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**Session II: Efficiency Analysis in Vertical Restraints – Background Note by the Secretariat**

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This document is circulated in preparation of the discussion under Session II of the Latin American and Caribbean Competition Forum that will take place on 20-22 September 2021 virtually (zoom meeting).

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## *Latin American and Caribbean Competition Forum*

### *Session II: Efficiency Analysis in Vertical Restraints*

*– Background Note by the Secretariat\* –*

#### *Abstract*

Vertical restraints are competition restrictions in agreements between firms at different levels of the production and distribution process. Over the past two decades, there has been a renewed interest by competition authorities in vertical restraints, in particular as a result of the drastic growth of e-commerce and the digital economy. While the overall consensus remains that the large majority of vertical restraints cases – notably those without the presence of significant market power – are either pro-competitive or competitive-neutral, the emergence of e-commerce has created new challenges for dealing with vertical restraints, including the analysis of efficiencies.

Latin America and the Caribbean has seen a limited number of vertical restraints cases to date, although they have been modestly increasing. Moreover, little of these cases pertains to restrictions in an online environment. Given the growth of e-commerce in the region, the region can expect such cases to increase, depending to a certain extent on enforcement priorities in the different jurisdictions.

An analysis of a selection of cases in Europe and Latin America suggests that efficiency considerations are not abundant in existing case practice, mainly due to the fact that the large majority of vertical restraints are not reviewed by competition authorities, exactly because they are presumed to be pro-competitive. In those cases where efficiencies are invoked, parties generally fail to prove the indispensability of the restraints for its objectives.

This background note provides a brief overview of the pro- and anti-competitive effects of vertical restraints as identified in the literature and case practice and discusses how pro-competitive effects or efficiencies are analysed and assessed within different legal and economic assessment frameworks. Furthermore, it utilises a selection of cases to demonstrate the relevance of different efficiency arguments in enforcement practice.

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## Table of contents

<b>Latin American and Caribbean Competition Forum Session II: Efficiency Analysis in Vertical Restraints – Background Note by the Secretariat – .....</b>	<b>2</b>
<b>1. Introduction .....</b>	<b>4</b>
<b>2. The concept of vertical restraints.....</b>	<b>5</b>
2.1. Definition and types of vertical restraints .....	5
2.2. Renewed focus on vertical restraints .....	7
2.3. Vertical restraints in Latin America .....	9
<b>3. Competition effects of vertical restraints .....</b>	<b>9</b>
3.1. Anti-competitive effects .....	10
3.2. Pro-competitive effects.....	10
3.3. Market power as a tool to distinguish pro-competitive from anti-competitive vertical restraints .....	12
<b>4. Efficiency analysis in vertical restraints cases .....</b>	<b>13</b>
4.1. Assessment frameworks for vertical restraints .....	13
4.2. Efficiency considerations in vertical restraints cases .....	19
4.3. Burden of proof .....	37
<b>5. Conclusion.....</b>	<b>40</b>
<b>Bibliography .....</b>	<b>42</b>

## FIGURES

Figure 2.1. Retail e-commerce sales worldwide 2014-24, USD bn.	7
Figure 2.2. Types of vertical restraints cases in EU Member States (number of cases), 2010-20	8
Figure 2.3. Number of vertical restraints cases in Latin America and Caribbean	9

## TABLES

Table 4.1. Types of vertical restraints encountered in a selection of vertical restraints cases <sup>1</sup>	20
Table 4.2. Occurrence of efficiency considerations in the selected vertical restraints cases <sup>1</sup>	20
Table 4.3. Types of vertical restraints and invoked efficiencies in the selected European cases as part of an Article 101(3) analysis	22
Table 4.4. Types of vertical restraints and invoked efficiencies in the selected cases in Latin America and the Caribbean	34

## 1. Introduction

1. It is quite common for firms active at different stages of the supply chain – for example, a manufacturer and a retailer or distributor of the product – to enter into an agreement rather than relying on spot market transactions. Such agreements and contractual provisions between firms that are vertically related may restrict the conditions under which firms may purchase, sell, or resell goods or services (so called **vertical restraints**).

2. Over the past two decades, there has been a renewed interest by competition authorities in vertical restraints. This is in particular a result of the drastic growth of e-commerce and the digital economy, which has significantly affected the distribution and pricing strategies of both manufacturers and retailers. Manufacturers have, for instance, sought greater control over their distribution networks as a reaction to the increased price transparency and price competition, in order to better controlling price and quality (European Commission, 2020, p. 32). The emergence of e-commerce has created new challenges to dealing with vertical restraints and efficiency analysis in vertical restraints cases.

3. The exact assessment of vertical agreements is dependent on the rules established in the relevant jurisdiction. However, agreements between vertically related firms are in the majority of cases not a competition concern. Many do not affect competition at all, while others may harm competition, but to such a limited extent, that the pro-competitive effects of the agreement are presumed to outweigh such negative effects. For some vertical restraints, however, the risk of harm to competition is more apparent and, depending on the jurisdiction, are considered *prima facie* restrictions to competition. A more detailed assessment of the effects is then necessary, including an analysis of resulting efficiencies that offset any presumed anti-competitive effect.

4. Different types of vertical restraints may create different efficiencies and in varying intensity, and there is substantial debate about them. If efficiencies have to be proven and balanced against anti-competitive effects, this poses a new set of challenges and so far efficiency claims are not often brought forward or, if they are, often fail to succeed.

5. In Latin America and the Caribbean, the area of vertical restraints is still fairly unexplored in most jurisdictions as there have been only few vertical restraints cases. However, the practice of vertical restraints is as relevant in the region as in any other part of the world, and competition enforcement can benefit greatly from established practice in different jurisdictions around the world.

6. The objective of the paper is to provide an overview of (i) the pro- and anti-competitive effects of vertical restraints as identified in the literature and case practice, (ii) how pro-competitive effects or efficiencies are analysed and assessed within different legal and economic assessment frameworks, (iii) the relevance of different efficiency arguments in enforcement practice and (iv) who bears the burden of proof (and when) in vertical restraints cases.

## 2. The concept of vertical restraints

7. This section will briefly elaborate on the concept of vertical restraints. Over the past 25 years, the OECD has organised a substantial number of sessions (e.g. roundtables, hearings and workshops) on the topic of vertical restraints and written a number of background notes and reports that are either dedicated to (certain types of) vertical restraints or touch upon them.<sup>1</sup> This section, and more general this paper, builds where possible and relevant upon this existing work by the OECD in this and related areas.

8. First, we will look at the definition of vertical restraints and the types that can be distinguished, after which we will briefly elaborate on the reason why vertical restraints are increasingly relevant for competition authorities. We will also provide a brief introduction of vertical restraints in Latin America.

### 2.1. Definition and types of vertical restraints

9. Firms active at different stages of the supply chain, such as a manufacturer and a retailer or distributor of the product, might prefer to enter into an agreement rather than relying on spot market transactions. Certain provisions in such agreements between vertically related firms may restrict the conditions under which firms may purchase, sell, or resell goods or services and are therefore called **vertical restraints**.

10. A non-exhaustive list of some of the most important types of vertical restraints can be drawn from previous OECD work (OECD, 2018) and (OECD, 2013, p. 11) – many of which can also be used in combination:

- Exclusive dealing – distributors commit to not selling products of other manufacturers;
- Exclusive distribution – each distributor is allocated a specific territory or a specific group of customers to which it can sell its products;
- Selective distribution – restriction of the number of authorised distributors based on selected qualitative criteria linked to the nature of the products and the complementary services that need to be provided to the buyers; in an online environment, they can include:
  - Online sales bans – an outright ban on internet sales; or link of online sales to minimum sales through brick and mortar stores;
  - Online marketplace bans – the prohibition of retailers to resell goods through (specific) online marketplaces operated by third party intermediaries;
  - Price comparison tool bans – the limitation by a supplier for the retailer to engage with price comparison tools<sup>2</sup>;

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<sup>1</sup> Existing work on vertical restraints by the OECD includes: Workshop on vertical restraints and vertical mergers, 25 February 2020; OECD (2019) Roundtable on Hub-and-Spoke Arrangements – Background Note; OECD (2018) Rethinking Antitrust Tools for Multi-Sided Platforms; OECD (2018) Implications of E-commerce for Competition Policy - Background Note; OECD (2015) Hearing on Across Platform Parity Agreements, paper by Prof. Morten Hviid; Hearing on Across Platform Parity Agreements, paper by Prof. Ariel Ezrachi; OECD (2013) Vertical Restraints For On-Line Sales; OECD (2012) The Role of Efficiency Claims in Antitrust Proceedings; OECD (2008) Resale Price Maintenance; OECD (2008) Competition Policy for Vertical Relations in Gasoline Retailing; OECD (2000) Competition Issues in Electronic Commerce; OECD (1997) Resale Price Maintenance.

<sup>2</sup> Price comparison websites allow consumers to search for products or services and compare the prices from different suppliers. Such websites usually provide the customer with a link that facilitates the sale of the product or service on

- Exclusive purchasing / single branding – an obligation of a buyer to buy the relevant products from one supplier;
- Exclusive supply – an obligation for the supplier to sell the relevant products to a single buyer;
- Tying and bundling – a manufacturer conditions the purchase of one product (the tying product) to the purchase of a second product (the tied product); when the two products are sold in fixed proportions this practice is normally called bundling.<sup>3</sup>
- Non-compete clauses – an agreement that effectively restricts the ability of the buyer to manufacture, purchase, sell or resell products which compete with those of the supplier.
- Quantity fixing – an agreement that specifies the quantity to be bought and resold by the retailer. It is similar to non-compete clauses and variants include quantity forcing (e.g. in the form of minimum purchase requirements or non-linear pricing), which constitutes a minimum quantity to be bought, and quantity rationing, which imposes a maximum quota.
- Resale Price Maintenance (RPM) – a retailer commits to charge a certain price, including the commitment to:
  - not increase the price beyond the price indicated by the manufacturer (maximum RPM);
  - price a product equal to the price indicated by the manufacturer (fixed RPM);
  - not lower the price below the price indicated by the manufacturer (minimum RPM).
- Across platforms parity agreements (APPA) or retail most favoured nation clauses (retail MFNs) – clauses in an agreement that guarantee to a sales platform or intermediary that the prices or terms and conditions quoted by suppliers on that platform will be as favourable as those offered on the supplier's own website (the *narrow* clause) or on any other platform (the *wide* clause);
- Dual pricing – a manufacturer charges different wholesale prices for products depending upon whether these are sold through different sales channels (for example offline or online).

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the website of the retailer. A ban on price comparison websites is aimed to limit the exposure of a supplier's products or services to comparison with comparable ones.

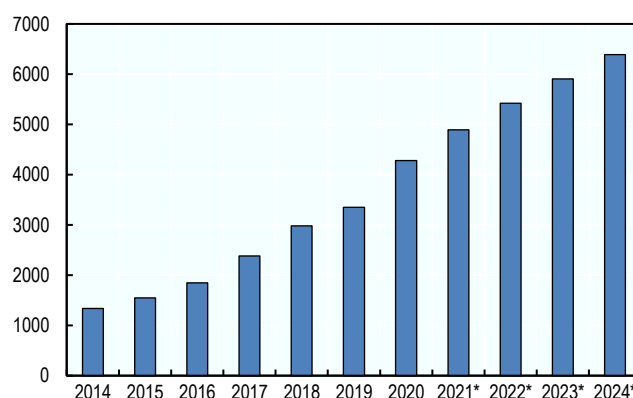
<sup>3</sup> Full-line forcing is a particular type of tying which requires the distributor to carry the manufacturer's whole range of products (Vergé, 2005, p. 3).

## 2.2. Renewed focus on vertical restraints

11. The development of the internet and e-commerce have had a profound impact on the way in which products and services are bought, supplied and distributed. The retail sector in particular has evolved spectacularly in the past 10 years. Worldwide retail e-commerce sales grew by approximately 21% per year between 2014 and 2020 and are expected to continue to grow by 11% per year until 2024 (see Figure 2.1).<sup>4</sup> This growth results in an expected increase of the percentage retail e-commerce sales of total retail sales of 13.8% in 2019 to 24.5% in 2025 (eMarketer, 2021).

12. This is no different in Latin America and the Caribbean. In fact, although retail e-commerce sales are still rather modest in Latin America compared to other regions<sup>5</sup>, Latin America showed the highest growth rate in 2020 (almost 37%) (eMarketer, 2021).

**Figure 2.1. Retail e-commerce sales worldwide 2014-24, USD bn.**



Note:

Source: Statista ([Global retail e-commerce market size 2014-2023 | Statista](#))

13. These changes have led to new business models, changed the competitive dynamics in many industries and prompted a renewed focus on vertical restraints in the last two decades, in particular.<sup>6</sup>

14. Indeed, the European Commission (EC) signaled an increase in the use of vertical restraints in its E-commerce Sector Inquiry (European Commission, 2017, p. 5). According to the report, online retailers face multiple vertical restraints due to contractual arrangements. Limitations include pricing limitations (or recommendations) (faced by 42% of retailers), limitations to sell on market places (18%), limitations to sell on its own website (11%), limitations to sell cross-border (geo-blocking) (11%), limitations to use price comparison tools (9%) and limitations to advertise online (8%).

<sup>4</sup> See also (OECD, 2018) for an elaboration on the growing importance of e-commerce and the implications for competition policy.

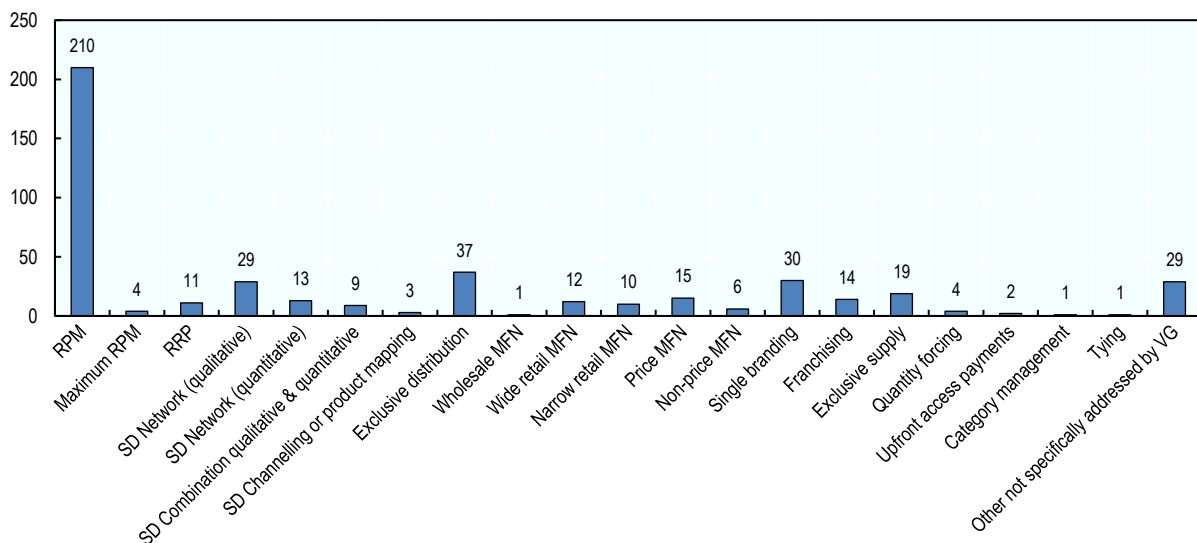
<sup>5</sup> Retail e-commerce sales in 2020 were USD 83 billion in Latin America, compared to for instance USD 749 in the US and USD 498 in Western Europe (eMarketer, 2020).

<sup>6</sup> See for instance (OECD, 2018) for an elaboration on the competition dynamics in e-commerce markets.

15. Consequently, the EC increased its own enforcement efforts, falling in tune with already existing efforts by the national competition authorities (NCAs) with regards to vertical restraints.

16. NCAs in the European Union (EU) have been actively enforcing against vertical agreements in the past decade. Between 2010 and 2020, NCAs have dealt with 392 cases, of which 257 cases led to a finding by the responsible NCA or the competent national court (European Commission, 2020, p. 47).<sup>7</sup> The large majority of cases deal with RPM cases (a breakdown of these cases by type of vertical restraint can be found in Figure 2.2). Moreover, several countries have developed guidelines in recent years on vertical restraints in general or certain specific vertical restraints in particular.<sup>8</sup>

Figure 2.2. Types of vertical restraints cases in EU Member States (number of cases), 2010-20



Note: SD: Selective Distribution; VG: Vertical Guidelines

Source: (European Commission, 2020, p. 40)

17. Cases in the US have not been plentiful<sup>9</sup>, but other jurisdictions, including China and India, have made them a priority.<sup>10</sup>

<sup>7</sup> Reasons for not pursuing the remaining cases included insufficient evidence or the removal of the vertical restrictions by the parties to the agreement before any final decision by the NCA.

<sup>8</sup> Examples are Ireland (2021, 2018, 2017), Slovak Republic (2021), The Netherlands (2019), Germany (2017) and Switzerland (2017).

<sup>9</sup> The FTC and DOJ file very few vertical restraint cases in any given year. Recent examples include the DOJ's enforcement action in 2018 against American Express (Amex) on exclusive dealing arrangements and FTC's challenge in 2019 to Qualcomm's licensing practices and exclusive chip deal agreements. In both cases, the government lost on appeal. State attorneys general and private parties have been somewhat more active in challenging vertical restraints (see [Getting The Deal Through – Lexology/United States](#), last accessed on 8 August 2021).

<sup>10</sup> Vertical restraints are an enforcement priority in China ([Getting The Deal Through – Lexology/China](#)) and India ([Global Competition Review - The Asia Pacific Antitrust Review](#)). Moreover, a (non-exhaustive) selection of vertical restraints cases and investigations on [GCR Insight: Cases and Precedents: Vertical Restraints \(globalcompetitionreview.com\)](#) has identified an increased number of cases or investigations in recent years.

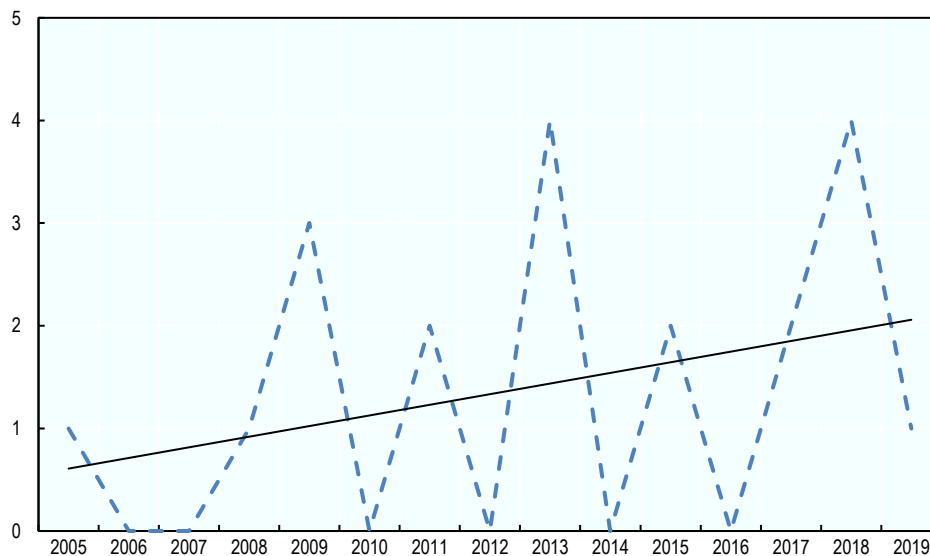


### 2.3. Vertical restraints in Latin America

18. In Latin America and the Caribbean, the number of vertical restraint cases until recently has been fairly limited. In the past 15 years, approximately 20-25 cases have led to a decision by national competition authorities.<sup>11</sup> Vertical restraints cases rely mostly on exclusive dealing and few investigations have been concluded on conducts such as RPM.

19. Although there has been a limited number of cases in the region, a slight upward trend can be observed (see Figure 2.3).

Figure 2.3. Number of vertical restraints cases in Latin America and Caribbean



Notes: Included jurisdictions are Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama and Peru. The year per case represents the year that a decision was taken by the relevant institution.

Source: OECD analysis

### 3. Competition effects of vertical restraints

20. Vertical restraints have the potential, depending on the context and environment, to produce both anti- and pro-competitive effects. In fact, most – if not all – types of vertical agreements are neither completely pro-competitive nor completely anti-competitive (Vettas, 2010). Moreover, minor contractual variations may have significant effects on the competitive outcome (Sahuguet, Steenbergen, Vergé, & Walckiers, 2016).

21. The ambiguous effect of vertical restraints, and the consequence that one cannot simply outlaw certain vertical restraints and permit others, suggests that a *rule of reason* (as opposed to *per se rule*) approach is preferred. Economic analysis in this regard can help to determine which types of agreements are capable of and likely to raise competition concerns, while it can also help to understand what types of justifications could be judged to outweigh identified anti-competitive effects.

<sup>11</sup> Based on the cases that have been identified through desk research. Vertical restraints cases were identified in seven jurisdictions, namely Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Panama and Peru. Many jurisdictions in the region had no vertical restraint cases at all.

22. This section will explore briefly the potential effects, both anti-competitive and pro-competitive, according to the economic literature. This will be followed by some guidance on how to distinguish malicious from benign vertical restraints. This will set the scene for taking stock of how efficiencies are being assessed in different jurisdictions and cases.

### 3.1. Anti-competitive effects

23. There exists a large body of literature that has considered the ways in which vertical restraints can be anti-competitive. In general, the literature has identified three types of competitive harm, namely foreclosure of market access, the softening of competition and the facilitation of collusion (OECD, 2013, pp. 13-14) and (European Commission, 2021, p. 9).

24. The first concern is the potential foreclosure effect, and thus reduced competition, of vertical restraints through the prevention or discouragement of entry or expansion or forcing competitors out of the market.<sup>12</sup> Vertical restraints that mimic vertical integration, such as exclusive dealing, may signal limited access to distributors or force competitors out of the market by increasing their costs.

25. The second concern relates to the softening of competition (both intra- and inter-brand). For example, market partitioning agreements or agreements that limit the freedom of a retailer to set its prices, can reduce the intensity of competition.

26. The third concern has to do with the possible facilitation of collusion by vertical restraints<sup>13</sup>, either on the upstream or downstream market. Some vertical restraints, such as RPM agreements, increase price transparency, which (i) enables retailers to track more effectively the prices charged by their rivals and (ii) allows suppliers to monitor retail pricing. This fosters the ability to detect deviation and can thereby facilitate collusion. RPM can also act as a vehicle for hub-and-spoke collusion (see (OECD, 2019)).<sup>14</sup>

### 3.2. Pro-competitive effects

27. Notwithstanding the potential anti-competitive effects of vertical restraints, it is universally accepted that vertical restraints often have positive effects. Without attempting to be exhaustive, this subsection will discuss some of the main efficiency justifications from the literature. Section 4.2 will provide more detail on efficiency justifications of vertical restraints which relate to the below mentioned pro-competitive effects.

#### 3.2.1. *Overcoming a hold-up problem*

28. Sometimes there are client-specific investments to be made by either the supplier or the buyer, that would have little or no value outside that specific commercial relationship. After such specific investment has been made, the bargaining position of the investing party decreases: it is held-up by the commercial partner, as it will lose the value of the investment if it does not accept certain conditions the latter may request. In such cases, a vertical restraint, such as long-term contracts including volume commitments or

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<sup>12</sup> Vertical restraints can foreclose the market in different ways (Verouden, 2008), namely foreclosing market access to rival suppliers, foreclosing market access to rival distributors or foreclosure as a commitment device.

<sup>13</sup> Both explicit collusion and tacit collusion, see (European Commission, 2010) (footnote 37).

<sup>14</sup> Hub-and-spoke arrangements can be characterised as any number of vertical exchanges or agreements between economic actors at one level of the supply chain (the spokes), and a common trading partner on another level of the chain (the hub), leading to an indirect exchange of information and some form of collusion between the spokes (OECD, 2019, p. 5).

exclusivity provisions, may be required before the investor commits to the necessary investments.

29. A specific hold-up problem may arise in the case of transfer of substantial know-how (European Commission, 2010). Know-how, once provided, cannot be taken back or returned, which puts the provider in a vulnerable position if it prefers the know-how not to be used for or by its competitors. In as far as the know-how was not readily available to the buyer, is substantial and indispensable for the operation of the agreement, such a transfer may justify a non-compete type of restriction.

### ***3.2.2. Addressing vertical externalities and vertical co-ordination problems***

30. In principle, a supplier and a retailer in a vertical relationship make independent and unco-ordinated strategic decisions, considering only the impact of their decisions on their own profits. Yet, whenever the decision of one of the two parties affects the volume of the product sold, it entails effects also on the profits of the other trading party. With both parties setting prices independently, this may result in prices that are too high, retail efforts that are too low and joint profits that are not maximised (OECD, 2013).

31. A well-known vertical co-ordination problem is the so called “*double marginalization*”. It occurs when both the supplier and the retailer enjoy some degree of market power and make unco-ordinated pricing decisions. As a consequence, the manufacturer adds a margin on production costs to set the wholesale price and the retailer adds a margin on the wholesale price to set the retail price. Hence, the price for the end consumer contains a double margin and is set at a level that is higher than the level that would be set by a vertically integrated firm. Co-ordination between the supplier and retailer of their pricing decision to maximize their joint profits may lead to a lower price, increasing their profits and benefiting consumers (OECD, 2013).<sup>15</sup>

### ***3.2.3. Addressing horizontal externalities and avoiding free-riding***

32. Another type of externalities are horizontal externalities: externalities between retailers or between suppliers. Such horizontal externalities occur for instance when a retailer can free-ride on the investments of one of its competitors to attract customers or increase demand, for instance in promotion activities or pre-sales services. Similarly, a supplier may free-ride on investments in promotion of its competitor at the retailer’s location.

33. Two types of special free-riding may occur when a retailer makes first-time investments to open up or enter a new market, and when there is a ‘certification free-rider issue’ (European Commission, 2010).

34. With regards to the opening up or entering of new markets, vertical restraints (such as territorial protection) may be needed to avoid other retailers free-riding on first-time investments that a particular retailer has incurred to establish the presence of a brand or product in a new geographic market. The certification free-rider issue concerns the situation in which certain retailers may have a reputation of offering only quality products. A supplier that launches a new product and cannot limit his sales to this premium channel, with a resulting risk of being delisted, can cause the product introduction to fail. Vertical restraints in the form of exclusive distribution or selective distribution can solve this issue

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<sup>15</sup> This double marginalisation problem is often addressed through the application of maximum RPM, which is generally not considered a competition problem because it does not eliminate the retailers’ ability to cut prices, nor does it seem to provide any new means to monitor each other’s pricing policy.

as long as this is temporary, i.e. to guarantee successful introduction of the new product but not so long as to hinder large-scale dissemination.

#### **3.2.4. Protection of a brand-image**

35. A supplier may be keen to somehow fix retail prices or conditions if these prices or conditions are understood by consumers as an indication of quality. Such incentive is likely if the supplier has built a reputation for producing high quality products. A retailer that heavily discounts the supplier's products may damage this brand image. However, this would require that a low product price is capable of compromising the brand image of a product and/or a manufacturer.

#### **3.2.5. Achieve economies of scale in distribution (reduce transaction costs)**

36. A vertical restraint is profitable for a manufacturer if it allows it to sell more units or if it reduces its costs. To achieve economies of scale, a manufacturer can decide to concentrate the resale of its products on a limited number of distributors, decreasing transaction costs. This can result in a lower retail price and higher sales.

### **3.3. Market power as a tool to distinguish pro-competitive from anti-competitive vertical restraints**

37. Given the ambiguous effects of vertical restraints on welfare, the question arises how to distinguish pro-competitive vertical restraints from anti-competitive ones. Assessing what effects materialise or are dominant (in many cases, some of the aforementioned effects might co-exist) can be a time-consuming undertaking.

38. An assessment of market power can be used as a practical tool to avoid having to conduct a detailed analysis in each case. According to economic theory, vertical restraints will raise concerns mostly in cases where at least one of the players enjoys a certain degree of market power (European Commission, 2021, p. 70), or where several market players apply parallel strategies<sup>16</sup>. Absent significant market power either upstream or downstream, vertical restraints are likely to be pro-competitive as they serve efficiency purposes (OECD, 2013, p. 15).<sup>17</sup>

39. As market power is difficult to measure, market shares of the parties are used as a proxy to gauge market power. In the EU, for example, a market share held by each of the undertakings party to the agreement of not more than 30% on the relevant market triggers a presumption of legality of the vertical agreement itself (provided the agreement does not contain certain types of severe – hardcore – restrictions of competition) (see also section 4.1.1).

40. In practice, it is not always easy to distinguish between vertical restraints cases (bilateral) and unilateral conduct (abuse of dominance) cases with vertical effects. In certain jurisdictions, including some in Latin America and the Caribbean, vertical restraints are assessed within the context of an overarching prohibition on practices that have as their object or effect to harm competition – including anti-competitive agreements and unilateral conducts (see 4.1.3).

<sup>16</sup> This pertains to the existence of multiple similar vertical restraints across a sector as another key consideration to determine whether the set of parallel restrictions as a whole contributes to the closing off of competition in the upstream or downstream markets. See Case C-345/14 *SIA „Maxima Latvija” v Konkurences padome* EU:C:2015:784, para. 29.

<sup>17</sup> While the analysis is similar (starting with the establishment of a certain degree of market power), the degree of market power normally required for a finding of an infringement under Article 101(1) is less than the degree of market power required for a finding of dominance under Article 102 (European Commission, 2021, p. 70).

## 4. Efficiency analysis in vertical restraints cases

41. As discussed in section 2 and 3, there is widespread agreement that vertical restraints are unlikely to cause anti-competitive effects absent significant market power. Therefore, it is especially when there is significant market power, that efficiencies are crucial to the overall assessment of the effect of the vertical restraint. However, the way in which, and extent to which, parties can (and have) invoke(d) efficiency arguments as well as how such efficiency considerations are assessed by the competition authority depends very much on the legal assessment framework in place, the type of vertical restraint and the specific elements of the case. This section will start with a brief discussion of different frameworks that are used to assess vertical restraints, including the way in which efficiencies are assessed. This will be followed by a review of the efficiency consideration in a selection of cases in Europe and Latin America and the Caribbean. The section will finish with a brief discussion on the burden of proof.

### 4.1. Assessment frameworks for vertical restraints

42. Jurisdictions may have different legal approaches to vertical restraints, based on different economic assumptions about their pro- and anti-competitive effects.

43. This subsection will provide a brief summary of (i) the existing legal framework with regards to vertical restraints and (ii) the way in which efficiencies are assessed in the EU (4.1.1), the United States (US) (4.1.2) and Latin America and the Caribbean (4.1.3).

#### 4.1.1. EU

##### *Overall framework of analysis for vertical restraints*

44. At the core of the European framework is Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) that prohibits (horizontal and vertical) agreements between two or more undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. Article 101(3) TFEU sets out an exception rule, which provides a defence to undertakings against a potential finding of an infringement of Article 101(1) of the Treaty. Consequently, agreements caught by Article 101(1) which satisfy the conditions of Article 101(3), are valid and enforceable.

45. Article 101(3) can be applied both in individual cases and in categories of agreements by way of a block exemption regulation. For vertical agreements, the benefit of a block exemption established by Regulation No 330/2010 (Vertical Block Exemption Regulation, VBER) is limited to categories agreements that are typically considered to satisfy the conditions of Article 101(3) TFEU.<sup>18</sup> The effect of the VBER is that the majority of vertical restraints in practice are exempted from the application of Article 101(1).

46. Over the years, the EC has built, through various regulations and guidelines, a series of presumptions (both of legality and of illegality). A first general presumption is that, absent significant market power either upstream or downstream, vertical restraints are likely to result in significant efficiencies and may therefore be considered pro-competitive. If each of the parties has a market share – which serves as a proxy for market power –

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<sup>18</sup> EC Regulation No 330/2010 expires on 31 May 2022 and will be replaced by an updated VBER, together with newly updated accompanying vertical guidelines. Both the draft VBER as well as the draft vertical guidelines are available in draft form and are currently undergoing a public consultation (see [2021 vber \(europa.eu\)](https://ec.europa.eu/competition/vertical_block_exemption_regulation/2021_vber_en), last accessed on 8 August 2021).

below 30%, a vertical restraint may be presumed to satisfy the conditions set out in Article 101(3) TFEU and therefore legal (OECD, 2013, p. 15).

47. This general presumption admits some exceptions. Some practices are qualified as hardcore restrictions.<sup>19</sup> For these, the general presumption is reversed: even if none of the parties seem to enjoy market power, the agreement is presumed to fall within the scope of Article 101(1) TFEU and to fail to meet the conditions of Article 101(3) TFEU. In these circumstances, the vertical restraint is presumed to be illegal, but the parties still have the possibility to plea for an unindividual exemption under Article 101(3), although very hard to demonstrate.

48. When the general presumption does not apply because one or both the parties surpass the 30% market share threshold, or the vertical restraint consists in a hardcore restriction or a restriction *by object* under Article 4 VBER<sup>20</sup>, each practice may be assessed individually on its own merits balancing the evidence in favour or against its legality. Firms have the possibility to demonstrate pro-competitive effects under Article 101(3). When the restriction is found to be anti-competitive, and the parties involved can substantiate likely efficiencies from including the restriction in the agreement and that all the conditions of Article 101(3) are fulfilled, the Commission will balance positive and negative effects to make the ultimate assessment (European Commission, 2010) (para 47).

#### *Assessment of efficiencies*

49. There are four cumulative conditions of Article 101(3) that need to be met for a horizontal or vertical restraints to be exempted from the general prohibition (European Commission, 2004):

- i. *The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;*
- ii. *Consumers must receive a fair share of the resulting benefits;*
- iii. *The restrictions must be indispensable to the attainment of these objectives; and*
- iv. *The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.*

50. With regards to the **first condition**, there are some elements that need to be taken into account:

- i. only objective efficiencies can be taken into account, meaning that efficiencies are not to be assessed from the subjective point of view of the parties;

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<sup>19</sup> Article 4 of the Vertical Block Exemption Regulation (VBER) defines certain hardcore restrictions that remove the benefit of the block exemption (European Commission, 2010). These hardcore restrictions include for instance minimum and fixed RPM, some territorial restrictions (e.g. active sales from one territory to the other) and the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level.

<sup>20</sup> Certain agreements (*by object*) are considered, by their very nature, as being harmful to competition (European Commission, 2014, p. 3). Consequently, a *by object* prohibition requires no assessment of actual anti-competitive effects in order for it to be declared incompatible with article 101(1) (European Commission, 2000, p. C 291/3). To determine whether an agreement reveals such a sufficient degree of harm to competition that it may be considered a restriction of competition by object, regard must be had inter alia to i) the content of its provisions; ii) the objectives it seeks to attain; and iii) the economic and legal context of which it forms a part. (Judgments of the Court of Justice of: 11 September 2014, *Groupement des cartes bancaires (CB) v. Commission*, paragraph 53; 4 October 2011, *Football Association Premier League and Others*, cases C-403/08 and C-429/08, EU:C:2011:631, paragraph 136.)

- ii. Cost savings that arise from exercising of market power by the parties cannot be taken into account (e.g. less marketing costs as a result of reduced competition);
- iii. All efficiency claims must be substantiated so that the following can be verified:
  - a) The nature of the claimed efficiencies;
  - b) The link between the agreement and the efficiencies;
  - c) The likelihood and magnitude of each claimed efficiency;
  - d) How and when each claimed efficiency would be achieved.

51. Efficiencies should result from the economic activity that forms the object of the agreement and should be directly linked with the agreement. In the case of cost efficiencies, these should be calculated or estimated as accurately as reasonably possible, based on verifiable data. The parties involved must also describe the method(s) through which the efficiencies have been or will be achieved. In the case of claimed efficiencies in the form of new or improved products, the nature of the efficiencies and how and why they constitute an objective economic benefit need to be described in detail.

52. With regards to the **second condition**, the fair share for consumers, the benefits that are passed-on (i) should at least compensate consumers for any actual or likely negative impact caused to them (hence, the greater the restriction of competition found, the greater the efficiencies and pass-on to consumers must be), (ii) need to be passed-on to the general consumer in the relevant market instead of certain individual ones, (iii) can be passed-on with a certain time lag, but the greater the time lag, the higher the required efficiencies, and (iv) should take into account a discount rate (reflecting inflation) for values in the future.

53. The following factors are relevant for the Commission in order to assess the extent to which cost efficiencies are likely to be passed on to consumers:

- i. The characteristics and structure of the market, including the degree of residual competition and the way in which firms in the market compete (e.g. price, capacity);
- ii. The nature and magnitude of the efficiency gains, with reductions in variable costs that are more likely to be passed through than reductions in fixed costs;
- iii. The elasticity of demand; and
- iv. The magnitude of the restriction of competition, so that the cost efficiencies can be compared with the potential increase in price caused by the restrictive agreement and consequent increase in market power.

54. The **third condition**, the indispensability of the restrictions, includes a two-fold test:

- i. the restrictive agreement must be reasonably necessary to achieve the efficiencies – no other economically practicable and less restrictive means can achieve the efficiencies, taking into account market conditions and business realities;
- ii. the individual restrictions of competition that flow from the agreement must be reasonably necessary for the attainment of the efficiencies – the parties involved should substantiate their claim with regard to both the nature of the restriction and its intensity.

55. The **fourth condition**, no elimination of competition, depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition. This assessment requires a realistic analysis of the various sources of competition in the market (including actual and potential competition), the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint.

56. Market shares are relevant, but more extensive qualitative and quantitative analysis is normally required. In the assessment of entry barriers and the real possibility for new entry, it is relevant to examine, inter alia (i) the regulatory framework, (ii) the cost of entry including sunk costs, (iii) the minimum efficient scale within the industry, (iv) the competitive strengths of potential entrants, (v) the position of buyers and their ability to bring onto the market new sources of competition, (vi) the likely response of incumbents to attempted new entry, (vii) the economic outlook for the industry may be an indicator of its longer-term attractiveness, and (viii) past entry or the absence thereof.

#### 4.1.2. US

##### *Overall framework of analysis for vertical restraints*

57. In the US, vertical agreements are generally treated under Section 1 of the Sherman Act, which prohibits any contract, combination in the form of trust, or conspiracy that may restrict trade. Yet, vertical restraints could also be treated under other provisions (Kaplow, 2016). Section 2 of the Sherman Act that applies to unilateral conduct and prohibits monopolisation, may also be applied to vertical agreements that are more concerned by distribution agreements and where the firm has monopoly power and engages in vertical conducts with the intent of foreclosing competition.

58. At present, the *rule of reason* governs all vertical agreements. This involves a balancing of likely anti-competitive and pro-competitive impacts, thus precluding the possibility of holding such restrictions to be *per se* illegal under Section 1 of the Sherman Act (OECD, 2018).<sup>21</sup>

59. In order to assess the competitive effects of a vertical restraint, a market power analysis is conducted. Federal courts make no inquiry into the competitive effects of a restraint unless a manufacturer has economic power in a relevant market, either at the manufacturing level or at the distributor or retailer level.

##### *Assessment of efficiencies*

60. Regulators and economists in the US generally apply a three-step rule of reason analysis in which plaintiffs first must demonstrate that the vertical restraint causes harm to competition. Defendants may then demonstrate an offsetting benefit to competition, which, if successful, then requires the plaintiffs to compare both pro- and anti-competitive effects, and possibly demonstrate that such benefits could not be achieved using less restrictive tactics (Jones & Kovacic, 2017, p. 273).

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<sup>21</sup> Section 1 of the Sherman Act contains no exceptions to the illegality of the practices covered by it. Consequently, all vertical restraints were initially subject to the *per se* illegality rule, and economic analysis was limited or even inexistent (Harbour, 2007). However, after 1977, the *per se* prohibition was gradually replaced by a rule of reason through three landmark rulings by the US Supreme Court. Firstly, *Sylvania* in 1977 put an end to the *per se* rule applied to non-price vertical restraints, *State Oil Co. v. Khan* in 1997 did the same to maximum RPM and finally, the Supreme Court ruled in *Leegin* in 2007 that all vertical restraints should be assessed under the “rule of reason” standard.



61. However, in recent years, the US has only approximately a handful of vertical restraints cases. OECD desk research had found six federal cases since 2015, but none of them discussed efficiencies. One concerned a per se prohibition<sup>22</sup> and in five cases the investigation was dismissed<sup>23</sup>. Hence, there is no real guidance on how efficiencies are assessed on a federal level in practice.

#### 4.1.3. Latin America

62. Jurisdictions in Latin America and the Caribbean have opted for a range of approaches to prohibit vertical restraints.

63. Jurisdictions in the region adopt broadly three different types of approaches for addressing vertical restraints, with some jurisdictions adopting a combination of them:

- a) Vertical restraints assessed within the context of a prohibition on anti-competitive practices (agreements and unilateral conduct) that have as their object or effect harm to competition **without** the need to establish the existence of a dominant position.
- b) Vertical restraints assessed within the context of a prohibition on practices anti-competitive (agreements and unilateral conduct) that have as their object or effect harm to competition **with** the need to establish the existence of a dominant position.
- c) Vertical restraints assessed within the context of specific prohibitions on particular types of practices.

64. An example of the first category is Colombia. In Colombia, the law prohibits “*agreements or understandings that have as their object the limitation of production, supply, distribution, or consumption of primary resources, products, merchandise, or services of domestic or foreign origin, and in general all types of practices, procedures or systems tending to limit open competition and to maintain or determine unfair prices*”<sup>24</sup>. Notably the part “*in general all types of practices, procedures or systems tending to limit open competition*” includes vertical restraints.<sup>25</sup>

65. Examples of the second category are Mexico, Chile and Brazil. In Mexico, the chapter on abuse of dominance includes an article that prohibits specific vertical practices<sup>26</sup>, while in Brazil<sup>27</sup> and Chile<sup>28</sup>, the provision in the law that prohibits the abuse of a dominant position, includes a list of restrictive practices (containing some that can be considered vertical restraints).

<sup>22</sup> Collins Inkjet Corporation v. Eastman Kodak Co, No. 14–3306, United States Court of Appeals, Sixth Circuit.

<sup>23</sup> It My Party Inc v. Live Nation Inc, No. 15–1278, United States Court of Appeals, Fourth Circuit; Suture Express Inc. v. Owens & Minor Distribution, Inc., Cardinal Health 200, LLC, No. 16-3065, United States Court of Appeals Tenth Circuit; Ohio et al. v. American Express Co. et al, No. 16–1454, US Supreme Court; US Airways, Inc. v. Sabre Holdings Corp., No. 17-960, United States Court of Appeals, Second Circuit; and FTC v. Qualcomm Incorporated, No. 19-16122, United States Court of Appeals, Ninth Circuit.

<sup>24</sup> Article 1 of Law 155/59, amended by Special Decree 3307/63.

<sup>25</sup> It shall be noted that case law allows vertical restraints to be addressed under abuse of dominance provisions as well. See for instance the IBOPE case (Resolution No. 23890 of 2011).

<sup>26</sup> Article 56 in Chapter III of the Federal Economic Competition Law of 2015 (on Relative Monopolistic Practices (Abuse of Dominance)).

<sup>27</sup> Article 36(IV) of law No. 12529/11.

<sup>28</sup> Article 3(b) of the Decree Law N° 211/1973.

66. Finally, Argentina is an example of the third approach, explicitly prohibiting 12 practices that restrict competition, including certain vertical restraints.<sup>29</sup>

67. Some jurisdictions in the region have developed guidelines on how to approach and assess vertical restraints and their potential efficiencies. Chile and Panama, for example, have specific guidelines that include the definition of a vertical restraint, their potential pro- and anti-competitive effects and the conditions for possible efficiencies claims. Argentina included in its general antitrust guidelines a section on vertical restraints. See also Box 1.

### Box 1. Efficiencies in guidelines on vertical restraints in Argentina, Chile and Panama

Chile's Fiscalía Nacional Económica (FNE)<sup>1</sup> and Panama's Competition and Consumer Protection Authority<sup>2</sup> have issued guidelines specifically on vertical restraints. Both guidelines include detailed considerations on how efficiencies should be invoked and the conditions that need to be fulfilled for them to be considered as part of the analysis.

In both cases, the guidelines highlight how such conducts could improve co-ordination among the agents in the value chain, improve efficiency and, in some cases, increase inter-brand competition. Moreover, the authorities recognise that vertical restraints could lead to efficiencies through the elimination of double marginalisation, free-riding behaviour and hold-up on investments.

The FNE establishes that the burden of proof for efficiency considerations is on the parties and that they ought to compensate the anti-competitive effects. It explains the importance and feasibility of efficiency claims, depending on the type of product and its characteristics. Such claims are said to be considered more feasible, for instance, in markets with low entry barriers at the distribution level, a low degree of product differentiation and/or no strong brand presence.

For efficiency considerations to be considered as a valid argument in Panama, the guidelines require that they should improve “*supply, distribution, commercialisation or consumption of the products or foster technical improvements*”, and that the vertical restraints should be necessary to achieve such results in the market. A list of possible efficiencies is presented, including prices and costs reductions, increase in quality, increase of the amount of available information to consumers, supply of new or better products with technological change, expansion of infrastructure, technology transfers, and the increase of inter-brand competition, among others.

<sup>29</sup> Article 3 of the Law 27442 of 2018. Since article 2 covers agreements between two or more competitors, article 3, although not explicitly stated, seems more aimed at vertical agreements.

Argentina also discusses vertical restraints' possible efficiencies, albeit in its guidelines for the analysis of exclusionary abuse of dominance cases.<sup>3</sup> They discuss what are the main efficiencies that could arise for conducts such as RPM, exclusivities and rebates. For RPM, it argues that there could be two efficiencies: (i) it could potentially create incentives for retailers to increase quality or to provide better services and (ii) it could potentially create more intra-brand competition even if it reduces inter-brand competition. Regarding exclusivity clauses, the main efficiencies described are (i) transaction costs savings between a company and its suppliers through the reduction of costs related to searching, negotiation and contractual breaches, and (ii) the need for exclusivity or rebate to perform specific investments that benefit retailers or clients or to perform activities that help increase quality or improve a service.

Notes:

<sup>1</sup> Fiscalía Nacional Económica (2014). Guía para el Análisis de Restricciones Verticales (<https://www.fne.gob.cl/advocacy/herramientas-de-promocion/restricciones-verticales/>).

<sup>2</sup> ACODECO's Resolution No. A-030/2009 by which the guidelines for the analysis of vertical conducts are issued. ([Autoridad de Protección al Consumidor \(acodeco.gob.pa\)](http://Autoridad.de.Proteccion.al.Consumidor.acodeco.gob.pa)) or [https://www.acodeco.gob.pa/uploads/pdf/legislacion\\_normativas/Guiaanalisisconductasverticales\\_30junio2009.08\\_19\\_2009\\_12\\_54\\_49\\_p.m..pdf](https://www.acodeco.gob.pa/uploads/pdf/legislacion_normativas/Guiaanalisisconductasverticales_30junio2009.08_19_2009_12_54_49_p.m..pdf)).

<sup>3</sup> Comisión Nacional de Defensa de la Competencia (2019). Guías para el Análisis de Casos de Abuso de Posición Dominante de Tipo Exclusorio. Buenos Aires. ([https://www.argentina.gob.ar/sites/default/files/guias\\_abuso\\_posicion\\_dominante.pdf](https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante.pdf)).

## 4.2. Efficiency considerations in vertical restraints cases

68. For the purpose of this paper, the OECD Secretariat reviewed (i) 44 vertical restraints cases from six European jurisdictions (EU, France, Germany, Portugal, Spain and UK) across 6 years (2015-2020) and (ii) 20 vertical restraints cases from six jurisdictions in Latin America and the Caribbean (Brazil, Chile, Colombia, Mexico, Panama and Peru) since 2005.<sup>30</sup>

69. Out of the 44 reviewed European cases, 32 cases led to an infringement decision – the remaining cases were closed for other reasons, including commitments. The restraint that was found most (across all 44 reviewed cases) was RPM (21 cases) (see Table 4.1). A total of 19 cases concerned selective distribution (including online sales bans and price comparison tool bans), while 11 cases dealt with exclusive distribution through territorial restrictions.<sup>31</sup>

70. In Latin America and the Caribbean, exclusive dealing has been by and large the most encountered vertical restraint in the identified competition cases (see Table 4.1). MFN clauses were found in four cases and RPM in two cases.

<sup>30</sup> This selected cases include all cases identified in the mentioned periods and jurisdictions. The selected cases in Latin America concern all vertical restraints cases identified by the OECD Secretariat. The selection of jurisdictions in Europe was mostly driven by enforcement activity regarding vertical restraints and the limited availability of final decisions in some jurisdictions. Although the number of vertical restraints cases in Europe during the selected period (from 2015 to 2020) is unknown, the EC had identified 392 cases between 2010 and 2020 (see figure Figure 2.2). Hence, the selection corresponds to approximately 20% of all vertical restraints cases.

<sup>31</sup> Some cases contained several vertical restraints, such that the sum of vertical restraints encountered is greater than the total number of cases reviewed.

**Table 4.1. Types of vertical restraints encountered in a selection of vertical restraints cases<sup>1</sup>**

<b>Europe (44 cases)</b>	<b>Number of times a vertical restraint was encountered</b>
RPM	22
Exclusive distribution (including territorial distribution)	11
Selective distribution (including online sales and price comparison bans)	8
Online sales ban	8
MFN	5
Non-compete clauses	1
Exclusive dealing	1
Tying and bundling	1
Quantity fixing	1
<b>Total</b>	<b>58</b>
<b>Latin America and Caribbean (20 cases)</b>	<b>Number of times a vertical restraint was encountered</b>
Exclusive dealing	12
MFN clauses	3
RPM	2
Quantity forcing	2
Selective distribution	1
Tying and bundling	1
<b>Total</b>	<b>21</b>

Note:

<sup>1</sup> The selection contains 44 vertical restraints cases from six European jurisdictions (EU, France, Germany, Portugal, Spain and UK) across 6 years (2015-2020) and (ii) 20 vertical restraints cases from six jurisdictions in Latin America and the Caribbean (Brazil, Chile, Colombia, Mexico, Panama and Peru) since 2005. See also Annex 1 and 2.

71. Efficiency considerations or analyses are fairly limited in the 64 reviewed cases (see Table 4.2).<sup>32</sup>

**Table 4.2. Occurrence of efficiency considerations in the selected vertical restraints cases<sup>1</sup>**

<b>Geography</b>	<b>Efficiencies invoked<sup>3</sup></b>	<b>Accepted efficiency considerations</b>
European cases (38 cases) <sup>2</sup>	12	0
Latin America and the Caribbean (20 cases)	8	1

Note:

<sup>1</sup> The selection contains 44 vertical restraints cases from six European jurisdictions (EU, France, Germany, Portugal, Spain and UK) across 6 years (2015-2020) and (ii) 20 vertical restraints cases from six jurisdictions in Latin America and the Caribbean (Brazil, Chile, Colombia, Mexico, Panama and Peru) since 2005. See also Annex 1 and 2.

<sup>2</sup> In 6 out of the 44 identified cases, information on the case was insufficient as the decision was not publicly available.

<sup>3</sup> For Europe, this pertains to the number of cases in which an assessment of efficiency considerations has been conducted in the context of a potential individual Article 101(3) exemption.

<sup>32</sup> As mentioned in footnote 9, in the US, there have been very limited vertical restraints cases and none discussed efficiency arguments.

72. In the selection of European cases, in 13 instances the parties invoked efficiencies for a potential Article 101(3) exemption (just over 30% of the reviewed cases).<sup>33</sup> In one case, the investigation was closed after commitments by the party, without an assessment of the efficiencies.<sup>34</sup> In twelve cases, the relevant competition authority established an Article 101(1) infringement, after which in nine of these twelve cases an assessment was conducted by the relevant competition authority to establish whether certain efficiencies offset the anti-competitive effects of the vertical restraint. Finally, in the remaining three cases<sup>35</sup>, a detailed Article 101(3) assessment of the invoked efficiencies was not conducted because the relevant authority considered an individual Article 101(3) exemption unlikely as it concerned a hardcore restriction.

73. In general, efficiency considerations in the context of an Article 101(3) exemption have not proven to be successful in the European cases that were reviewed for this paper.

74. In Latin America and the Caribbean, efficiency considerations were invoked in eight cases (40%) and were accepted once. In the Brazilian Unilever case, the accepted efficiencies related to potential free-riding by competitors on investments made by the manufacturer (Unilever), see also paragraphs 135-139).

75. When invoking efficiencies, parties often put forward multiple efficiency considerations in a case. When looking closer at the types of efficiency considerations invoked by the parties, it can be observed that they differ in Europe and Latin America and the Caribbean.

76. This subsection will provide a brief analysis of the efficiencies invoked in the selected cases in each region to better understand the types of cases involved, the way in which the arguments were brought and how they were assessed. The cases are categorised by type of vertical restraint.

#### 4.2.1. European cases

77. At a first glance, there is a fairly limited number of cases where the parties brought efficiency arguments for an individual Article 101(3) exemption. However, it is important to note that in Europe, as described in Section 4.1.1, the VBER exempts a category of vertical restraints from the application of Article 101(1), namely those cases where efficiencies are assumed to outweigh any negative effects. Consequently, as there exists no authorisation or notification system for vertical restraints in Europe<sup>36</sup>, the large majority of restraints in vertical agreements are self-assessed by the companies and do not become an enforcement case. Moreover, this has led the EC and NCAs to focus largely on those vertical agreements with hardcore or *by object* restrictions, where an analysis of the effects

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<sup>33</sup> Melia (EC, Case AT. 404528 – Melia (Holiday Pricing)); Guess (EC, Case AT. 40428 – Guess); Booking (Bundeskartellamt, Case B 9-121/13) ; Stihl (Autorité de la concurrence, Case No 18-D-23, 24 October 2018); Bikeurope (Autorité de la concurrence, Case No 19-D-14, 1 July 2019); Super Bock (Autoridade da Concorrência, Case No. PRC/2016/4); Atresmedia/Mediaset (Comisión Nacional de los Mercados y la Competencia, Case No. S/DC/0617/17 Atresmedia/Mediaset); Ping (CMA, Case No 50230) and Vaillant (Comisión Nacional de los Mercados y la Competencia, Case No. S/0629/18 Asistencia Técnica Vaillant).

<sup>34</sup> Booking (Autorité de la concurrence, case 15-D-06).

<sup>35</sup> Refrigeration (CMA, case CE/9856/14), Bathroom fittings (CMA, Case CE/9856/14) and Asics (Bundeskartellamt, KVZ 41/17).

<sup>36</sup> This authorisation and notification system with the EC for vertical restraints was abolished in 2004, together with removal of the Commission's exclusive jurisdiction over Article 101(3), effectively decentralising the enforcement of Article 101(3).

is not required (see footnote 20). Indeed, 36 of the 44 reviewed European cases were *by object* cases.<sup>37</sup>

78. Efficiencies that were claimed most by the parties are: (i) the preservation of quality and brand image or reputation; and (ii) lower prices for final consumers. The elimination of free-riding behaviour, reduction of costs and consumer safety were all used in two cases. Other efficiencies claimed by the parties included costs savings (including production, distribution and transportation costs), safety reasons, and the ability to provide customers with pre- and after sales (see Table 4.3).

**Table 4.3. Types of vertical restraints and invoked efficiencies in the selected European cases as part of an Article 101(3) analysis**

Europe (12 cases)	# of times a vertical restraint was encountered (with a 101(3) efficiency assessment <sup>1</sup> )	Europe (12 cases)	# of times an efficiency argument was invoked <sup>2</sup>
RPM	5 (3)	Preserve brand image/product quality	6
Exclusive distribution (including territorial restrictions)	3 (3)	Lower prices	3
Selective distribution (including online sales and price comparison bans)	4 (3)	Prevent free riding	2
RPM	3 (3)	Reduce costs	2
MFN	1 (1)	Ensure consumer safety	2
Selective distribution	1 (1)	Improve access for consumer to pre- and after sales	2
Tying and bundling	1 (1)	Increase operational efficiency	1
Quantity fixing	1 (1)	Increased inter-brand competition	1
		Reduction of searching costs	1
		Other <sup>3</sup>	3

Note:

<sup>1</sup> An assessment discussing the four cumulative conditions for an individual Article 101(3) exemption.

<sup>2</sup> The number of invoked efficiency considerations exceeds the number of cases in which efficiencies have been invoked as oftentimes more than one efficiency argument is brought forward.

<sup>3</sup> Other includes: reduce demand uncertainty, increase competitiveness of retailers and improve access for consumer to pre- and after sales.

79. Efficiencies have not been quantified in any of the cases, regardless of the detailed guidance provided in the different EC regulations and guidelines, including a report commissioned by the EC in 2006 that meant to facilitate the practical application of the efficiency test (Copenhagen Economics, 2006).<sup>38</sup>

<sup>37</sup> The lack of *by-effect* cases by the EC (and the NCAs) has led to some concerns, focusing on different (almost opposite) arguments. One line of reasoning is that vertical agreements are being over-enforced. The EU-approach would rely too heavily on broad presumptions of illegality (the *by object* criteria) which are not justified by economic theory or experience (creating Type I error risks) and result in a lack of transparency on the analysis and balancing of pro- and anti-competitive effects of vertical arrangements (de la Mano & Jones, 2017). A second line of reasoning is that companies may enter increasingly into agreements which “merely” restrict competition by effect, since they know that Article 101 is unlikely to be enforced (Witt, 2018). Since restrictions *by effect* are not necessarily less harmful to competition and consumer welfare than *by object* restrictions, this is argued to be an undesirable development. Both lines of reasoning share a common solution: taking on more ‘by effect’ cases, especially more complex (truly *by effect*) cases (Witt, 2018, p. 447) and (de la Mano & Jones, 2017).

<sup>38</sup> For instance, it provided guidance on how to measure efficiencies (as well as anti-competitive effects) of a vertical agreement by distinguishing three levels of analysis: identification, substantiation and quantification (Copenhagen

80. Below, the nine European cases will be discussed, per category restraint, that have seen an explicit assessment of invoked efficiencies in the context of an individual Article 101(3) analysis.

81. Before doing so, an interesting observation from the review of the selected European cases is that while the EU legal framework provides for an efficiency defence by means of a possible individual Article 101(3) exemption (as was explained in Section 4.1.1), in practice efficiency arguments have also been brought or assessed in the context of the establishment of an Article 101(1) infringement in the first place. This is the case in *Coty* (EC, 2017) and (CEAHR, 2017), in which the efficiency arguments supported the conclusion that the vertical agreement complied with Art 101(1), which made an assessment for an Article 101(3) exemption redundant. They both pertained to selective distribution (see Box 2) .

### Box 2. Efficiencies in the context of an Article 101(1) case: *Coty* (2017) and CEAHR watches (2017)

**Coty** Coty owns luxury cosmetic products that are distributed in Europe via a selective distribution network, requiring distributors to meet certain criteria to assure quality services. When one of the distributors refused to comply with one of the requirements, particularly regarding the prohibition of online sales through non-authorised third parties' websites, the company launched a case in Germany to prevent the distributor from selling the products, particularly through Amazon. The case was first decided by the Court of First Instance, which concluded that Coty's selective distribution network was unjustified and that the specific restrictions on online sales constituted a hardcore restriction. Coty appealed to the Higher Regional Court, which referred the question to the ECJ.

In its judgement<sup>1</sup>, the ECJ determined that luxury goods suppliers may prohibit their distributors from selling its products through third-party platforms that are not authorised sellers. For the Court, the internet sale of luxury goods via platforms which do not belong to the selective distribution system for those goods (in the context of which the supplier is unable to check the conditions in which those goods are sold) involves a risk of deterioration of the online presentation which may harm their luxury image and thus their very character. Consequently, the prohibition by a supplier of luxury goods on its authorised distributors to use third-party platforms for the internet sale is considered appropriate to preserve the luxury image of those goods.

In this conclusion, the Court specified that because the *Metro I* criteria were met – the distributors were chosen based on objective and qualitative criteria and the distribution systems were used in a uniform and proportionate matter – this selective distribution system is exempt from Article 101(1) TFEU. It was stated that Coty's ban on online sales did not constitute a hardcore restriction because it did not exclude online sales entirely and because it did not exclude them to a certain category of customers as a whole. In short, the Court concluded that the clause was appropriate and did not go beyond what was necessary to ensure the preservation of the luxury image of Coty's brands.

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Economics, 2006, p. 11). *Identification* is determining the identity of potential efficiencies that the agreement may generate. The following step, *substantiation*, aims to assess the size order (e.g. small or large) of the effects from the agreement. These can normally be identified with immediately available information, including, for instance, research literature and case law. The third step, *quantification*, aims to assess the absolute size of the effects, and only follows if substantiation does not provide an answer to the question of whether anti-competitive effects outweigh efficiencies or vice versa. The reason is that the quantification step uses sophisticated economic tools, is much more reliant on data availability and more time consuming.

**CEAHR** A judgement of the General Court's Second Chamber in October 2017<sup>2</sup> ruled in favour of a 2014 decision taken by the EC to not open an investigation related to vertical restraints on the grounds of efficiencies claimed by the potentially investigated parties.

In 2004, the Confédération Européenne des Associations d'Horlogers-réparateurs (CEAHR) filed, a complaint against different watch manufacturers concerning alleged infringements of Articles 101 and 102 TFEU. The allegedly anti-competitive conduct included the establishment of selective repair systems by most of the Swiss watch manufacturers, enabling independent repairers to become authorised repairers provided that they meet criteria relating to their training, experience and equipment and the suitability of their premises.

The EC first rejected the complaint in 2008 on the ground that there was insufficient EU interest in continuing the investigation. However, a judgement by the General Court in 2010 held that the EC had infringed its obligation to take into consideration all the relevant matters of law. Consequently, the EC decided to reopen the procedure in 2011. In 2014, the Commission adopted a final decision, rejecting, for the second time, the complaint.<sup>3</sup> In its decision, it highlighted some efficiency considerations for a selective distribution system, making an infringement of Articles 101 (or 102) TFEU unlikely. More specifically, it considered that:

- *the nature of the product made a selective repair system necessary in order to preserve the quality of the watches, ensure their optimal use, prevent counterfeiting and preserve the brand image and aura of exclusivity and prestige attached to those luxury products from the point of view of their consumers.*
- *the selection of authorised repairers was carried out on the basis of objective criteria applied in a uniform and non-discriminatory manner*
- *the criteria concerning the training and experience of repairers, and the tools, equipment and stock of spare parts at their disposal, used to assess their ability to carry out repairs within a reasonable period, though varying between manufacturers, were qualitative criteria that did not go beyond what was necessary to achieve the objective of the system.*

Moreover, authorised repairers were not contractually obliged to refrain from repairing watches of other brands and the large investments to be made (to become an authorised repairer) could not be regarded as artificial barriers to market entry and were not disproportionate, since they were justified by the objective of quality and it was not uncommon for repairers to work for several brands.

In reference to the aforementioned *Metro criteria*, the Commission stated that a qualitative selective distribution system is generally considered to fall outside the scope of Article 101(1) TFEU for lack of anticompetitive effects, provided that it is objectively justified, non-discriminatory and proportionate. The General Court, after considering all pleas raised by the CEAHR to be ineffective or unfounded, dismissed the action.

Notes:

<sup>1</sup> Coty Germany GmbH v. Parfümerie Akzente GmbH, Case C-230/16.

<sup>2</sup> Case No. T-712/14, 23<sup>rd</sup> October 2017, Judgement of the General Court (Second Chamber).

<sup>3</sup> Case No. AR 39097 – Watch Repair.



*RPM*

82. In Europe, RPM has been the most frequently enforced type of vertical restraint in the last decade (see Figure 2.2).<sup>39</sup> Recent vertical restraints cases in Europe are also often RPM-related.<sup>40</sup>

83. The most common arguments in favour of pro-competitive effects revolve around the idea that RPM improves inter-brand competition by enhancing distribution efficiency. More specific welfare-enhancing effects are (OECD, 2008, pp. 24-30): the encouragement of retailers to provide efficient pre-sale services, the combat of free riding, the protection of brand image, the management of demand uncertainty, the encouragement of preferred treatment by multi-brand dealers, the promotion of entry, the elimination of double marginalisation and the prevention of price gouging by dealers with market power. Notwithstanding these potential pro-competitive effects, fixed and minimum RPM are treated as *by-object* prohibitions in Europe (and many other jurisdictions, except for instance the US with its assessment under the ‘rule of reason’<sup>41</sup>).

84. Of the 44 reviewed cases for the purpose of this paper, 22 cases (50%) dealt with RPM (see Table 4.1). However the parties had invoked efficiency arguments in only five of these cases. Moreover, in two of those, efficiency arguments were not assessed (as it was considered a hardcore restriction) and in the other three cases, the raised efficiency considerations concerned mostly or solely another vertical restraint that was combined with RPM.<sup>42</sup> See for the cases that also concern RPM, paragraphs 91-93 for Guess, 125-127 for Vaillant and 122-124 for Super Bock.

*Selective distribution (including online sales ban)*

85. Selective distribution systems are used in different ways. Suppliers adopt selective distribution, typically, in an effort to ensure a sufficiently high-quality retail experience for their products, or more specifically to protect a product’s market positioning, preserve brand image or reputation, guarantee provision of effective or individualised pre- and after-sales services to consumers, or ensure a more homogenous presentation of products across multiple individual retailers (OECD, 2018, p. 17).

<sup>39</sup> Other countries have also increased their attention on RPM, such as China, Russia, and India. See the GCR overview of vertical restraints cases and investigations mentioned in footnote **Error! Bookmark not defined.**

<sup>40</sup> See for instance “Austria fines backpack maker for RPM and online sales ban” on 3 August 2021 ([Global Competition Review - Austria fines backpack maker for RPM and online sales ban](#)) and “France fines eyewear companies €126 million for vertical restraints” on 22 July 2021 ([Global Competition Review - France fines eyewear companies €126 million for vertical restraints](#)).

<sup>41</sup> In the US, however, after the *Leegin* case, no federal RPM cases have followed. In practice, at State level, the ‘rule of reason’ treatment for minimum RPM is not universally embraced; see for instance (Collin, 2013). Under many state laws, RPM agreements were considered ‘*per se*’ unlawful, and those state laws were not overturned by *Leegin*. However, some states disagreed and even rejected the application of *Leegin*. There have been cases on state-level (for instance, see an overview from April 2017: [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/lindsay\\_chart.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.pdf)).

<sup>42</sup> This is in line with research by the EC, which had also indicated that efficiency considerations had been scarce in RPM cases. See “Discussion on Current Ideas on RPM”; Presentation by Andrea Amelio, DG Comp European Commission, during the seminar “Pros & Cons of Vertical Restraints”, Stockholm, 8 November 2019. During this presentation, preliminary research was presented on 79 identified vertical cases, investigated by NCAs in the period 2013-2018, that fell within the scope of the VBER, 51 of which concerned (also) RPM. In these cases, parties rarely provide efficiencies justifications.

86. Over the last ten years, the use of selective distribution systems has increased. In an online world, they allow manufacturers to control distribution better, through (i) maintaining a coherent brand image across offline and online sales (ii) avoiding free riding between the two channels, and (iii) offering a certain degree of protection against the sale of counterfeit products (de la Mano & Jones, 2017). In terms of enforcement practice, this increase in use has been visible; selective distribution has been enforced substantially in Europe (see Figure 2.2).

87. Outright bans on internet sales constitute the most obvious vertical obstacle to e-commerce: such clauses impose a straightforward contractual prohibition on resale of the relevant product in the online environment (OECD, 2018, p. 22) to selected retailers.

88. An online marketplace ban represents a less all-encompassing variety of online sales bans: instead of a blanket prohibition of e-commerce channels, retailers are contractually prevented from reselling goods through online marketplaces operated by third party intermediaries. The principal reason why manufacturers wish to restrict sales through third party online platforms relates to brand image and positioning: manufacturers may be concerned that association with an online marketplace may diminish consumers' perceptions of the quality or value of its products. Other identified concerns include a desire to combat the sale of counterfeit products, the need to ensure adequate provision of specific pre- and after-sales services, the prevention of free-riding on existing distribution channels and a lack of customer service interaction at platform-level (OECD, 2018, p. 23).

89. The new draft vertical guidelines indicates that a restriction on the use of online marketplaces can generally benefit from a block exemption (European Commission, 2021, pp. 82-83).

90. The below four cases discuss efficiency considerations regarding selective distribution in the context of possible requested Article 101(3) exemption. All of them concern some form of online sales ban, and efficiencies focus mostly on the protection of a brand-image and prevention of free riding. This is in line with the rationales that are mentioned in the literature, but relevant competition authorities have found the efficiency arguments to be insufficient for an Article 101(3) exemption. In none of the cases, the parties were able to show to a sufficient degree the indispensability of the restrictions for the attainment of its objectives, while in some the efficiencies themselves were sufficiently clear (as to how they contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress).

91. In **Guess**<sup>43</sup> (EC, 2018), the case revolved mainly around the branding clothing manufacturer's selective distribution system, but the relevant agreements also included RPM clauses. The contracts incorporated clauses that prevented distributors from bidding on brand names and trademarks as keywords from online search advertising, selling online without an express authorisation from Guess, selling to consumers outside specific territories, cross-selling to other authorized distributors and setting resale prices autonomously. More concretely, the company applied higher retail prices generally in Eastern Europe than in Western Europe, with an average price difference of 5-10%.

92. Guess argued that online search advertising restrictions were to protect the brand image and assure quality standards. However, through internal documents, the EC found that the objective of this policy was to reduce competitive pressure by authorised retailers on Guess' own online retail activities and to keep down its own advertising costs.

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<sup>43</sup> European Commission, Case AT. 40428 – Guess.

93. Consequently, it rejected the efficiency arguments for a potential individual Article 101(3) exemption as the four cumulative conditions for such an exemption (see paragraph 49) were not met. In particular, it considered there were no indications that the conduct contributed to improving the production or distribution of Guess' products, or to promoting technical or economic progress, while allowing consumers a fair share of the potential benefits resulting from Guess' restrictive practices. In addition, there are no indications either that the conduct was indispensable, for example to address free-riding, or to protect Guess' brand image. With regards to the RPM clauses, the EC concluded that fixing minimum prices go beyond the requirements of a distribution system, making the conduct anticompetitive by object.

94. In **Ping**<sup>44</sup> (UK, 2017), the Competition and Markets Authority (CMA) sanctioned Ping's for its online sales policy in respect of the sales of Ping golf clubs, included in its contractual agreements with its authorised retailers. The American golf equipment manufacturer introduced a Custom Fitting Policy which required that Ping clubs should be sold after a face-to-face Custom Fitting Policy, banning the sales of Ping golf clubs online on distributors websites.

95. Ping contended that the internet ban should be exempted under Article 101(3) TFEU on the ground that it produced real benefits for consumers which could not be achieved in any other way. There were two main efficiency claims: the promotion and benefits of custom fitting and the consequent impact on Ping's brand image, and addressing distributor's free riding.

96. The CMA concluded that Ping's sales policy constitutes an online sales ban, infringing the prohibition in section 2(1) of the Competition Act 1998 (Chapter 1 prohibition) and Article 101(1) TFEU, and that the conduct was not 'objectively justified'. Following this conclusion, the CMA conducted an assessment of the four cumulative conditions for a potential Article 101(3) exemption but found that Ping failed to substantiate the first (contributing to the improvement of Ping's products or distribution or promotion of economic progress) and third exemption criteria (the indispensability for the invoked efficiencies).

97. Ping appealed the decision twice, but unsuccessfully as both the Competition Appeal Tribunal (CAT)<sup>45</sup> as well as the Court of Appeal<sup>46</sup> dismissed the appeal. Moreover, the appeals focussed more on whether or not the case pertains to a *by object* infringement or can be 'objectively justified', although the same conclusions were reached with regards to the failure to meet the conditions for an Article 101(3) exemption.

98. In **Bikeurope**<sup>47</sup> (France, 2018), the French Competition Authority (the Autorité) sanctioned Bikeurope BV (Bikeurope) and its parent company Trek Bicycle Corporation, for prohibiting its authorised distributors from selling its Trek brand bicycles online, contrary to Articles L. 420-1 of the Commercial Code and paragraph 1 of Article 101(1). The Autorité considered that by requiring its distributors to sell Trek bicycles from their physical points of sale, Bikeurope had *de facto* prohibited them from selling these products online.

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<sup>44</sup> CMA, Case No 50230.

<sup>45</sup> Ping Europe Limited v. Competition Markets Authority [2018] CAT 13, Case No: 1279/1/12/17.

<sup>46</sup> Ping Europe Limited v. Competition and Markets Authority, Case No: C3/2018/2863.

<sup>47</sup> Autorité de la concurrence, Case No 19-D-14.

99. Bikeurope and Trek Bicycle maintained that the restriction of competition induced by the online sales ban, even if it existed, should be exempted on the basis of Articles 101(3) and L. 420-4 of the Commercial Code. To justify the granting of this exemption, the parties pointed out that the professional skills required by Bikeurope of its resellers and the attention paid by the latter to their ongoing training are beneficial to consumers; therefore, the sale on the Internet of certain products, in particular those presenting a certain technicality, would have a potentially negative impact for the consumer.

100. However, the Autorité concluded that the ban went beyond what was necessary to preserve in particular the safety of consumers and the high technicality of bicycles. The obligation to deliver to the store, invoked by Bikeurope, was not required by the regulations related to the marketing of bicycles applied at this time. By imposing this online sales ban, the Autorité considered that such restriction reduced the possibility of distributors to sell products outside their physical catchment area, limited the choice of customers desiring to buy without traveling, and had a particular degree of harmfulness to competition, therefore constituted an anti-competitive restriction by object.

101. Moreover, the parties did not meet the conditions required for the granting of an individual Article 101(3) exemption by failing to demonstrate the causal link between the clauses in question and their possible contribution to the improvement of distribution or economic progress nor the exclusion of the possibility of eliminating competition for a substantial part of the products in question.

102. In **Stihl**<sup>48</sup> (France, 2018), the French Competition Authority (the Autorité) investigated Stihl for adopting a selective distribution system for garden equipment by imposing two restrictions on online sales by its authorised distributors. Firstly, it required the hand-delivery of Stihl's products, which Stihl deemed to be dangerous (products such as chainsaws, brush cutters, pole-saws or electric pruners), either through the collection at the distributor's premises or the delivery by the distributor itself to the customer. The Autorité considered this a *de facto* ban on the sale of its products through websites of its distributors. Secondly, Stihl prohibited the sale of all of its products on third-party online platforms.

103. The Autorité did not consider the use of a selective distribution system for its products as such an infringement, noting that such system was required to preserve the quality and the proper use of the products, taking into account the safety considerations and to need to protect the brand image and quality. It found that Stihl's ban on sales over third-party platforms was legitimate and complied with Article 101(1) TFEU.<sup>49</sup>

104. However, the Autorité found that the *de facto* ban on online sales constituted a *by object* restriction under Article 101(1) TFEU. Stihl disputed the presence of a restriction of competition, but claimed that, even if it existed, it should be exempted under Article 101(3) (and L. 420-4 du code de commerce). However, the Autorité found that the conditions were not fulfilled, mainly because it failed to show the indispensable nature of the infringement for addressing the safety concerns.

105. Consequently, Stihl was fined for the *de facto* ban of the sale of its products through websites of its distributors. The decision was appealed unsuccessfully by the parties, although the Paris Court of Appeal reduced the fine.

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<sup>48</sup> Autorité de la concurrence, Case No 18-D-23, 24 October 2018.

<sup>49</sup> For this conclusion, the EC referred to the Coty decision.

*MFN*

106. MFN-clauses (or across platforms parity agreements – see an OECD Rountable on this topic (OECD, 2015)) are frequently used in e-commerce and as a result, MFN-cases have been fairly frequent in the past decade as well. Approximately 5% of the cases in Europe between 2010-2020 included MFN-clauses, while this percentage was higher in Latin America and the Caribbean (approximately 17%).

107. One of the efficiencies thought to be relevant in the case of MFNs is the prevention of free-riding by suppliers on investments made by platforms. In particular, the concern is that suppliers may use online platforms to attract customers, after which they redirect potential customers to their direct or other sales channels by undercutting prices (OECD, 2018). Other potential benefits include the reduction of search costs and strengthening of inter-brand competition, the prevention of rent-seeking behaviour by the supplier and the protection for platforms against demand uncertainty (European Commission, 2020, pp. 100-104).

108. In recent years, some enforcers had concluded that narrow MFN-clauses can potentially be pro-competitive, but wide MFN-clauses are more problematic.<sup>50</sup> The EC has reflected some recent case law in its draft revised VBER and guidelines, published on 9 July 2021.<sup>51</sup> In these guidelines, the EC distinguishes between different channels to which a parity clauses can refer: (i) direct channels (sales channels operated by a supplier of goods or services, or ‘narrow’); (ii) indirect channels (channels operated by third parties); or (iii) all channels (‘wide’). Parity obligations which refer only to direct channels are often called ‘narrow’, whereas those that refer to all channels are often called ‘wide’.

109. The revised draft VBER removes the benefit of the block exemption for across-platform retail parity obligations (aforementioned category ii), and adds them to the list of excluded restrictions (Article 5(d) of the revised draft VBER). Therefore, this type of parity obligation would have to be assessed individually for a possible exemption under Art. 101 (3) TFEU. Conversely, the draft revised VBER still block exempts narrow MFNs. These narrow MFNs continue to benefit from the safe harbour provided by the VBER, subject to the general conditions for the application of the VBER, including the 30% market share threshold.<sup>52</sup>

110. Cases that attest to these diverging views on how to assess (wide and narrow) MFNs – and which are some of the most discussed cases regarding MFNs in recent years – are the different Booking.com cases that was investigated in different jurisdictions (see also Box 3).

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<sup>50</sup> For instance, a CMA market study in 2017 found that while narrow MFNs can provide for efficiency justifications, depending on the sector, there are no credible efficiency justifications for wide MFNs that cannot be achieved by less restrictive means (such as narrow MFNs) (Competition & Markets Authority (CMA), 2017) (para. 4.92).

<sup>51</sup> See also [2021 vber \(europa.eu\)](https://european-council.europa.eu/media/en/press-room/pages/press-room-detail.aspx?lang=en&id=12345), last accessed on 8 August 2021.

<sup>52</sup> Further guidance on the assessment of parity obligations is provided in sections 6.2.4 and 8.2.5 of the draft revised Vertical Guidelines.

### Box 3. Booking.com

Booking.com is a hotel-booking platform that offers services that try to match demand and supply for hotel rooms, enabling consumers to book hotels directly via its platform in exchange for a commission. In the past, Booking.com has been using (both wide and narrow) MFNs in its terms and conditions, which prohibited hotel providers from offering their rooms at a better price elsewhere.<sup>1</sup>

In 2014, Booking.com reached a settlement with the competition agencies of France, Italy and Sweden, agreeing to remove wide MFN clauses from its contracts with hotels.<sup>2</sup>

CADE in Brazil<sup>3</sup>, the Australian Competition and Consumer Commission<sup>4</sup>, the Turkish Competition Authority<sup>5</sup> and the Russian Federal Antimonopoly Service<sup>6</sup> have investigated wide MFN practices by Booking.com, finding similar solutions to stop the investigated practice.

Note:

<sup>1</sup> The first proper assessment of wide best-price clauses dates back to 2013, when the BKA prohibited such clauses (case B 9-121/13).

<sup>2</sup> See for instance [France, Sweden, Italy accept booking.com antitrust proposals | Reuters](#), 21 April 2015.

<sup>3</sup> See <http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense>

<sup>4</sup> See <https://globalcompetitionreview.com/expedia-and-bookingcom-settle-australian-probe>.

<sup>5</sup> CPI Competition Policy International, “Turkey: Competition board fines Booking.com,” published 16 January 2017, available online at: <https://www.competitionpolicyinternational.com/turkey-competition-board-fines-booking-com/>. Turkey’s Competition Authority fined Booking.com TRY 2.54 million (approximately EUR 625 000).

<sup>6</sup> [Global Competition Review - Russia sends second warning to Booking.com](#)

111. In the German **Booking**<sup>53</sup> case (2015), however, the case had a different trajectory and involved efficiency arguments. Firstly, the Bundeskartellamt (BKA) found in 2015 that narrow MFNs infringe competition law because such clauses illegally restrict the pricing freedom of hotel providers and create barriers to entry for booking platforms.

112. On appeal, the Higher Regional Court of Düsseldorf (or *Oberlandesgericht Düsseldorf*, OD) annulled the BKA’s ruling in 2019 on the grounds that narrow best-price clauses should be considered as a necessary ancillary agreement to an agency contract. In particular, they were considered necessary to prevent the free-rider problem, where hotels could use Booking.com’s services to attract customers and then offer a cheaper option on their own websites. In such cases, booking platforms would lose out on commission, despite the hotel having benefitted from their services.

113. Finally, in May 2021, the Federal Supreme Court (or Bundesgerichtshof, BGH) overturned the OD ruling that narrow best-price clauses applied by Booking.com indeed violate EU competition law.<sup>54</sup> Firstly, the court did not agree with the view of the OD that narrow best-price clauses applied by Booking.com constituted an ancillary agreement necessary for an agency contract and therefore fell outside the scope of Article 101(1) TFEU. For this to be the case, such clauses would have to be objectively necessary for the

<sup>53</sup> Bundeskartellamt, case B 9-121/13.

<sup>54</sup> See “Federal Court of Justice confirms illegality of Booking.com’s “narrow price parity clauses”, press release BKA, 18 May 2021 [[18\\_05\\_2021\\_BGH\\_KVR\\_54-20\\_Booking.com.pdf \(bundeskartellamt.de\)](#)].

performance of the contract. However, the object of the contract, namely the online mediation brokerage of hotel rooms, would also be achievable without a best-price clause. Secondly, the BGH stated that the narrow best-price clauses are not exempted from the prohibition of Article 101(1) TFEU under the block exemption (VBER) as the company's market share on the relevant market for hotel booking platforms in Germany exceeds 30%.

114. Ultimately, the BGH rejected a possible individual exemption under Article 101(3) TFEU. The pro-competitive aspects of narrow best-price clauses, such as addressing the free-rider problem and providing increased market transparency for consumers, had to be carefully weighed against their anti-competitive aspects when applying Article 101(3). However, the Bundeskartellamt found that Booking.com had been able to further expand its market position in Germany after the clauses were banned following the 2015 decision.

*Exclusive distribution (including territorial restrictions)*

115. Vertical agreements can include different types of exclusivity clauses, including exclusive distribution (but also exclusive dealing, and exclusive supply, see section 2.1). Such exclusivity clauses might limit only the distributor's or both parties rights. Exclusivity clauses may prevent free-riding and enable the supplier or purchaser to invest in and promote their businesses because of certainty of supply or demand.

116. All of the exclusive distribution cases that have seen a discussion on a potential Article 101(3) exemption involved territorial restrictions. Territorial sales provisions are a practical implementation of exclusive distribution and may limit the geographical territory that a particular distributor is allowed to serve. By granting an exclusive territory, intra-brand competition is eliminated as there is only one distributor for the customers in a certain territory. However, although intra-brand competition may be eliminated, such clauses create the incentive for a retailer to invest more in for instance sales services, which would benefit also competing distributors, because it is able to appropriate (in full or in part) the fruits of its investments.

117. Three recent examples of territorial restrictions where the efficiency considerations were brought forward by the parties are the cases of Meliá, Super Bock, and Vaillant. In all three cases, parties claim the restraints reduce prices, mostly related to increased operational efficiency. However, again the relevant competition authorities argued that parties failed to prove that the restraints were indispensable for the achievement of their objectives.

118. In **Melia**<sup>55</sup> (EC, 2020), the EC settled with Meliá Hotels an investigation regarding territorial restrictions in vertical contracts with the four largest European tour operators (Kuoni, REWE, Thomas Cook and TUI). Such contracts contained a clause according to which contracts were valid only for reservations of consumers who were resident in specified countries.

119. For the Commission, the behaviour constituted a restriction of competition by object as those provisions deterred tour operators from distributing hotel accommodations freely in all EEA countries, causing a partitioning of the internal market.

120. Meliá argued the existence of efficiencies resulting from its conduct. For instance, the company stated that such restrictions allowed for the increase in room occupancy by accounting for consumption patterns in the various markets, and ensured that the low prices for rooms to be included in packages reached the targeted consumers.

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<sup>55</sup> European Commission, case AT. 404528 – Melia (Holiday Pricing).

121. The EC, however, considered that the restrictive clauses were a hardcore restriction and did not benefit from the exemption from the application of Article 101(1) TFEU. Nevertheless, it analysed the efficiencies presented and concluded that: (i) the clause did not directly address the efficiencies sought by Meliá; (ii) even if a group of consumers might have benefited from the low prices, the negative effects on the consumers who were prevented from buying such accommodations were not compensated by the positive effects in another unrelated geographical market; and (iii) territorial restrictions are not indispensable for improving the efficiency of Meliá's hotel accommodation distribution system.

122. In **Super Bock**<sup>56</sup> (Portugal, 2016), the Portuguese Competition Authority (AdC) sanctioned Super Bock Bebidas S.A. for an Article 101(1) TFEU infringement for signing exclusivity contracts with retailers that included clauses on geographical distribution for sales, prohibitions to give discounts and RPM. It pertained to 8 relevant markets related to hotels, restaurants and cafes distribution channels of beverages including beer, water and soft drinks, among others. Moreover, Super Bock implemented a monitoring system to control prices charged by its retailers with threats that included finishing the contracts or refuse to supply after non-compliance of the maximum discounts allowed.

123. For the AdC, fixing resale prices has, by itself, the object of restricting competition and, therefore, it argued that no analysis of the effects was needed. However, Super Bock alleged that the conduct had pro-competitive objective related to the increase of competitiveness of retailers, as well as a decrease in prices for final consumers. According to the firm, the discounts included in their contracts would make the distribution more efficient and such efficiency would be reflected in the price to final consumers.

124. The AdC conducted an analysis of the four criteria for an Article 101(3) exemption, but rejected the efficiency argument as it did not meet the requirement to prove that the restrictions were necessary to reach the objective. Additionally, the AdC found evidence that contradicted the claim as it showed that Super Bock wanted to uniformly increase prices instead of decrease them. Other evidence proved that retailers perceived less competitive pressure from other retailers of competing brands and consumers indeed paid higher prices.

125. In **Vaillant**<sup>57</sup> (Spain, 2019), the Spanish Competition Authority (CNMC) sanctioned four enterprises that belong to Vaillant Group, a multinational group that commercialises products and offers services related to heating, ventilation and air conditioning technologies. According to the CNMC, the companies infringed article 1 of Law 15 of 2007 by imposing vertical restraints in its contracts including a limitation of passive sales through exclusive territorial dealings and restrictions on the pricing of technical assistance services (RPM), as well as cross-selling restrictions on spare parts.

126. Parties claimed the following efficiencies for the territorial limitations to argue for a potential exemption on the basis of Article 1.3 of the Competition Law (the efficiencies exception): (i) territorial limitations corresponded to a short radius of action so that technical assistance is not time consuming and could be done immediately after it is requested by the clients; (ii) the exclusive territories guaranteed the economic viability of the retailers and, therefore, allowed them to be able to provide its services; and (iii) the shorter travel distances and times reduced the costs of transport, allowing for lower prices for consumers and users.

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<sup>56</sup> Autoridade da Concorrência, case No. PRC/2016/4.

<sup>57</sup> Comisión Nacional de los Mercados y la Competencia, Case No. S/0629/18 Asistencia Técnica Vaillant.



127. The CNMC determined that no efficiency had been derived from the practices and they had not generated benefits for the consumer or clients of the companies participating in the conduct in any case.

*Other*

128. The last case concerns a case that tying and bundling and quantity fixing case. The efficiency defense was unsuccessful as the parties failed to prove the benefits for consumers (condition 1) and the indispensability of the restraints for the attainment of its objectives (condition 3).

129. In **Atresmedia/Mediaset**<sup>58</sup> (Spain, 2019), the Comisión Nacional de los Mercados y la Competencia (CNMC) sanctioned two broadcasting groups (and two of the main providers of television advertising in Spain) for infringing Article 101(1) by imposing high minimum quotas on advertisers in their contracts and providing special discounts and rates for the agencies that accomplished specific goals as part of an incentives policy. Moreover, failure to comply with these quotas could be penalized. This strategy in the sale of television advertising led them to limit the capacity of other television channels to capture advertising market share. Each television group practiced this type of agreement independently, but the commercial conditions applied by both were very similar. In assessing the effects, their cumulative nature was taken into account, since they represented 85% of the television advertising market in Spain (more than 40% each).

130. Both parties invoked an efficiency claim. Atresmedia indicated that compliance with the minimum quotas helped with business planning and made planning of supply and budget more predictable and easier. Mediaset also claimed that the conducts led to better and easy management of advertising space and added that it also led to costs reductions.

131. When addressing the efficiencies, it stated that it was improbable that efficiencies would significantly benefit advertisers, as there was significant evidence of the contrary: increased and inefficient use of resources and lack of access to desired products and services, which led to inefficacy of the advertising actions. In this sense, they concluded the first condition was not fulfilled and that it was enough to reject the efficiency arguments brought by the defendants. Regardless, the CNMC also determined that the second condition was not met either, since the restrictions were not essential to achieve such benefits, existing others less harmful means as, ultimately, their conduct would lead to an increase in prices of advertised products for consumers.

132. The CNMC rejected the efficiency claims as it argued that an effective planning of its business is not dependant on the imposition of quotas, making the anticompetitive conducts unnecessary to achieve such goals. Moreover, the restraints imposed were assessed to not improve management as it increased co-ordination problems between all channels and incompatibilities in the timing the ads were presented. To the contrary, the CNMC found that even some clients argued that this lack of co-ordination generated reductions on the efficacy of their advertising strategies. The CNMC concluded that efficiencies were not quantified and that, even if they existed, they were probably not sufficient to offset the distortions on competition that the infringement generated.

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<sup>58</sup> Comisión Nacional de los Mercados y la Competencia, Case No. S/DC/0617/17 Atresmedia/Mediaset.

#### 4.2.2. Cases in Latin America and the Caribbean

133. The most common types of efficiency considerations that have been raised by the companies involved in Latin America and the Caribbean are the prevention of free-riding, the reduction of risks associated with illegal activities and the improvement of operational efficiency.

**Table 4.4. Types of vertical restraints and invoked efficiencies in the selected cases in Latin America and the Caribbean**

Latin America and Caribbean (8 cases)	# of times a vertical restraint was encountered	Latin America and Caribbean (8 cases)	# of times an efficiency argument was invoked <sup>1</sup>
Exclusive dealing	6	Prevent free riding	4
RPM	1	Reduce illegal activity	3
Quantity forcing	1	Improve operational efficiency	2
		Reduce transaction costs	1
		Increase inter-brand competition	1
		Other <sup>2</sup>	3

Notes:

<sup>1</sup> The number of invoked efficiency considerations exceeds the number of cases in which efficiencies have been invoked as oftentimes more than one efficiency argument is brought forward.

<sup>2</sup> Other includes: increase market share, increase product quality and increase welfare for consumers.

134. Below, those cases in Latin America and the Caribbean will be discussed, per category restraint, that include an analysis of invoked efficiencies.

#### *Exclusive dealing*

135. Of the 20 cases reviewed for the purpose of this paper, 12 cases dealt with exclusive dealing, see Table 4.1. Of these, 6 included an analysis of efficiencies. The prevention of free riding was the most argued efficiency, with the improvement of operational efficiency and the reduction of illegal activity being second.

136. In the **Unilever**<sup>59</sup> case (Brazil, 2018), the Brazilian Competition Authority (CADE) imposed a fine on Unilever Brasil Ltda for entering into agreements that imposed certain exclusivity conditions with its points of sales. CADE ordered Unilever to exclude any provisions implicating sales exclusivity, marketing exclusivity and guarantees of minimum sales from its contracts with points of sales related to impulse ice cream in Rio de Janeiro and Sao Paulo. The investigated conduct<sup>60</sup> also included the imposition of specific conditions on the use of freezers (Unilever provided freezers for free and demanded that they only stored its own ice cream).

137. The authority analysed efficiencies presented by Unilever for some of the conducts. For the exclusivities in marketing and sales, Unilever stated that in the absence of such exclusivities, the company would not be able to provide a bonus for sales to its retailers and that those bonuses helped them grow their business. The company also stated that evident efficiencies did not exist, but that the conduct was not significant enough to foreclose competitors. However, CADE established that they were imposed on a significant

<sup>59</sup> Processo Administrativo No. 08012.007423/2006-27.

<sup>60</sup> Initially, CADE opened the investigation against Unilever and Nestlé Brasil Ltda, but as the latter did not hold a dominant position in the market, this investigation was closed.

number of retailers, including the largest and most important ones, and that exclusivities were not needed to provide bonuses for sale volumes. Additionally, those bonuses did not represent lower prices for consumers.

138. For the conditions on the exclusive use of Unilever's freezers for its own ice cream, the company stated that the absence of such clauses could result in free riding behaviour from competitors. This free riding would consist of opportunistic behaviour by its competitors, since consumers could perceive all ice cream from the Unilever freezer to be Unilever ones, potentially leading to higher sales for the competitor.

139. These latter efficiencies were accepted by CADE, judging them to be sufficient to legitimise the exclusivities. Nonetheless, Unilever was sanctioned for the exclusivities in sales and marketing.

140. In the **Bleach**<sup>61</sup> case (Peru, 2008), INDECOPI sanctioned Qimpac S.A. and Clorox Perú S.A. for an agreement that allowed exclusive distribution of sodium hypochlorite by Clorox and included a refusal to supply to its competitors.

141. The parties argued that the agreement (i) produced economies of scale that led to a reduction of transaction costs and (ii) reduced uncertainty with regards to the supply of the product, including decreasing risks for illegal activity (drug trafficking and money laundering). Although none of the efficiencies were quantified, INDECOPI presented in its decision an analysis on each of them. It concluded that the exclusivity was not necessary to achieve such efficiencies, and rejected all the claims made by the parties.

142. In the **Colmotores**<sup>62</sup> case (Colombia, 2018), Colombia's Superintendence of Industry and Commerce (SIC) investigated General Motors Colmotores S.A. (GMC) for including exclusivity clauses in their distribution agreements. These exclusivity clauses restricted Chevrolet car dealers to distribute or commercialise other car brands, and included threats to dealers to terminate the contract.

143. General Motors presented some efficiencies of its conduct, including increased access for distributors to training, advertising funds, confidential information and specific knowledge on the vehicles, among others. For the SIC, the efficiencies were not exclusive to their business model and could also have materialised under a confidentiality clause in the distribution contracts.

144. However, the SIC closed its investigation, mainly because of the fact that although GMC, through Chevrolet, was market leader in some of the segments, it did not have a dominant position or substantial market power in the market due to low barriers to entry, a large supply by other brands through imports and many consumers displaying preference for other brands, among other factors. As such, it concluded that the conduct did not have the potential to affect competition.

145. The **IBOPE**<sup>63</sup> case (Colombia, 2011) involved two interlocking vertical arrangements designed to exclude competitors by denying them a critical input. The inputs were television audience share statistics and data showing which advertisers ran commercials on what channels at what times. Both data sets were produced by IBOPE, the dominant firm in its field. The audience share statistics were used by television networks to price their advertising time for sale, and the broadcasting data for commercials were used by advertising agencies to strategize advertising time purchases for their clients.

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<sup>61</sup> Expediente 003-2003/005-2008-INDECOPI/CLC

<sup>62</sup> Resolución Número 56350/2018.

<sup>63</sup> Resolución Número 23880/2011.

Colombia's two dominant privately-owned television networks -- RCN and CARACOL -- obtained exclusive rights to all of IBOPE's statistics, and then dramatically increased the price to their international broadcasting company competitors for access to the audience share data. RCN and CARACOL also partnered with UCEP, an association of Colombian advertising agencies, giving UCEP exclusive access to the commercial broadcasting data. This enabled UCEP to increase prices charged to its advertising agency rivals for data access, thus reducing competition from them. (OECD, 2016, p. 23)

146. The SIC, considered the restriction a *by object* one and presented why the conduct was exclusionary, including an analysis of the efficiencies arguments presented by the defendants. The first efficiency was that the agreement prevented illegal firms on the downstream market to access the information. For the SIC, this was neither an efficiency argument, nor the way to solve the issue. In addition, some documents proved the intention to exclude competitors. The second efficiency argument claimed that by fixing a new price, a problem of free riding was being eliminated. Under the former price, some companies were unfairly subsidizing others. The SIC concluded that even if this was the case, which the SIC think was not the case due to the existing security features to control access the reports, the problem could have been corrected by alternative ways than an agreement. Thirdly, parties discussed that the agreement included a clause on auditing the quality of the reports, which, in general, generated higher welfare for its consumers. For the SIC, this auditing was not needed and ended up increasing the cost of production of the reports and, in turn, the price for its consumers.

147. In the **Telcel**<sup>64</sup> case, (Mexico, 2018), the Federal Institute for Telecommunications (IFT) prohibited Telcel to sign exclusive agreements that required retailers, such as Blue Label, to not commercialise or provide airtime to Telcel's competitors in the mobile phone service and exclusively distribute airtime from the Telcel brand.

148. The prohibition was due to Telcel's substantial market power and the potential exclusionary effects of the conducts. In its defence, Telcel alleged that Blue Label had increased its market share due to the exclusivity agreement. However, the IFT determined that this situation was due to the investment that the company had received from a third party and not for the reasons alleged by Telcel. Therefore, no efficiency was generated from this conduct and the exclusivity was deemed unnecessary.

149. In the **Refineria**<sup>65</sup> case (Panama, 2019), the Third Court of Justice upheld a decision by the Ninth Circuit Court of Panama in a case brought by the Competition Authority (ACODECO) where Refineria Panama was sanctioned for unreasonable exclusivity contracts for its distributors. Particularly, the company established a shift system for the distribution of fuel, according to the market share of each of the wholesale distributors.

150. In Panama, a efficiency exception of this kind of infringement is established in article 5 of Law 45 of 2007 that indicates that an efficiency claimed must be reasonable, verifiable and quantifiable. The latter did not occur in this case and the authority proceeded to confirm the sanction. Mainly, the Refineria argued that its shift system had managed to organise the dispatch of fuel to distributors more efficiently. However, the opposite occurred, as it was proven that distributors with a smaller market share had to wait for hours, and even days, to load fuel while their assigned shift arrived. It was precisely this inefficiency that led to the complaints submitted to initiate this investigation.

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<sup>64</sup> Expediente E-IFT/UCE/DGIPM/PMR/0006/2013.

<sup>65</sup> Sentencia No 107-15.

*RPM*

151. Of the 20 cases reviewed for the purpose of this paper, 2 cases (in Brazil and Colombia<sup>66</sup>) dealt with RPM (see Table 4.1), one of which dealt with efficiencies.

152. In **SKF**<sup>67</sup> (Brazil, 2013), Brazil's first RPM case, the Brazilian Competition Authority (CADE) sanctioned the Brazilian company SKF for putting in place a minimum RPM practice with its commercial retailers.

153. SKF argued that although RPM could have limited intra-brand competition, it increased efficiency of the distribution network due to an increase in inter-brand competition. According to SKF, this also led to increases in quality of services and the elimination of free-riding. Other efficiencies alleged by the company were the protection of the trademark and the economic sustainability of distributors.

154. However, for CADE, the efficiencies raised were not proven by the defendant, and in particular, that they could not have been achieved through less restrictive means, that they resulted in benefits for consumers and that they outweighed the anti-competitive effects. Finally, the fact that the initiative to implement the RPM came from the network of distributors was sufficient for CADE to conclude that it was impossible to argue there were legitimate economic benefits from the conduct.

*Quantity forcing*

155. In the **Movistar**<sup>68</sup> case (Chile, 2009), Movistar was sanctioned for restrictions as a result of unilateral modifications to vertical contracts with Virtual Mobile Operators. It increased its prices by more than 85% and discriminated between operators, leading to *de facto* price rationing, with the objective of providing itself with a competitive advantage when competing with the Virtual Mobile Operators through offering its services direct to final customers. Finally, it also blocked SIM cards and refused to supply some services or supply them with reduced quality.

156. Movistar's justification referred to the existence of illegally operating Virtual Mobile Operators that wanted to use Movistar's network. However, for the TDLC, this was not proven. TDLC analysed all the contracts and fees charged by Movistar and concluded that they differentiated between operators and did not correspond with an economic rationale. Movistar stated this was partly due to a "traffic cost" generated by those who bought more minutes. For the TDLC, the behaviour concerned margin squeeze of Virtual Mobile Operators downstream and the traffic argument was not sufficient to justify such anti-competitive effects.

**4.3. Burden of proof**

157. The burden of proof with regards to vertical restraints cases in practically all jurisdictions follows the principle that the competition authority has the initial burden of proving an anti-competitive provision or agreement, after which the parties involved can mitigate these concerns by invoking and substantiating (or even calculating) possible efficiencies. Such an allocation of the burden of proof is justified as the information required to assess the claimed efficiencies is usually exclusively held by the parties (OECD, 2012, p. 93).

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<sup>66</sup> Brazil: SKF (08012.001271/2001-44 in 2013) and Colombia: Rice Mills (Res. 16562/2015).

<sup>67</sup> Administrative Proceeding n° 08012.001271/2001-44.

<sup>68</sup> Sentencia No. 88/2009.

158. However, the way in which cases are dealt with differs somewhat, depending the legal framework.

159. In Europe, companies do not need to notify a vertical agreement. It is the Commission that can decide to open an investigation into a vertical agreement. It follows a "staggered approach" when analysing the anti-competitive effects and the efficiencies during such investigation:

- i. Firstly, the Commission bears the burden of proving that the agreement is covered by article 101(1) (see also paragraph 4.1.1). For this, it needs to establish that the agreement affects trade and includes provisions that restrict competition.
- ii. If the agreement includes *by object* or hardcore restrictions, this effectively reverses the burden of proof. Unless the companies involved can demonstrate that the hardcore restraint gives rise to efficiencies, the Commission is entitled to assume – rather than having to prove – negative effects on competition under article 101(1).
- iii. If the agreement is covered by article 101(1) and does not include *by-object* or hardcore restrictions, the Commission establishes whether the agreement is covered by an automatic rule of exemption or non-prohibition (e.g. vertical block exemption, de minimis notice).
- iv. If this is not the case, an individual examination by the Commission follows, to assess the effects of the agreement and whether the agreement qualifies for an individual exemption under Article 101(3). As in the case of by object or hardcore restrictions, the burden of proof is reversed. The companies involved claiming the benefit of Article 101(3) bear the burden of proving that the four conditions of that provision are fulfilled. When likely anti-competitive effects are demonstrated, undertakings may substantiate efficiency claims and explain why a certain distribution system is indispensable to bring likely benefits to consumers without eliminating competition before the Commission decides whether the agreement satisfies the conditions of Article 101(3). In practice, of course, while the burden of proving efficiency effects initially lies on the undertaking invoking the defence, the Commission has to engage with the calculations and evidence offered by the investigated company(ies) and refute these to the required legal standard, if it intends to reject them (Witt, 2018, pp. 436-437). If the Commission is not satisfied with substantiated efficiency claims, it must reject those claims and provide reasons for its position. Otherwise, the burden of proof borne by the party making the efficiency claims is considered to be discharged (OECD, 2012, p. 94).
- v. Lastly, the Commission can withdraw the benefit of the VBER in exceptional circumstances. In this case, the burden of proof is with the Commission to prove firstly that the VBER applies to the respective vertical agreement, which means that it must fall within the scope of Article 101(1), and secondly that this agreement has effects that are incompatible with Article 101(3), which means that it fails to fulfil at least one of the four conditions of Article 101(3). Pursuant to Article 29(2) of Regulation 1/2003, the same requirements apply where a NCA withdraws the benefit of the VBER in relation to its Member State.

160. In jurisdictions in Latin America and the Caribbean, similar to the EU approach, the parties have the burden to prove that their conduct produces efficiencies and that such efficiencies offset the anti-competitive effects that could have been generated with the

vertical restraint. Most of the countries also analyse whether the efficiencies raised are passed to the consumer and whether the vertical restraint was indispensable to reach those results.<sup>69</sup>

161. The US follows a three-step approach (or rule of reason analysis) (Jones & Kovacic, 2017, pp. 273-275):

- i. The plaintiffs must show that the vertical restraint causes harm to competition. If successful;
- ii. defendants have to come forward with plausible, legally cognizable justifications for their conduct that may demonstrate an offsetting benefit to competition. If successful;
- iii. the court will conduct the “balancing” and assess the evidence to determine whether the plaintiff’s hypothesis of harm is more likely than not. The plaintiff must explain why the court may conclude, without further evidence, that anti-competitive effects are likely to predominate, or to provide evidence suggesting that such an outcome is likely. In some cases, the plaintiffs must demonstrate that such benefits could be achieved using less restrictive tactics. If the plaintiff meets this burden, the evidentiary burden shifts to the defendant to show that the restraint does not harm consumers or has net procompetitive virtues. The plaintiff bears the ultimate burden of persuasion in establishing all elements of the offense.

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<sup>69</sup> See for instance the Chilean guidelines on vertical restraints: *Guía para el Análisis de Restricciones Verticales*), Fiscalía Nacional Económica (2014).

## 5. Conclusion

162. The attention for vertical restraints in many jurisdictions around the world is undergoing a renaissance in the last two decades, mainly driven by the rapid growth of e-commerce. While the overall consensus remains that the large majority of vertical restraints cases – notably those without the presence of significant market power – are either pro-competitive or competitive-neutral, the emergence of e-commerce has created new challenges for dealing with vertical restraints, including the analysis of efficiencies.

163. Legal systems have responded differently to these developments and challenges. In Europe, the EC and NCAs have published different guidelines and regulations over the years that have built relative presumptions of legalities and illegalities with the aim to provide transparency, legal certainty and support with the interpretation of the law, incorporating case law where relevant.

164. The US, after a number of landmark cases, has taken the approach to assess each case on its merits through a *rule of reason* approach. This is based on the presumption that vertical restraints are at its core pro-competitive, unless market power exists. While US cases therefore start with the application of a market power screen, in Europe such analysis is more implicitly included in the EC's VBER, which applies a market share threshold for the parties of 30% on the relevant market for vertical restraints to be presumed legal (absent hardcore or *by object* restrictions).

165. Market power is also a key concept in most Latin American jurisdictions, especially as in several jurisdictions vertical restraints are assessed through the same legal provisions as the abuse of a dominant position. Several Latin American cases indeed show elements of both abuse of dominance and vertical restraints, sometimes blurring the line between both types of conduct.

166. Regardless of the legal system and the more implicit or explicit market power analysis, the focus on instances where a certain degree of market power exists (proxied by market shares) limits the number of enforcement cases as well as the extent to which efficiencies arguments are invoked. Both in the US and most jurisdictions in Latin America and the Caribbean, a market power analysis is required to render a positive result, before efficiencies are invoked and/or considered.

167. In Europe, the VBER has a similar limiting effect on the number of vertical restraints cases. Moreover, of those cases that do end up being investigated by competition authorities, the majority relate to *by object* or hardcore restrictions – where illegality is presumed and an analysis of the effects is not required – which makes an efficiency argument in these cases more complicated.

168. The number of vertical restraints cases differs substantially around the world. European competition authorities have dealt with a substantial number of vertical restraints cases in the last decade, while the US, for instance, has only seen a handful of cases in the past decade. In Latin America, the number is also relatively small, although it has been modestly increasing.

169. When taking a closer look at a selection of 64 vertical restraints cases in Europe and Latin America and the Caribbean, reviewed for the purpose of this paper, a minority of these cases includes explicit efficiency considerations. Moreover, out of this selection of 64 cases, efficiency considerations were accepted only once (in Brazil).



170. The type of efficiency raised depends on the type of vertical restraint and the legal and economic context. In Europe, most of the reviewed cases dealt with vertical restraints in an online context, in particular RPM. However, efficiency arguments related to RPM are almost non-existent, notably as minimum and fixed RPM are considered a hardcore restriction. Instead, most efficiency considerations in the reviewed cases concerned selective and exclusive distribution. Selective distribution cases were mostly argued to preserve quality and brand image, while exclusive distribution cases would lead to lower prices. Evidently, the reasons of why efficiency arguments were unsuccessful differed per case. However, almost in all reviewed European cases, the parties failed to substantiate the claim that the vertical restraints were indispensable for its objectives.

171. In Latin America, almost none of the reviewed 20 cases dealt with vertical restraints in an online context. Instead, the majority of cases pertained to exclusive dealing in an offline setting, which was the category of cases that also included most efficiency arguments. Where the European framework includes a clear framework of assessment for assessing efficiency arguments (based on four cumulative conditions that need to be fulfilled to qualify for an individual Article 101(3) exemption), this is absent in Latin America and the Caribbean. Consequently, efficiencies invoked as well as their assessments by relevant competition authorities are often very much specific to the circumstances of the case.

172. Overall, Latin America and the Caribbean has seen a limited number of vertical restraints cases to date, although they have been modestly increasing. Moreover, little of these cases pertains to restrictions in an online environment. Given the growth of e-commerce in the region, the region can expect such cases to increase, depending to a certain extent on enforcement priorities in the different jurisdictions. Given the pro-competitive character of many vertical restraints, efficiency considerations should be expected as well. For such considerations, lessons can be learned from jurisdictions in other parts of the world, although they have also proven that efficiency considerations are rarely successful.

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## Annex 1: Identified vertical restraints cases in six jurisdictions in Latin America

	Jurisdiction	Year	Case name	Case number	Link to decision
1.	Brazil	2018	Unilever	08012.007423/2006-27	<a href="https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yNSSv4HRBkiXirjAbwD5CILsBuy6nUiikqvP74ylnPNrzGR7R9WpzbneAbbHzw06QRpEJ_ptVdpGT_LQjVWH3F8P0">https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yNSSv4HRBkiXirjAbwD5CILsBuy6nUiikqvP74ylnPNrzGR7R9WpzbneAbbHzw06QRpEJ_ptVdpGT_LQjVWH3F8P0</a>  <a href="http://en.cade.gov.br/cade/noticias/unilever-e-condenada-por-criar-barreiras-a-concorrentes-no-mercado-de-sorvetes">http://en.cade.gov.br/cade/noticias/unilever-e-condenada-por-criar-barreiras-a-concorrentes-no-mercado-de-sorvetes</a>
2.	Brazil	2018	OTAs	08700.006295/2017-07	<a href="https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yP-WYSNABEMhacMgHzltD12Z7suHhN1VAgGxE7IXSpz7qLPG8UydlXtZX-dlgX030826AB2eKsomZcurMRHYid">https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yP-WYSNABEMhacMgHzltD12Z7suHhN1VAgGxE7IXSpz7qLPG8UydlXtZX-dlgX030826AB2eKsomZcurMRHYid</a>  <a href="http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense">http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense</a>
3.	Brazil	2015	Aperam	08700.010789/2012-73	<a href="https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?xgSJHD3T17R0CrGytJb0A1Onc6JnUmZgGFW0zP7uM95CzsnQ7yktQlx_5M1tk8kfAw1sqZ7qEyOKWblvxbztr07mD86EL1jCQe920AKW3yKvcqsw2sr2Y1Ll47Nh">https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?xgSJHD3T17R0CrGytJb0A1Onc6JnUmZgGFW0zP7uM95CzsnQ7yktQlx_5M1tk8kfAw1sqZ7qEyOKWblvxbztr07mD86EL1jCQe920AKW3yKvcqsw2sr2Y1Ll47Nh</a>
4.	Brazil	2013	SKF	08012.001271/2001-44	<a href="https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?5LK2OPcLJR_ipmlldOEcWJwPucpbCJDecPgMLiCe73jB508ahT9wUzaXUnjAZUJ4XW1xtu1H5kGUyGvypRMajWmJzBqZ7tkJ5OpHVelxfwpnSYvFw1IVXU02fZRvCSdL">https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?5LK2OPcLJR_ipmlldOEcWJwPucpbCJDecPgMLiCe73jB508ahT9wUzaXUnjAZUJ4XW1xtu1H5kGUyGvypRMajWmJzBqZ7tkJ5OpHVelxfwpnSYvFw1IVXU02fZRvCSdL</a>  <a href="http://en.cade.gov.br/cade/noticias/cade-condena-skf-por-fixacao-de-preco-de-revenda">http://en.cade.gov.br/cade/noticias/cade-condena-skf-por-fixacao-de-preco-de-revenda</a>
5.	Brazil	2013	Philip Morris	08700.005949/2012-62	<a href="https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcl9FcFMR5UuJ6rLqPEJuTUu08mg6wxLi0JzWxCor9mNcMYP8UAjTVP9dxRfPBceyCeROpZyvRfDgxdAA9HwBJBpDNFg8tO4xTSz3AKlrv">https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcl9FcFMR5UuJ6rLqPEJuTUu08mg6wxLi0JzWxCor9mNcMYP8UAjTVP9dxRfPBceyCeROpZyvRfDgxdAA9HwBJBpDNFg8tO4xTSz3AKlrv</a>  <a href="http://en.cade.gov.br/press-releases/cade-ends-exclusivity-in-tobacco-points-of-sale">http://en.cade.gov.br/press-releases/cade-ends-exclusivity-in-tobacco-points-of-sale</a>
6.	Brazil	2009	Ambev	08012.003805/2004-10	<a href="https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?K0Xi3eEqJC73dCc3G_MH5w73G76ivtXYDDG65Jr7vK4fhNNdRnnFDgAfjTIfRn8_ywCudV1gCNGRQiNqXFACnZSZJsfAfZ2fbBauGMNnTdlN0DwYM9Im9HROghU5D8Z">https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?K0Xi3eEqJC73dCc3G_MH5w73G76ivtXYDDG65Jr7vK4fhNNdRnnFDgAfjTIfRn8_ywCudV1gCNGRQiNqXFACnZSZJsfAfZ2fbBauGMNnTdlN0DwYM9Im9HROghU5D8Z</a>  <a href="http://en.cade.gov.br/press-releases/cade-settles-with-individuals-in-the-ambev2019s-to-contigo-case">http://en.cade.gov.br/press-releases/cade-settles-with-individuals-in-the-ambev2019s-to-contigo-case</a>
7.	Chile	2009	Telecoms	Sentencia No. 88/2009	<a href="https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/sentencias/Sentencia_88_2009.pdf">https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/sentencias/Sentencia_88_2009.pdf</a>
8.	Chile	2009	Matches	Sentencia No. 90/2009	<a href="https://www.fne.gob.cl/wp-content/uploads/2011/03/sent_0090_2009.pdf">https://www.fne.gob.cl/wp-content/uploads/2011/03/sent_0090_2009.pdf</a>
9.	Chile	2005	Tobacco	Sentencia No. 26/2005	<a href="https://www.fne.gob.cl/wp-content/uploads/2011/07/sent_26_2005.pdf">https://www.fne.gob.cl/wp-content/uploads/2011/07/sent_26_2005.pdf</a>

10.	Colombia	2018	General Motors	Res. 56350 of 2018	<a href="https://www.sic.gov.co/sites/default/files/estados/032020/RES_OLUCI%C3%93N%2056350%20-%2008%20DE%20AGOSTO%20DE%202018%20-%20%20ARCHIVO%20-%20GENERAL%20MOTORS.pdf">https://www.sic.gov.co/sites/default/files/estados/032020/RES_OLUCI%C3%93N%2056350%20-%2008%20DE%20AGOSTO%20DE%202018%20-%20%20ARCHIVO%20-%20GENERAL%20MOTORS.pdf</a>
11.	Colombia	2015	Rice Mills	Res. 16562 of 2015	<a href="http://normograma.info/sic/docs/pdf/r_siyc_16562_2015.pdf">http://normograma.info/sic/docs/pdf/r_siyc_16562_2015.pdf</a>
12.	Colombia	2011	IBOPE	Res. 23890 of 2011	<a href="http://normograma.info/sic/docs/pdf/r_siyc_23890_2011.pdf">http://normograma.info/sic/docs/pdf/r_siyc_23890_2011.pdf</a>
13.	Colombia	2011	Bavaria	Res. No. 33361 of 2011	<a href="http://normograma.info/sic/docs/pdf/r_siyc_33361_2011.pdf">http://normograma.info/sic/docs/pdf/r_siyc_33361_2011.pdf</a>
15.	Mexico	2018	Telcel - Blue Label	E-IFT/UCE/DGIPM/PMR/0006/2013	<a href="http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliiga/vppift120418293noct.pdf">http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliiga/vppift120418293noct.pdf</a>
15.	Mexico	2017	Mexico City International Airport	DE-009-2014	<a href="https://www.cofece.mx/cofece/images/ST/Excusas/DE-009-2014.pdf">https://www.cofece.mx/cofece/images/ST/Excusas/DE-009-2014.pdf</a>
16.	Mexico	2013	Pemex Refinación	DE-024-2010	<a href="https://www.cofece.mx/cofece/images/solicitudes/DE-024-2010.pdf">https://www.cofece.mx/cofece/images/solicitudes/DE-024-2010.pdf</a>
17.	Panama	2019	Refinery	Sentencia No 107-15	<a href="https://www.acodeco.gob.pa/uploads/pdf/fallos_sancciones/Fallo2daInstancia_Refineria2019.02_10_2021_04_32_51_p.m.pdf">https://www.acodeco.gob.pa/uploads/pdf/fallos_sancciones/Fallo2daInstancia_Refineria2019.02_10_2021_04_32_51_p.m.pdf</a>
18.	Panama	2017	Beers	Sentencia No 109-15	<a href="http://www.acodeco.gob.pa:8080/uploads/pdf/fallos_sancciones/FalloCervezas.10_15_2018_08_05_15_a.m..pdf">http://www.acodeco.gob.pa:8080/uploads/pdf/fallos_sancciones/FalloCervezas.10_15_2018_08_05_15_a.m..pdf</a>
19.	Peru	2013	Cement	Case 003-2008/CLC  Res. No. 010-2013-INDECOPI	<a href="http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/8407357b-e2d1-483b-9d6e-9ba4d7f4b92e">http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/8407357b-e2d1-483b-9d6e-9ba4d7f4b92e</a>
20.	Peru	2008	Bleach	Case 003-2003/CLC  Res. 005-2008-INDECOPI/CLC	<a href="http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/e7bb6b6b-dd1c-4f4a-9200-2fcbde3265f">http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/e7bb6b6b-dd1c-4f4a-9200-2fcbde3265f</a>

Source: Desk research OECD

## Annex 2: Identified vertical restraints cases in Europe (EC, France, Germany, Portugal, UK, Spain) 2015-2020

	Jurisdiction	Year	Case name	Case number
1.	European Union	2020	Meliá	AT 40528
2.		2020	NBC Universal	AT 40433
3.		2019	Nike	AT 40436
4.		2019	Sanrio	AT 40432
5.		2019	Pay TV	AT 40023
6.		2018	Guess	AT 40428
7.		2018	Groupe Canal +	T-873/16
8.		2018	Asus	AT 40465
9.		2018	Denon & Marantz	AT 40469
10.		2018	Philips	AT40181
11.		2018	Pioneer	AT30182
12.		2017	Amazon	AT 40153
13.		2017	CEAHR Watches	T-712/14
14.	France	2019	Bikeurope B.V.	19-D-14
15.		2018	Stihl	18-D-23
16.		2015	Adidas	
17.		2015	Booking	15-D-06
18.	Germany	2017	Coty	EU:C:2017:941
19.		2017	Clothing	B2-62/16
20.		2017	Asics	KVZ 41/17
21.		2016	Beer	B10-20/15
22.		2016	Lego	
23.		2015	Factory Outlet Centers	B1-62/13
24.		2015	Coffee	B10-50/14
25.		2015	Metzeler (mattresses)	B1-83/11
26.		2015	Car dealers	
27.		2015	Booking	B9-121/13
28.	2015	(Taipur) Mattresses	B1-84/11	
29.	Portugal	2016	Super Bock	PRC/2016/4

30.	United Kingdom	2020	Musical instruments	50565-6	
31.		2020	Guitars	50565-3	
32.		2020	Synthesizers	50565-4	
33.		2020	Electric drums	50565-5	
34.		2019	Casio	50565-2	
35.		2017	Light fittings	50343	
36.		2017	PING - Golf equipment	50230	
37.		2017	Online Auction Platforms	50408	
38.		2016	Refrigeration	CE/9856/14	
39.		2016	Bathroom fittings	CE/9857/14	
40.		2016	Posters and frames	50223	
41.		Spain	2020	Adidas	S/DC/0621/18
42.			2019	Vaillant	S/0629/18
43.	2019		Atresmedia / Mediaset	S/DC/0617/17	
44.	2016		Opel	S/DC/0556/15	