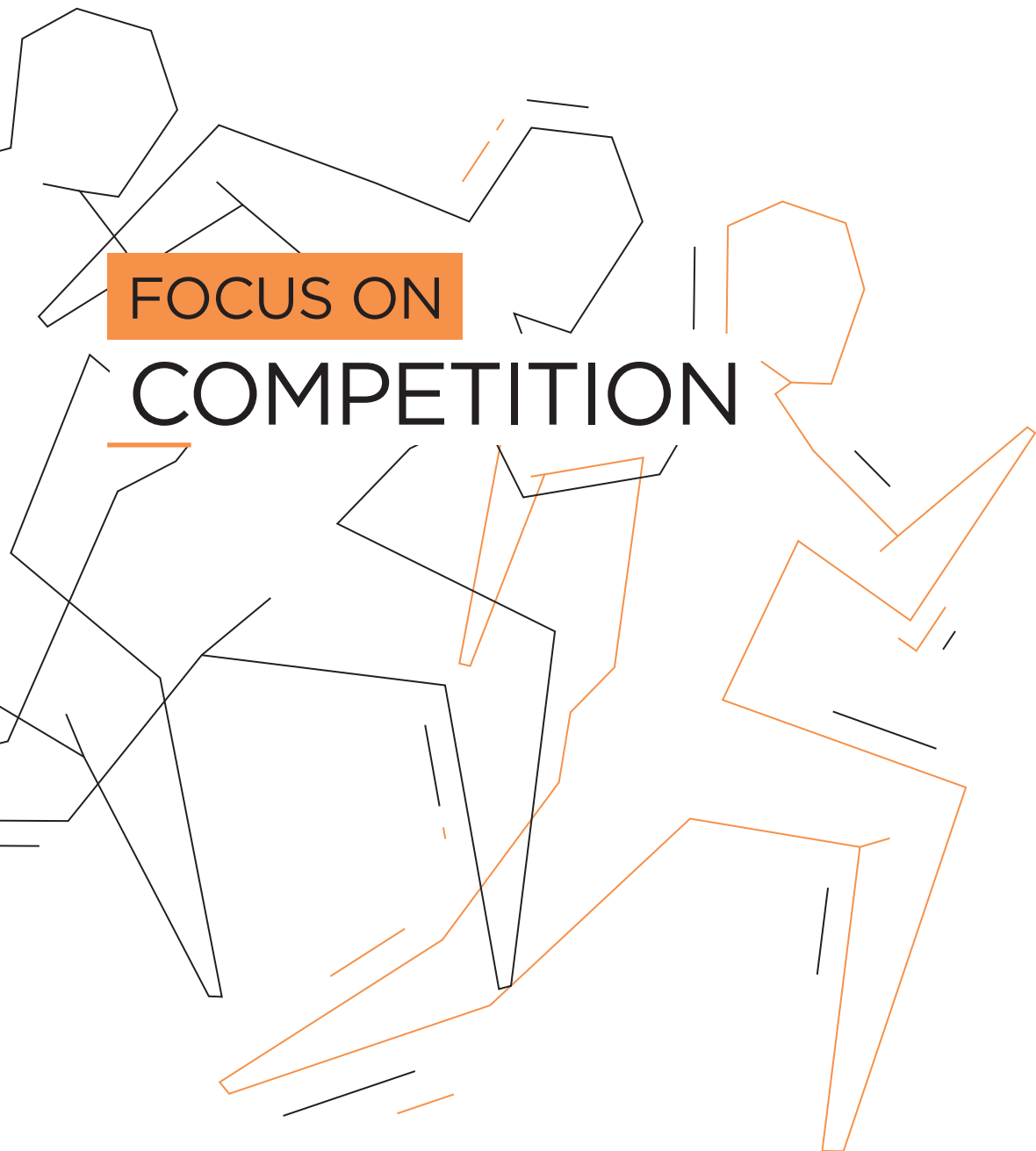


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IV

European Perspective



IV/09

The background of the entire page is a solid orange color. Overlaid on this background are several abstract, white line-art shapes. These shapes are composed of various straight lines of different lengths and orientations, creating a complex, geometric pattern that resembles stylized mountain ranges or abstract architectural structures. The lines are thin and white, contrasting sharply with the orange background.

Vertical Restraints in an Online World

By Jan Jeram, White & Case
LLP, Brussels / Washington ¹

¹ This article is based on a longer contribution on this topic to the Competition Law Journal. See: M. Israel, J. MacLennan, J. Jeram: 'Vertical restraints in an online world: competition authorities gear up their enforcement approach in the digital economy', *Competition Law Journal*, Volume 18, Issue 1 (March 2019).

In the new era of digitization, algorithmic price monitoring and price setting has the potential to lead to rapid and widespread price changes across entire online marketplaces, often leading to lower prices, which benefit consumers. The manner in which suppliers react to these pricing pressures has resulted in behaviours that may involve collusion, but more often are reminiscent of classic vertical restraints, albeit in the new digital era.

The regulation of vertical restraints has been a long-standing facet of competition law, governed at the European level by Article 101 TFEU. The European Commission (“Commission”) and national competition authorities have been tackling vertical restraints in the online world, with varying results, as the European economy continues to digitize.

The E-commerce Sector Inquiry

The online commerce market is worth over €500 billion per year in Europe and continues to grow.² As part of its efforts to modernize its approach in this new online context and face the challenges thrown up,

the Commission launched its Digital Single Market Strategy on 6 May 2015. A key constituent of that strategy was the E-Commerce Sector Inquiry (the “Sector Inquiry”), which was launched with the intention that knowledge gained could contribute to greater enforcement of competition law in the e-commerce sector.

Concluded in 2017, the Sector Inquiry found an increase in price transparency, price competition, and price monitoring. The introduction to the Commission’s Final Report on the Sector Inquiry noted that “[w]ith pricing software, detecting deviations from ‘recommended’ retail prices takes a matter of seconds and manufacturers are increasingly able to monitor and influence retailers’ price setting.”³ This increased use of algorithms and the automatic amalgamation of real-time pricing information allows suppliers, distributors and resellers to monitor prices on a near-constant basis. This can result in markets being able to react more quickly to customer demand, but is also seen by some – especially competition authorities – as an attempt by manufacturers

to better control prices in an increasingly competitive online landscape.⁴

The Sector Inquiry also highlighted the extent to which both price limitations/recommendations and algorithmic price-tracking have been implemented by suppliers. Specifically, four out of five manufacturers use price recommendations, and 38% use price-tracking software.⁵ Of course, simply recommending resale prices does not amount to resale price maintenance (“RPM”), and price recommendations are an important way for manufacturers to ensure that the quality and brand integrity of their products are communicated to customers, yet the line between recommendations and restrictions can be narrow.

Resale price maintenance +

Algorithmic price-tracking, coupled with price-adjusting algorithms by resellers, may result in conduct that is harmful to competition if the results are used by

⁴ The Sector Inquiry revealed that 53% of retailers track the online prices of their competitors; of these, 67% use automatic software for that purpose. Of those retailers that use such software, 78% track prices in order to adjust their own prices to those of their competitors.

⁵ Commission Staff Working Document accompanying the Final Report on the E-commerce Sector Inquiry, SD (2017) 154 final (10 May 2017).

² ‘Ecommerce in Europe was worth €534 billion in 2017’, Ecommerce News (2 July 2018).

³ European Commission, Final Report on the E-commerce Sector Inquiry, COM (2017) 229 final (10 May 2017), para. 13.

suppliers to seek to prevent prices falling below a certain level, e.g. below their recommended price, in order to stave off the effects of automatic price reductions from other retailers. EU competition law prohibits a supplier from interfering with a reseller's freedom to set prices; an agreement which establishes a minimum resale price is a 'by object' restriction of competition under Article 101(1) TFEU and is considered to be a 'hardcore restriction' under Article 4(a) of the Vertical Block Exemption Regulation ("VBER").⁶ RPM encompasses both direct price-fixing (e.g. a contractual term specifying a minimum resale price) and indirect price-fixing (e.g. threatening a supplier with sanctions if it does not adhere to specified price levels).

In terms of the enforcement of competition law rules banning RPM, in 2003 the Commission fined Yamaha €2.56 million for setting a minimum retail price for musical instruments sold by distributors that engaged in parallel imports.⁷ In the 15 years following that decision, however, the Commission did not bring

a single case relating to RPM, preferring to rely on enforcement at the Member State level. Many national competition authorities, including in the Balkan region, did indeed take action against RPM under their domestic laws and it was appropriate for them to do so, especially at a time when retail distribution systems and consumer buying patterns were typically no wider than national in scope.

The combination of attempts to influence a retailer's selling price, together with use of algorithmic price tracking or software to identify the residency of an online purchaser (geo-blocking) has led to an increase in the number of cases that could be described as 'RPM+'. Such cases involve suppliers using traditional vertical price restrictions to counteract the effects of the ease with which purchasers from across the EU can access goods (and services) in other Member States and access information about prices from a wide variety of sources. These cases have caught the Commission's interest, and led to a recent resurgence of interest in RPM from an enforcement perspective. Following the Sector Inquiry, the Commission opened several investigations into RPM in the consumer electronics sector, which resulted in four RPM decisions in 2018. These were the first RPM decisions the

Commission had taken since the *Yamaha* decision in 2003.

Resale price maintenance: 2018 cases

After the conclusion of the Sector Inquiry, the Commission initiated separate proceedings against four consumer electronics manufacturers: *Asus*, *Denon & Marantz*, *Philips* and *Pioneer*,⁸ each of which featured an 'RPM+' element. *Asus*, *Denon & Marantz* and *Pioneer* each involved manufacturers which were monitoring their resellers' pricing behaviour using price comparison websites,⁹ i.e. websites which operate as vertical search engines that automatically amalgamate prices on identical products from a range of retailers in real time, allowing a consumer to pinpoint the reseller with the lowest price at any given point. The *Asus*

⁸ Case AT.40465, *Asus* (vertical restraints) (24 July 2018); Case AT.40469, *Denon & Marantz* (vertical restraints) (24 July 2018); Case AT.40181, *Philips* (vertical restraints) (24 July 2018); and Case AT.40182, *Pioneer* (vertical restraints) (24 July 2018). A total of more than EUR 111 million in fines was levied against the undertakings involved, with the companies in all four cases acknowledging the alleged infringements and agreeing to cooperate with the Commission. Absent that co-operation the fines would have been materially higher.

⁹ *Asus*, para. 27; *Denon & Marantz*, paras 45, 49, 56, 76 and 79; and *Pioneer*, paras 70 and 97.

⁶ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, (2010) O.J. L 102/1.

⁷ Case COMP.37975, *Po/Yamaha* of 16 July 2003.

decision also details the use of software monitoring tools by Asus to identify resellers that were selling below the recommended resale price.¹⁰

In terms of algorithmic price setting, the *Pioneer* decision, in particular, details the extent to which advances in online marketplaces have enabled the anti-competitive use of RPM by manufacturers. Pioneer was aware that its resellers closely monitored online resale prices and would immediately match a decrease in another retailer's online price. The Decision outlined that "many dealers used so-called spiders that are software programmes that track the prices online and automatically adjust to match the lowest price available online, even without the dealer being aware of the price adjustment".¹¹

The decision details that, as part of its strategy, Pioneer's staff would often target just one price-setter, the "aggressor" that had originally lowered the price, thus triggering the chain of price reductions. Pioneer explained that the way online pricing affected the price-setting of its products was the reason why Pioneer had considered it necessary to take measures to prevent or slow down price

erosion by intervening with the lowest-pricing retailers to get prices increased.¹² Once Pioneer had intervened with the "aggressor" to amend its prices, the followers' prices would automatically re-adjust, too.¹³

All four decisions acknowledge that price-monitoring and adjustment software programmes multiply the impact of any price interventions, and that consequently the RPM engaged in by all four companies was an effort to avoid online price erosion across entire online retail networks.¹⁴ These knock-on effects, which can quickly spread across the whole market, are a further reason why the Commission may have decided to commit resources to investigating these cases. With their limited resources, competition authorities typically have discretion as to which cases they initiate. In the traditional bricks-and-mortar retail model, the impact of bilateral RPM arrangements between a manufacturer and reseller (or even between a manufacturer and multiple resellers) may have a fairly limited impact. However, taking action against only one "aggressor" can have knock-on effects across an entire online market. This is because preventing one reseller from

lowering prices will immediately have an impact on the prices other resellers offer, if they use algorithms to match competing resellers' prices.

Geo-blocking: Pioneer and Guess

A second facet of the *Pioneer* decision was the extent to which Pioneer coupled its online RPM efforts with restrictions on its resellers' ability to engage in cross-border online sales outside of a reseller's designated sales territory, strategies which the decision describes as closely linked.¹⁵

Many manufacturers are concerned about price arbitrage as differences in the economic conditions across the European Economic Area ("EEA") mean that a product can command a higher price in some EEA States than in others. Enabling price arbitrage was a specific preoccupation of the Commission through the 1980s and 1990s, and the law preventing restrictions of sales across borders by manufacturers or suppliers has been clearly established since then. Nevertheless, Pioneer admitted to identifying lower-pricing resellers through tracking serial numbers and contact-

¹⁰ Asus, para. 27.

¹¹ *Pioneer*, para. 136 (emphasis added).

¹² *Pioneer*, para. 137.

¹³ *Pioneer*, para. 139.

¹⁴ See, for example, Philips, para. 64.

¹⁵ *Pioneer*, para. 99.

ing such retailers directly to seek to prevent them making cross-border sales to customers in other EEA States.¹⁶ Pioneer also maintained blacklists of lower-pricing retailers that were engaging in cross-border trade outside their allocated territory and imposed sanctions against them by limiting sales to such retailers, increasing the wholesale price of products sold to them, or refusing to accept orders from those retailers altogether.¹⁷ Pioneer admitted to engaging in such behaviour in order to guard against any potential downward effect on price which such cross border trade could have, which again could be exacerbated by spider programmes, triggering a broader downward trend in prices across a price region.

Following on from *Pioneer*, and as a direct follow-up to the Sector Inquiry, the Commission again tackled geo-blocking in the *Guess* decision in December 2018.¹⁸ Guess had built anti-competitive measures into its selective distribution agreements, including restricting resellers from selling to

consumers located outside the authorised reseller's allocated territory. The Commission also uncovered restrictions that prevented resellers from independently deciding the retail price of Guess products. In addition, the anti-competitive arrangements were found to have included restricting authorised retailers from using the Guess brand names and trademarks for the purposes of online search advertising.¹⁹ This is a further new development – including in the US and other jurisdictions – and one that can be expected to be considered in future cases.²⁰

¹⁹ *Guess*, para. 102.

²⁰ In November 2018, the US Federal Trade Commission ordered 1-800 Contacts to cease and desist from enforcing settlement agreements entered into with competitors, which had the effect of ensuring that those competitors' rival adverts would not appear in response to online searches for 1-800 Contact's trademarked terms: see FTC Opinion, *In the Matter of 1-800 Contacts, Inc.*, (7 November 2018); 1-800 Contacts appealed the FTC's order and the matter is now pending before the Second Circuit. In January 2019, the Turkish Competition Board initiated an investigation 'in relation to algorithm updates and AdWord advertisements regarding general search services': see Rekabet Kurumu press release, 'Investigation initiated about Google Reklamcilik ve Pazarlama Ltd. Şti., Google International LLC, Google Ireland Limited and Apple Inc.' (7 January 2019).

The geo-blocking issues in the *Guess* and *Pioneer* cases reflect the Commission's interest in this area, and are also addressed by the EU's new Geo-blocking Regulation, which came into force on 3 December 2018.²¹ The practices in the *Guess* and *Pioneer* cases were prohibited by Article 101(1), but the Geo-blocking Regulation also expressly prohibits traders from discriminating between customers on the basis of their nationality, place of residence or place of establishment. The Commission has in addition launched geo-blocking investigations into the behaviour of numerous companies.

Lively enforcement in Member States

The Commission had, for a number of years, left the task of enforcement in the vertical restraint context to national competition authorities, which have not shied away from this responsibility. Some of the authorities in the Balkan region also have considerable experience in purs-

¹⁶ *Pioneer*, para. 101.

¹⁷ *Pioneer*, para. 102.

¹⁸ Case AT.40428, *Guess* (17 December 2018), para. 13; the Commission levied a fine of more than EUR 39 million on Guess (reduced by 50% due to Guess's co-operation).

²¹ Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, (2018) O.J. L 601/1.

ing the traditional RPM cases.²² In more recent years, however, national competition authorities across Europe have also taken active enforcement action in the area of vertical restraints of online sales. This trend appears not to have yet taken root in the Balkan region, but is likely to start taking shape soon.

The following pages provide a short summary of key cases and developments in the field of vertical restraints of online sales in **Germany**, **France** and the **UK**, where most of the action has taken place. Readers who are particularly interested in the topic can use the references in the footnotes for extra reading.²³

²² See, for example, the Croatian Competition Agency's Decision of 3 December 2014 in UP/I 034-03/13-01/016 *Kraš i Narodni trgovački lanac*; Decision of 5 May 2017 in UP/I 034-03/2015-14/037 *Duina*; Decision of 5 May 2017 in UP/I 034-03/2015-01/036 *Fred Bobek*; Decision of 17 December 2015 in UP/I 034-03/2014-01/022 *Piaggio Hrvatska*, and Decision of 20 December 2016 in UP/I 034-03/2013-01/035 *Gorenje Zagreb*. The Serbian Commission for Protection of Competition also has experience with enforcing the rules against RPM, including in the automotive sector, sporting goods sector, and baby care products. The notable exception is Slovenia without any final decisions on the issue of RPM.

²³ Readers can also refer to a longer contribution on this topic by M. Israel, J. MacLennan and J. Jeram in 'Vertical restraints in an online world: competition authorities gear up their enforcement approach in the digital economy', *Competition Law Journal*, Volume 18, Issue 1 (March 2019).

Germany. The enforcement of competition law against RPM, together with intervention against online resale restrictions, has long been a particular priority for the German competition authority, which has shown its willingness to also engage with vertical restraints online. The FCO has tended to take a stricter position than other competition authorities.

As far back as 2010, the FCO imposed a fine of EUR 2.5 million on Garmin for setting higher ex-factory prices for retailers with their own online stores whose prices were conspicuously low.²⁴ If these retailers raised their online prices, Garmin would grant them a retrospective 'kickback' (or rebate) as a compensatory bonus, which was held to constitute RPM. Most famously, the FCO has addressed behaviour that seeks to hinder online sales through the prohibition of the retailers' use of certain platforms (such as Amazon, eBay, etc.) and price comparison sites. This was the main issue at hand in the

well-known *Coty* case²⁵ and the *ASICS* decision.²⁶

Drawing from its experience, the FCO has recently published two documents relevant to the question of RPM in the online world. The first is a Guidance Note on RPM, which provides important guidance for manufacturers and retailers in all sectors and includes concrete, real-life examples of behaviour that will be considered to be RPM.²⁷

The note deals with important practical issues such as data and information sharing between

²⁵ Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941. The CJEU held that brands could prohibit resellers from retailing their products through online third-party platforms where an "aura of luxury" is an inherent quality of those products, and a selective distribution system (excluding online platforms) is necessary to preserve that aura.

²⁶ Case KVZ 41/17, *ASICS* (12 December 2017). The German Federal Court held that a prohibition preventing retailers from participating in price comparison websites was not a restriction capable of exemption (as had been the case in *Coty*). In distinguishing *Coty* from *ASICS*, the Federal Court seemed to emphasize that the *ASICS* case did not concern luxury goods as *Coty* had, and that the prohibition in question had been coupled with a host of other restrictions (such as a prohibition on using the *ASICS* brand name).

²⁷ FCO, *Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector* (July 2017).

suppliers and resellers, the discussion of recommended resale prices and the planning of promotional campaigns. The second is a paper entitled ‘Competition restraints in online sales after Coty and Asics – what’s next’,²⁸ in which the FCO recognised that the use of online tools for price monitoring and setting had brought about something of a ‘[r]enaissance of RPM and alternative restraints in online sales’.²⁹ The paper makes clear that, in the FCO’s view, ‘it is not necessary to generally prohibit the use of marketplaces’ to protect a brand’s image, not least because the FCO considers that online marketplaces and price comparison websites are ‘clearly more significant in Germany than in other Member States’.³⁰ It seems, therefore, that, irrespective of *Coty*, the FCO will continue to take a dim view of online platform bans in Germany.

Most recently, on 6 November 2019, the FCO and the French Competition Authority (“FCA”) published a joint study on algorithms and competition. While the study focuses on risks related to pricing collusion between competitors, it offers general

insight into the authorities’ understanding of the concept and functioning of algorithms, which is relevant also in the field of RPM.³¹

France. The FCA has a well-established body of case law dealing with vertical restraints, and with RPM in particular.³² In the last decade, the FCA’s scrutiny has also led it into the online arena. The recent *Stihl* case illustrates that enforcement against online sales restrictions is becoming increasingly strict and is expected to continue, with ongoing investigations into the distribution of spectacles and cosmetics already underway.³³

In its E-commerce Opinion, the FCA stressed that while each manufacturer is free to organise its distribution methods and impose certain conditions on the sale of its products offline and online, it cannot ban online sales

as a matter of principle.³⁴ In line with this view, the FCA imposed a fine of EUR 900,000 on Bang & Olufsen for having prohibited the resellers in its selective distribution network from selling the brand’s products online by issuing certain conditions on the use of the Internet which together rendered online sales ‘materially impossible’.³⁵ Most recently, in July 2019, the FCA fined Bikeurope for explicitly preventing its distributors from selling the bikes online.³⁶ By contrast, in November 2015, the FCA closed a probe into Adidas’s online sales practices after Adidas removed a prohibition on sales via online marketplaces from its distribution contracts.³⁷

The October 2018 decision in *Stihl* represents the first time that the FCA adopted a

²⁸ FCO, *Competition restraints in online sales after Coty and Asics – what’s next?* (October 2018).

²⁹ *Ibid.*, pp. 1-2.

³⁰ *Ibid.*, p. 3.

³¹ Autorité de la concurrence, Bundeskartellamt, Algorithms and Competition (November 2019).

³² Three landmark RPM cases are: Decision 06-D-04, Practices observed in the luxury perfume sector (13 March 2006); Decision 07-D-50, Practices implemented in the toy distribution sector (20 December 2007); and Decision 11-D-19, Practices implemented in the fancy goods and toys distribution sector (15 December 2011).

³³ See ‘Un cartel des lunettes mis au jour par l’Autorité de la concurrence’, *Le Figaro* (19 October 2016).

³⁴ Opinion 12-A-20 on the competitive operation of the e-commerce sector (18 September 2012). See also FCA press release, ‘Findings of the sector inquiry into e-commerce’ (18 September 2012).

³⁵ Decision 12-D-23, *Practices implemented in the hi-fi and home cinema equipment sector* (12 December 2012). See FCA press release, ‘The Autorité de la concurrence fines Bang & Olufsen for prohibiting its approved distributors from selling its products online’ (12 December 2012).

³⁶ Decision 19-D-14, Practices implemented in the high-end bikes sector (1 July 2019).

³⁷ FCA press release, ‘The Autorité de la concurrence has closed an investigation against Adidas’ (18 November 2015).

final decision on the validity of restrictions on the sale of products on online platforms.³⁸ The case addresses a question that was arguably left open after *Coty*, i.e. whether platform bans for non-luxury goods can be justified.³⁹ The FCA appears to have answered in the affirmative, accepting that the need to preserve the quality of the products and ensure their proper use could justify the third-party platform ban. However, Stihl had also required its distributors to either hand-deliver ‘dangerous’ products to customers or require customers to collect such products in person from their premises, prohibiting the use of any third-party delivery service. While Stihl argued that it had imposed this requirement to ensure that safety briefings on the products could be delivered

to customers, the FCA found that this requirement was not justified by safety concerns, since it was not required by the applicable health and safety regulations and was not required by Stihl’s main competitor. The FCA found that this de facto ban on online sales via distributors’ websites was an infringement of competition ‘by object’ that was not justified by the efficiencies claimed by Stihl. The FCA imposed fine of EUR 7 million – a record amount for online sales restrictions in France – and ordered Stihl to amend its selective distribution contracts.⁴⁰

UK. Much like its German and French counterparts, the CMA has also been active in applying competition law and assessing vertical constraints in online markets. Over the past years, the CMA has issued many interesting decisions in this area⁴¹ and published useful guidance papers for businesses and prac-

tioners.⁴² The CMA, and the UK government more generally, intend to tackle head-on the issues raised by the growing online marketplace.⁴³ The UK aims to be able to rely on a substantial body of evidence on the operation of online markets, and conclude on the extent to which the CMA’s enforcement toolbox is sufficiently adapted to those findings.

The most discussed CMA decision in the field of vertical restraints in the online world was the August 2017 fine on Ping for entering into agreements with its UK resellers which included a complete prohibition on online sales.⁴⁴ Ping had argued that its online sales ban was objectively justified; the CMA partially agreed, but concluded that a complete online sales ban was

³⁸ Decision 18-D-23, *Distribution practices implemented in the gardening equipment sector* (24 October 2018). See FCA press release, ‘The Autorité de la concurrence fines the manufacturer Stihl 7 million euros for having prevented its authorised distributors from selling its products online’ (24 October 2018). This is also the first FCA decision on this topic following the landmark *Coty* judgment.

³⁹ On 13 July 2018, the Paris Court of Appeal upheld the platform ban of the cosmetic manufacturer Caudalie, putting an end to a five-year legal saga by ruling that platform bans may, in certain circumstances, apply to non-luxury products: *SAS eNova Santé v SAS Caudalie*, no. 17/20797 (13 July 2018).

⁴⁰ Recently, the authority’s decision was by and large confirmed by the Court of Appeal. See *Cour d’Appel de Paris*, N. RG 18/24456 *Stihl*, 17 October 2019.

⁴¹ Case CE/9856/14, *Online resale price maintenance in the commercial refrigeration sector* (24 May 2016); Case CE/9857/14, *Online resale price maintenance in the bathroom fittings sector* (26 April 2016); Case 50223, *Online sales of posters and frames* (12 August 2016); Case 50343, *Online resale price maintenance in the light fittings sector* (3 May 2017).

⁴² See *Price-fixing: guidance for online sellers* (November 2016); *Restricting online resale prices: CMA letter to suppliers and retailers* (20 June 2017); *Resale price maintenance case studies* (20 June 2017); and *Pricing algorithms: Economic working paper on the use of algorithms to facilitate collusion and personalised pricing* (CMA94, 8 October 2018).

⁴³ Interesting reports have been published in the UK on this matter. See, for example, House of Lords, Select Committee on European Union, *Online Platforms and the Digital Single Market* (20 April 2016). See also Report of the Digital Competition Expert Panel, *Unlocking digital competition* (March 2019).

⁴⁴ Case 50230, *Online sales ban in the golf equipment sector* (24 August 2017).

a disproportionate measure for achieving the justified aim because less restrictive means were available to Ping. The CMA concluded that the online sales ban was not an objectively justified restriction. Ping appealed the decision to the Competition Appeal Tribunal, which largely upheld the CMA's decision.⁴⁵ The judgment offers an interesting overview and analysis of the qualification of a behaviour as a 'by object' restriction of competition and the applicable legal tests and burden of proof.⁴⁶

Most recently, in August 2019, the CMA fined Casio £3.7 million for preventing online discounting of its digital pianos and keyboards.⁴⁷ This was the CMA's largest-ever fine for this type of offence.

Conclusions and a look forward

National competition authorities, rather than the Commission at the EU level, have considered

RPM and other vertical restrictions in the online sphere in recent years. This has often led to the publication of guidance or commentary to both explain the issues and to highlight to business that competition law applies in online markets as much as it does in traditional retail ones. On the other hand, the cross-border nature of consumer shopping, and the EU Sector Inquiry, has prompted a renewed interest by the Commission in vertical restraints, and that focus is unlikely to diminish. Practitioners should keep an eye out for possible divergences between the authorities' decisional practices, which could be damaging for the development of consistent jurisprudence and legal certainty for companies.

In the future, the issues that the competition authorities are expected to (continue to) grapple with include selling via marketplaces or price-comparison sites and the use of automatic software to adjust prices. One of the main challenges for the authorities might be to appropriately tackle the functioning of platforms performing hybrid functions, i.e. platforms that perform both as an authorised retailer and an intermediary for other online dealers. This trend could raise two particular considerations: (i) strong market positions for online platforms

due to the increased network effects that the depth of their product offering can bring; and (ii) the potential squeezing-out of independent retailers, given platforms' cooperation with manufacturers. Indeed, in July 2019, the Commission announced that it had opened an investigation under Articles 101 and 102 to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplaces was in breach of EU competition law.⁴⁸

This should be set against the context of a VBER regime that is due to expire on 31 May 2022. In preparation for that date, the Commission has launched an evaluation exercise designed to '*check whether the Regulation is still effective, efficient [and] relevant*'.⁴⁹ The purpose of the evaluation is to gather evidence on the functioning of the VBER regime to allow the Commission to decide if the VBER should lapse, be

⁴⁵ *Ping Europe Limited v. Competition and Markets Authority* [2018] CAT 13.

⁴⁶ Ping has appealed the judgment to the Court of Appeal, which held a hearing on 6/7 November 2019; see C3/2018/2863 *Ping Europe Limited v. Competition and Markets Authority*.

⁴⁷ Case 50565-2, *Online resale price maintenance in the digital piano and digital keyboard sector* (1 August 2019).

⁴⁸ European Commission, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon (17 July 2019). Case number: AT.40462. On the same day, the German FCO and Austrian Competition Authority announced the closing of their respective investigations, following commitments by Amazon to amend its terms of service with merchants.

⁴⁹ European Commission, Staff Working Document, *EU competition rules on vertical agreements – evaluation*.

prolonged or ‘*be revised to take proper account of new market developments since its adoption in 2010, notably the increased importance of online sales and the emergence of new market players such as online platforms*’.⁵⁰ A public consultation on the topic was launched on 4 February 2019 and has recently closed as the review process continues.⁵¹ The review of the VBER may provide more clarity and guidance on the way online sales and certain platform restrictions are to be considered, given the potentially different interpretations by various national competition authorities. The updated regulation is expected to include provisions on MFN clauses and online selective distribution (to address the *Coty* judgment).

Finally, following the European elections in May 2019, a new College of Commissioners is expected to swear in shortly under the leadership of Ursula von der Leyen. The Commission’s focus on digital markets is set to sharpen further after Margrethe

Vestager’s nomination for a second term as Competition Commissioner, now with a significantly expanded portfolio, taking on one of the most visible and senior roles in the new Commission. She will also be responsible for coordinating the Commission’s wider digital policy and making Europe ‘fit for the digital age’. This might see the implementation of the ideas set out in the much-publicised special advisers’ report on competition policy for the digital era,⁵² which advocates for a tougher stance toward dominant platforms. Digital businesses (and online platforms in particular) can expect regulatory pressure to intensify over the next five years, as the EU is eager to claim global leadership in this sector.

⁵⁰ See https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981_en.

⁵¹ See https://ec.europa.eu/competition/consultations/2018_vber/index_en.html. The Staff Working Document is expected to be released in late 2020.

⁵² A report by J. Cremer, Y.A. de Montjoye, H. Schweitzer, *Competition policy for the digital era* (4 April 2019).