaluation of the Vertical Block Exemption Regulation (VBER) and the Guidelines on Vertical Restraints, The European Commission recently released a study authored by leading European economists (Study). The Study provides useful insights into the current regulatory regime for vertical restraints.¹ Its main criticism: The current rules provide insufficient legal certainty as to how Article 101 TFEU applies to vertical restraints in the e-commerce sector.

The VBER and the Guidelines on Vertical Restraints have been in force since 2010. The VBER will expire on 31 May 2022. The Commission is currently evaluating whether the rules set out in the VBER and the Guidelines on Vertical Restraints are still effective, efficient and relevant. The Study is part of that evaluation process. It concludes that, while at the time of their adoption, the VBER and the Vertical Guidelines provided sufficient legal certainty, the developments in e-commerce and the increasing importance of online marketplaces and platforms mandate a revision of the current EU legal framework.

E-commerce has been rising drastically in the last decade. While globally online spending by consumers has exceeded \$1 trillion in 2012 for the first time,² the number of digital buyers worldwide is expected to continue to rise to over 2 billion in 2020.³ The effects of the growing e-commerce sectors have already been subject to the Commission's E-Commerce Sector Inquiry⁴, which resulted in three main findings:(i) A growing pro-

1 <https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf>

2 <https://www.emarketer.com/Article/Ecommerce-Sales-Topped-1-Trillion-First-Time-2012/1009649>

3 <https://www.statista.com/statistics/251666/number-of-digital-buyers-worldwide>

4 https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf



portion of manufacturers decided to sell their products directly to consumer through their own online retail shops, thereby competing increasingly with their distributors; (ii) there is an increased use of selective distribution systems, where the products can only be sold by pre-selected authorized sellers, which allows manufacturers to better control their distribution networks, in particular in terms of the quality of distribution but also price; and (iii) there is an increased use of contractual restrictions to better control product distribution. The Study concludes that the VBER and the Vertical Guidelines are insufficient to respond to these developments, as they lack in clear definitions and guidelines specifically tailored to online sales.

The Study considers various aspects of the e-commerce space and identifies provisions that may require revision in light of recent market developments. Very useful – the Study also provides a comprehensive overview of the case law of the National Competition Authorities and the competent national courts on vertical restraints.

- **Online platforms** are one of the specific features of the e-commerce industry, which the Study focuses on. The Study finds that platform providers act as brokers on various sides of the market. It is therefore unclear whether platforms count as a “provider” or also as a “purchaser” or whether they can be “genuine agents” for purposes of the VBER. Moreover, the Study concludes that market share threshold of 30 %, which is currently enshrined in the VBER, needs to be adjusted in the realm of online platforms, as their market influence is mostly determined by their access to data and by network effects rather than by its turnover.
- With regard to the increased use of **selective distribution** systems, the Study considers the landmark judgment of the European Court of Justice (ECJ) in *Coty*. There, the ECJ confirmed that luxury brand manufacturers may prohibit authorized distributors in a selective distribution system from using in a discernable manner third-party online platforms to sell their branded goods. The Study recommends that the exemption for selective distribution systems under the VBER need to reflect the findings of this judgement. This adaptation should furthermore include a clarification as to whether the ECJ’s holding in *Coty* applies solely to luxury goods or also to other high-quality branded products.
- Concerning **most favored nation clauses (MFN)**, the the Study focuses on whether narrow MFNs may raise less competition concerns than broad MFNs. While, for the hotel industry, it suggests that narrow MFNs may indeed have been as harmful as broad MFNs, the Study does not offer any general conclusions for other sectors.



The Study emphasizes the need for adapting the EU's regulatory regime for vertical restraints to the online space. According to the Commission's website, final results of the evaluation phase of the review process are to be expected in the second quarter of 2020. The Commission will then proceed to the impact assessment phase at the end of which the Commission will need to determine what the future regulatory framework for vertical restraints should look like. The Study rightly highlights that, while the e-commerce sector confronts regulators with novel challenges, particularly given the level of innovation and how quickly business models may change, the current evaluation process is an opportunity for the Commission to resolve legal uncertainty and adopt vertical rules that help companies to do what they are supposed to do – developing products and services that make life better for consumers.

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