RETHINKING THE EU'S *BY OBJECT* APPROACH TO VERTICAL RESTRICTIONS

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CPI ANTITRUST CHRONICLE
DECEMBER 2020

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CPI Antitrust Chronicle December 2020

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I. INTRODUCTION

The EU is in the process of revising its rules on vertical agreements as contained in the Vertical Block Exemption Regulation (VBER) and Vertical Guidelines, which expire in May 2022.[2] Ahead of further consultations and the publication of draft revised rules, the European Commission (Commission) published in September a staff working document evaluating how the current rules have functioned since their adoption in 2010 (the Evaluation), as well as a short Inception Impact Assessment, concerning potential policy options in a limited number of areas.[3]

The Evaluation, the outcome of two years of consultation and evidence gathering, finds that the VBER and Vertical Guidelines are still relevant and useful tools to facilitate the self-assessment of vertical agreements. But it also finds that distribution markets have changed significantly due to the growth of e-commerce and new market players, such as online platforms. These developments have led to considerable changes in distribution models, generally increasing the range of distribution channels used by suppliers, but also in the range of vertical restrictions used to regulate distribution in and across such channels.

In light of these changes, the Commission concludes that the EU's vertical rules, whose aim has been to improve legal certainty, are no longer meeting that objective. Various rules lack clarity, give rise to diverging interpretations, or are no longer applicable to the current business environment. In other places, the Commission recognizes that gaps have emerged, including in the range of vertical agreements deserving exemption under article 101(3) of the Treaty on the Functioning of the European Union ("TFEU").

But the Commission finds that the list of hardcore restrictions included in the rules – those agreements typically treated as having the object of restricting competition under article 101(1) TFEU – to be generally appropriate.

This conclusion raises questions. What the Evaluation fails to recognize, as we seek to show in the remainder of this article, are certain fundamental problems with the Commission's approach to hardcore/by object restrictions, and particularly in how that approach has been applied to vertical agreements in the context of online selling.

2 Commission Regulation 330/2010 OJ 2010 L102/1 and the Vertical Restraints Guidelines OJ 2010 C130/1.

3 Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation SWD(2020) 172 final, September 8, 2020, and Commission, Inception Impact Assessment, Ref. Ares(2020)5806566, October 23, 2020.

II. WHAT IS WRONG WITH THE EUROPEAN APPROACH TO RESTRICTIONS BY OBJECT IN VERTICAL AGREEMENTS?

Defining certain agreements as having the object of restricting competition relieves competition authorities of the burden of demonstrating that the agreement has had anti-competitive effects before finding an infringement.[4] As such they are intended as a tool of procedural efficiency, lessening the evidential burden on competition authorities, but they also aid businesses by providing legal certainty. As they are typically reserved for the most serious types of infringements, and companies ought to know better, they are also typically subject to the heaviest fines.

This approach to enforcement is however only workable and proportionate if the category of agreements to which the by object characterization applies is carefully and strictly defined. Where exactly to draw the line between by object and 'by effect' restrictions has been a matter of debate, including pronouncements of the Court of Justice of the European Union ("CJEU") on a number of occasions over the past decade – a point not reflected in the Commission's Evaluation. Perhaps the most seminal case of this period, and which narrowed what had been seen as an undue expansion of the concept of restriction by object, is *Cartes Bancaires* (2014). The approach in the *Cartes Bancaires* judgment can be summed up by reference to the words of Advocate General Wahl in that case, that the by object category should be reserved for "*conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics*."[5]

In our view, *Cartes Bancaires* marks a departure from the position underlying the current vertical rules adopted in 2010, but it has also not always been fully reflected in subsequent decisional practice. The issue with the current vertical rules in particular lies in part with the basic way in which they apply the elements of article 101 TFEU. For example, the Vertical Guidelines proceed on the basis that certain vertical agreements have the object of restricting competition under article 101(1) TFEU, whilst leaving open that they could nonetheless have pro-competitive effects.[6] (A similar approach is also reflected for example in the Commission's 2018 *Guess* decision, as we discuss further below.) Those pro-competitive effects are however left to be assessed under article 101(3) TFEU as part of an efficiency defense, only once a presumption of illegality has arisen and the burden of proof shifted to the allegedly infringing firm.

If competition authorities following these rules are routinely able to conclude that an agreement has an anti-competitive object, and at the same time leave open that it may have pro-competitive effects, there is a real risk of reaching false positives. Or, adapting the colorful analogy of AG Bobek in *Budapest Bank*, there is a risk that the Commission looks at something that superficially resembles a fish and disregards the fact that it smells like a lily.[7] That risk is then heightened by the reality that in practice, when faced with a presumption of illegality and bearing the burden of proof, many companies are not prepared to challenge an authority's by object finding, but instead opt for settling and not contesting those findings in order to obtain a reduction in their fine.

As a result, the reasoning underlying many competition authorities' by object findings is rarely tested, leaving any potential flaws in the approach unchecked and becoming embedded in decisional practice. The risk of this occurring is also greatest in our view when the by object approach is applied to markets as changing and complex as vertical markets in their current stage of development.

4 By object restrictions are nonetheless distinct from *per se* infringements under U.S. antitrust law, in that they are in principle always open to justification under article 101(3) TFEU. A by object analysis will also involve consideration of the economic and legal context of the agreement in question (whereas such matters may more typically fall under a rule of reason approach in the U.S.).

5 C-67/13 P *Cartes Banciares* EU:C:2014:1958, para. 56; C-67/13 P *Cartes Bancaires* EU:C:2014:2204, paras. 51-53.

6 See Vertical Guidelines, paras. 47 and 122.

7 Case C-228/18 *Budapest Bank* EU:C:2019:678, para. 51.

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III. THE EXAMPLE OF *PING v. CMA*: FAR FROM A HOLE IN ONE

The rare occasions when an authority's by object reasoning is challenged, however, afford an opportunity to see how coherent the approach really has been. A good example of this is the recent *Ping* case in the UK. Ping, the U.S. golf club manufacturer, had required the members of its selective distribution network in the UK to only sell its custom golf clubs after an in-store custom-fitting. In its 2017 infringement decision, the UK's Competition and Markets Authority ("CMA") considered Ping's online sales ban to have the object of restricting competition, as it restricted the ability of its resellers to sell custom golf clubs and to compete in and across online/offline distribution channels. Ping was accordingly fined £1.45 million.[8]

Ping challenged the decision before the Competition Appeal Tribunal (the Tribunal) in 2018, and in turn before the Court of Appeal, which handed down its judgment in January 2020.[9] Whilst both appellant courts ultimately upheld the CMA's decision, what is striking is the CMA's and the courts' struggle to find a clear and coherent explanation for the by object finding. To highlight a number of key points:

- Before the CMA and on appeal, Ping argued that its online sales ban was not intended to restrict competition but to promote in-store custom fitting. Custom fitting was an integral aspect of its brand; could only properly take place in-store; and online selling of its custom clubs would risk disincentivizing its resellers from investing in in-store custom fitting for fear of free-riding by online sellers.

- The CMA actually accepted that in-store custom fitting was a legitimate objective for Ping to pursue. But at the same time, it considered the online sales ban to have an anticompetitive objective. The way the CMA sought to overcome this apparent contradiction was to consider that the ban went beyond what was necessary to achieve its legitimate aim, so that in effect, the legitimate objective could not be taken into account.[10]

- On appeal, the Tribunal considered that the CMA had committed an error of law. It should not have considered proportionality as part of its assessment of the object of the rule, but only once its object had been established, as part of an article 101(3) TFEU assessment.[11] The Court of Appeal was unsure who was right between the CMA and Tribunal, but found the law to be "*frustratingly untidy*" on this issue and in need of clarification by the CJEU.[12]
- The Tribunal went as far as to say that it was "*prima facie counterintuitive that the internet ban, adopted by Ping with the intention of ensuring that customers purchase correctly fitted clubs, thereby enhancing their enjoyment of the game, …should be found to have had as its object the prevention, restriction or distortion of competition resulting in the imposition of a quasi-criminal fine.*"[13] If this was the case, it is difficult to see how the online sales ban conforms with *Cartes Bancaires* in terms of the harmful nature of the ban being "*proven and easily identifiable, in the light of experience and economics.*"

- The Tribunal appeared to overcome this by not actually applying *Cartes Bancaires* but the earlier and wider "*real (non-fanciful) potential to restrict competition*" test from the CJEU's 2011 *Allianz* judgment.[14] On appeal the Court of Appeal was then at pains to explain that *Allianz* had not actually been the test applied by the Tribunal.[15]

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8 CMA, Case 50230 *Online sales ban in the golf equipment sector*, August 24, 2017.

9 *Ping v. CMA* [2018] CAT 13, and *Ping v. CMA* [2020] EWCA Civ 13.

10 CMA, Case 50230 *Online sales ban in the golf equipment sector*, August 24, 2017, para. 4.165.

11 *Ping v. CMA* [2018] CAT 13, para 94-100. The Tribunal also accepted that objective justification could be considered at the prior stage in applying the *Metro* test (by which selective distribution measures can fall outside of article 101 TFEU altogether *inter alia* if they are necessary for non-price competition) but considered this was also distinct from assessing the object of a measure, and from a proportionality assessment under article 101(3) TFEU.

12 *Ping v. CMA* [2020] EWCA Civ 13, paras. 71-75.

13 *Ping v. CMA* [2018] CAT 13, para. 147.

14 *Ibid.* para 142, citing Case C-32/11 *Allianz Hungária* EU:C:2013:160, para. 38.

15 *Ping v. CMA* [2020] EWCA Civ 13, para. 116.

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- The Court of Appeal followed *Cartes Bancaires* more closely, but it struggled to apply it in a convincing way. It could not point to any economic literature to support why the internet ban should be treated as a by object restriction, whilst it could only point to a limited body of experience. It referred to the CJEU's 2011 *Pierre Fabre* judgment in which the CJEU had held that an online sales ban was liable to restrict competition by object. But the ban in *Pierre Fabre* – far more clearly on the facts – had no alternative pro-competitive/legitimate rationale to explain it, whilst the judgment is primarily notable for its lack of detailed reasoning.[16] The Court of Appeal also cited the CJEU's 2016 *Coty* judgment, but that case concerned a different restriction (a ban on resellers using online marketplaces) and did relatively little to elaborate on the reasoning applicable in *Pierre Fabre*.[17] It also cited two other CJEU cases that had been relied upon in *Pierre Fabre* but which concerned not competition law but the free movement of goods and services.[18]

- In turns, the CMA and appellant courts each relied on the CJEU's 2008 judgment in *BIDS* as establishing the principle that an agreement can have the object of restricting competition even if it serves other legitimate objectives.[19] But this overlooked that *BIDS* concerned a very specific context: a horizontal cartel. As one commentator has noted,[20] horizontal cartels are the one area of competition law that rarely if ever have an alternative *pro-competitive* objective to explain them.

- The same cannot necessarily be said for other areas of competition law, and especially not for vertical agreements. Vertical agreements are in fact distinctive in being the one area of competition law where the CJEU long ago recognized that a restriction of price competition can potentially be off-set by the pro-competitive elements of a vertical agreement on non-price parameters, such as to even result in the agreement falling outside of the scope of article 101 TFEU altogether (under the *Metro* test).[21] This cautions against any simplistic read-across of *BIDS* outside of the context to which it applied.

IV. WAY FORWARD?

With cases marred by as many difficulties and complications as *Ping*, it can be difficult to see how a more coherent approach to defining a by object restriction in the context of vertical agreements can be struck. Fortunately, two CJEU judgments from this year provide helpful further direction. These are *Paroxetine* and *Budapest Bank*, in which the CJEU reached the view that an agreement should not be treated as a by object restriction if an alternative plausible pro-competitive or neutral rationale casts "reasonable doubt" as to whether the agreement reveals a sufficient degree of harm.[22] This would imply a significant change in the basic approach to applying article 101 TFEU. Plausible pro-competitive rationales should obtain a fair hearing before an authority concludes on the anti-competitive objective of an agreement, rather than being relegated to an article 101(3) TFEU assessment, only once a legal presumption of illegality has arisen and the burden of proof shifted to the alleged defendant.

But, unfortunately, these case-law developments and their implications for the VBER and Vertical Guidelines are not discussed in the Commission's Evaluation. To address this, we consider the impact of this case-law, together with a number of other issues, in relation to five key vertical restrictions: RPM, dual pricing, selective distribution, online marketplace bans, and brand bidding restrictions.

16 C-439/09 *Pierre Fabre* EU:C:2011:649, paras. 34-47.

17 C-230/16 Coty EU:C:2017:941. The CJEU focused on explaining why a ban on the use of online marketplaces could fall outside article 101(1) TFEU under the *Metro* criteria because, in contrast to the absolute sales ban in *Pierre Fabre*, resellers would remain free to sell via their own online stores or non-marketplace third party sites.

18 Case C-322/01 *Deutscher Apothekerverband* EU:C:2003:664 and Case C-108/09 *Ker-Optika* EU:C:2010:725.

19 C-209/07 *BIDS* EU:C:2008:643, para. 21.

20 See Pablo Ibáñez Colomo "*On Ping: the CAT reinvents economics in a paragraph – will cartels now be allowed?*," Chillin'Competition, 11 September 2018.

21 C-26/76 *Metro* EU:C:1977:167, para. 21.

22 C-307/18 *Paroxetine* EU:C:2020:52, paras. 89 and 110-111, and C-228/18 *Budapest Bank* EU:C:2020:265, paras 82-83. See also AG Bobek's Opinion in C-228/18 *Budapest Bank* EU:C:2019:678, para. 81.

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A. RPM

The Evaluation finds that retail price maintenance (RPM) has been the most enforced vertical restriction by European competition authorities over the past decade, representing 210 of 351 vertical infringement cases. The Commission see this statistic as confirmation that the classification of RPM as a by object restriction continues to be appropriate.[23]

However, this statistic to the contrary could be a sign that something is amiss. If by object cases are supposed to be reserved for restrictions that are "*proven and easily identifiable*," why are so many companies committing them?[24] At the same time, could it also have something to do with the difficulties, discussed above, that companies face in challenging by object findings? Could there also be novel features to more recent RPM cases (such as the fact that many have involved RPM in relation only to online selling) which have resulted in their being overlooked due to the by object approach?

To take another CMA case, *National Lighting Company (NLC)* from 2017 as an example:[25]

- NLC, a light fittings manufacturer, had imposed a maximum discount off the recommended resale price that its resellers were allowed to offer online.

- The CMA saw this as an indirect form of RPM, with the object of restricting competition as it was aimed at restricting online resellers' ability to lower their resale prices.

- NLC did not contest this finding as it admitted the infringement in order to reduce its fine under the CMA's settlement procedure. This then excused the CMA from having to consider any plausible pro-competitive effects of the online discount policy.

- However, it is at least apparent from the factual background of the case, that the discount policy stemmed in part from complaints from brick & mortar resellers who were unable to earn a margin due to undercutting by online resellers.[26] These resellers could well have had a genuine concern about free-riding. NLC's discount policy, in turn, if it sought to prevent free-riding, might have had at least a plausible pro-competitive rationale to protect resellers' incentives to invest in pre- and after-sales services. But these are all issues that unfortunately go unaddressed in the decision.

  The shortcomings of the CMA's decision also appear to stem from a number of additional underlying issues in the EU's approach to RPM:

- First, the Vertical Guidelines privilege online selling. The Guidelines celebrate the internet as a "powerful tool" to reach a greater number of customers and facilitate price competition[27] but they give very little attention to the challenges it presents for competition on non-price parameters. This makes it easier for competition authorities to use a similarly one-dimensional approach, and indeed the CMA uses language that closely matches the Vertical Guidelines to justify its decision.[28]

- A more balanced view is however possible and was well illustrated for example by the Commission's 2017 e-commerce sector inquiry. In the same breath as acknowledging the importance of the internet for price competition, the Commission acknowledged the challenges it presents in terms of "*addressing free-riding and maintaining the incentives for resellers to invest in high quality services*" and "*competition on parameters other than price, such as quality, brand and innovation*."[29] Free-riding had also been found to be a significant issue

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23 See Evaluation, pages 48 and 172.

24 A survey of UK businesses commissioned by the CMA in 2018 found generally a low level of awareness that RPM constituted an infringement (see ICMUnlimited, *Competition law research 2018*). Whilst lack of awareness is clearly relevant, what is not clear is the extent to which this is compounded by the infringement not being sufficiently clear and intuitive in the first place.

25 CMA, Case 50343 *Online resale price maintenance in the light fittings sector*, May 3, 2017.

26 *Ibid.* paras. 3.45 and 3.65.

27 Vertical Guidelines para 52.

28 CMA, "Restricting resale prices: an open letter to suppliers and resellers," June 20, 2017.

29 Commission, *Final report on the E-commerce Sector Inquiry* SWD(2017) 154 final, May 10, 2017, paras. 11-12.

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amongst stakeholders surveyed in the Commission's inquiry.[30] Equally, and as noted above, longstanding CJEU case-law (e.g. *Metro*) has recognized the potential trade-offs between competition on price and non-price parameters in the context of vertical agreements.

- Second, it is easy to forget that RPM primarily only concerns a restriction of *intra-brand* competition. The current Vertical Guidelines in fact acknowledge that "*the loss of intra-brand competition can only be problematic if inter-brand competition is limited*," but confusingly never reconcile this with its approach to defining practices such as RPM as hardcore/by object restrictions.

- Third, the economic evidence regarding the competitive effects of RPM is mixed, and this was in fact noted in a survey of the economic literature commissioned by the Commission as part of its Evaluation.

- Fourth, the EU's approach to RPM stands in contrast to other notable jurisdictions such as the U.S. and Australia, which take a far more balanced and reasoned approach to RPM.[31]

- Finally, if the issue in a case like *NLC* is that the discount policy in question went beyond what was necessary to achieve any putative pro-competitive aim to curb free-riding, it would seem that the Court of Appeal in *Ping* has now rendered doubtful the legality of competition authorities inserting proportionality into a by object assessment.

The Commission's Inception Impact Assessment from October 2020 suggests that the Commission has not entirely closed its mind to concerns about the current approach to RPM as it refers to conducting further discussions with businesses regarding the specific circumstances in which RPM might give rise to efficiencies under article 101(3) TFEU, and what evidence would be required in this regard.[32] But in view of the issues noted above, we are doubtful if this goes far enough.

If the Commission is ultimately unwilling to make more fundamental changes, we think it should at the very least ensure that clear alternative avenues exist for suppliers to address free-riding and other concerns presented by e-commerce, such as through dual-pricing and selective distribution (as discussed further below).

B. Dual Pricing

The Vertical Guidelines treat dual pricing (suppliers charging a lower wholesale price to its resellers for their offline sales than for their online sales) as a hardcore (by object) restriction of competition.[33] It also provides for only very narrow circumstances in which it could be justified under article 101(3) TFEU.

Most stakeholders consulted by the Commission as part of the Evaluation consider that these provisions are unworkable or at least lack clarity. In particular, some argue that it fails to recognize the role dual pricing can play in compensating resellers for the higher costs that typically arise in offline selling, and curbing the risk of free-riding. We are minded to agree. Put simply, and further to the discussion above, to the extent dual pricing can have a plausible pro-competitive rationale, this needs to be considered before jumping to a by object categorization.

Notably, although not expressed in these terms, the Commission does appear to be more receptive to these concerns. The Inception Impact Assessment acknowledges that "*physical stores are facing increasing pressure*" and that the current rules may prevent suppliers from "*incentivsing [their] associated investments*," and as a result the Commission is in fact considering the possibility of ceasing to treat dual pricing as a hardcore/by object restriction.[34] This is a very welcome development.

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30 *Ibid*. paras. 313-320.

31 See e.g. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); and ACCC, *Statement of Reasons in respect of a notification lodged by Tooltechnic Systems (Australia) Pty Ltd for resale price maintenance conduct on Festool and Fein power tools*, July 25, 2018.

32 Inception Impact Assessment, pages 2.

33 Vertical Guidelines, para. 52(d).

34 Inception Impact Assessment, pages 2-3.

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C. Selective Distribution

The current VBER and Vertical guidelines are notable for taking a relatively permissive approach to selective distribution agreements. Such agreements are treated as falling outside of article 101(1) TFEU irrespective of the nature of the products or the selection criteria, provided the parties' market shares do not exceed 30 percent and the agreement does not otherwise contain any hardcore restrictions.

According to the Commission's Evaluation, some EU national competition authorities ("NCAs") believe this approach is too liberal and needs to be restricted. They consider that, in response to the growth of online selling, manufacturers have increasingly used selective distribution agreements purely as a way to reduce intra-brand competition and to stabilize retail prices. In our view this is not wholly fair. To the extent the internet continues to pose very real challenges to manufacturers in terms of protecting resellers' incentives to invest in non-price parameters, selective distribution should remain an option for manufacturers. It should also not be forgotten that under longstanding case-law manufacturers can seek to protect non-price competition even if this corresponds to a "*desire to maintain a certain price level*."[35]

D. Online Marketplace Bans

Respondents to the Commission's consultations as part of the Evaluation agree that the vertical rules need to be updated in light of the CJEU's 2017 *Coty* judgment.[36] In that case, the CJEU considered that a manufacturer of luxury perfumes and cosmetics could in principle restrict the members of its selective distribution system from selling on online marketplaces in order to preserve the luxury image of its goods, and such a restriction would fall outside of article 101(1) TFEU. However, opinion is not settled on how that case should be interpreted. Some NCAs, in particular the German NCA, believe that *Coty* should be confined to genuinely prestigious goods only in the context of selective distribution, whilst marketplace bans outside of this context should be treated as by object restrictions of competition.[37]

We disagree. The only legally consistent approach is that *Coty* should apply in principle to all types of products that currently justify selective distribution, which includes prestigious/luxury items, highly technical products, and all products where the companies in question meet the market share safe harbor under the current VBER/Vertical Guidelines. Moreover, outside of the context of selective distribution, it should remain possible for suppliers that adopt marketplace bans to escape a by object restriction under article 101(1) if they have a plausible pro-competitive/neutral rationale raising reasonable doubt as to the degree of harm arising from it. This could include for example, bona fide concerns about the level of pre- and after- sales service provided by such marketplaces and their impact on non-price parameters of competition.

E. Brand Bidding Restrictions

Restrictions on a reseller's ability to bid on a supplier's brand name or trade mark in internet searches are not covered by the current VBER and Vertical Guidelines. Whilst the Commission's Evaluation shows that there is consensus that guidance is needed on their treatment, there is little consensus on the approach to adopt. Some argue that, further to the Commission's 2018 *Guess* decision, they should be treated as hardcore by object restrictions of competition.[38] But we caution against a simplistic reading of that case:

- Whilst the Commission in *Guess* did treat a brand bidding restriction as a by object restriction of competition, the brand bidding restriction had never been the main target of the Commission's investigation, which had looked at a range of other more standard hardcore restrictions adopted by Guess. Instead, Guess had in fact admitted the brand bidding restriction in an attempt to reduce its fine as part of the Commission's settlement procedure.

- The Commission did consider whether the brand bidding restriction could be said to have a pro-competitive/legitimate rationale, including whether it could be said to be aimed at avoiding customer confusion between Guess and its authorized resellers, or reducing Guess' advertising costs. But it did not consider either to be supportable.[39] The Commission also referred to a third possible pro-competitive/legitimate motive, whether the brand bidding restriction was aimed at preventing free-riding on Guess' brand investments. But it only raised

35 C-26/76 *Metro* EU:C:1977:167, para. 21.

36 C-230/16 *Coty* EU:C:2017:941.

37 This is the approach the German competition authority has also enforced: see e.g. decisions B2-98/11ASICS August 26, 2015 and B3-137/12 *Adidas*, June 27, 2014.

38 Case AT.40428 *Guess*, Commission decision of December 17, 2018.

39 *Ibid*. paras. 114-126.

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this in the context of article 101(3) TFEU, after having concluded that the restriction had an anti-competitive object.[40] As the burden for making out an article 101(3) TFEU defense rested with Guess, and Guess had no intention of making one, this question was left entirely unaddressed.

- Why the Commission thought free-riding could only be considered under article 101(3) and not under article 101(1) along with the other two possible pro-competitive rationales is anomalous. This is also particularly so given that the UK CMA's 2017 market study into digital comparison tools considered the same three rationales, and free-riding was the one possible pro-competitive rationale that the CMA concluded might be credible, at least in the case of a narrowly construed brand bidding restriction (where the restriction relates to bidding on the brand name/trade mark alone, and not when used in conjunction with non-brand related words).[41]

This suggests that brand bidding restrictions need to be considered carefully in light of each of their possible pro-competitive rationales, and their specific context, before simplistically being added to the list of hardcore restrictions.

V. HOW DOES THE EU'S SINGLE MARKET POLICY FIT IN?

Some may argue that the approach advanced in *Paroxetine* and *Budapest Bank*, to require competition authorities to pay attention to plausible pro-competitive rationales before finding an agreement has the object of restricting competition, may not neatly apply to vertical agreements. This is because the logic behind treating certain vertical agreements as by object restrictions in European competition law has not always been a purely economic one in terms of weighing anti- or pro-competitive object or effects. [42] Instead, it has at times also been motivated by a policy consideration, in terms of whether a vertical restriction frustrates the creation of the European single market, with the earliest articulation of this principle arising in *Consten & Grundig*.[43]

The problem with the single market objective, however, is that it is rarely given a clear articulation – perhaps because competition authorities tend to be uncomfortable adopting overtly political reasoning. Instead it tends to get entwined and blurred into economic principles. This only makes decision-making practice harder to understand and undermines legal certainty. *Ping* is a good example. Only after various twists in legal argument does the Court of Appeal finally land on the logic of *Consten & Grundig* to justify the CMA's by object finding.[44] The Vertical Guidelines are little better, where the single market objective only receives passing reference, leaving open to what extent it is relevant to any of the vertical restrictions discussed in the Guidelines.[45]

All this means that if the EU's vertical rules are to continue to be guided by the single market policy objective, this needs to be made far more explicit and clarified in any revised VBER and Vertical Guidelines. Conversely, the UK, after the end of the transition period, should feel free to adopt a different approach.

40 *Ibid*. para. 164.

41 CMA, *Digital comparison tools market study*, Final report, 26 September 2017, para. 4.110.

42 Colomo, P. I. & Lamadrid de Pablo, A "Court of Appeal in Ping: how market integration complicates the analysis of object restrictions" *Chillin'Competition*, April 2020; see also Colomo, P. I. & Lamadrid de Pablo, A. "On the notion of restriction of competition: what we know and what we don't know we know," in D Gerard, M Merola, B Meyring (eds) *The Notion of Restriction of Competition* (Bruylant 2017).

43 Joined Cases 56 and 58/64 *Consten & Grundig* EU:C:1966:41.

44 *Ping v. CMA* [2020] EWCA Civ 13, para. 109.

45 Vertical Guidelines, para. 7.

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VI. CONCLUSIONS

To draw conclusions from the above:

- If the VBER and Vertical Guidelines are to achieve their aim of improving legal certainty, they need to take a more coherent and rigorous approach to defining by object vertical restrictions, in line with the latest CJEU jurisprudence.

- This includes ensuring that plausible pro-competitive rationales for a restriction are considered before concluding on the object of a restriction, rather than relegating such considerations to an article 101(3) TFEU assessment.

- The vertical rules need to take a more balanced approach to e-commerce, acknowledging its merits in facilitating price competition, but giving fuller weight to the challenges presented for competition on parameters other than price.

- To the extent the vertical rules continue to be guided by the single market policy objective, this must be made far more explicit and clear.

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