Authority for Consumers & Markets

ACM's strategy and enforcement priorities with regard to vertical agreements

This version is a courtesy translation of the original document prepared in the Dutch language.

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1 Introduction

In this document, the Netherlands Authority for Consumers and Markets (ACM) gives insight into its strategy and enforcement priorities with regard to "vertical" agreements. A vertical agreement is an agreement between two or more undertakings that are active at different levels of the same distribution chain of goods or services. The agreement could relate to the conditions of the purchase, sale or resale of the respective goods or services.[1]

The objective of this document is to provide insight into ACM's strategy and enforcement priorities with regard to vertical agreements. This document is not intended to constitute a statement on the relevant legal framework, and is without prejudice to the interpretation of competition law by the national and European courts. The document is also not intended to constitute a statement on the enforcement practices of other competition authorities and of the European Commission.

Structure of this document
Chapter 2 sets out the background to the publication of this document by ACM. The legislative framework is addressed first. Vertical agreements are subject to Dutch and European competition law, thereby falling under ACM's enforcement jurisdiction. The chapter then describes several developments that have led ACM to provide more insight into ACM's strategy and enforcement priorities with regard to vertical agreements and into the consequences for undertakings that are active in the Netherlands.

In chapter 3, ACM explains in general terms its strategy and enforcement priorities with regard to vertical agreements. For ACM, the enhancement of consumer welfare is a deciding factor. In chapter 4, ACM gives more insight into how it assesses the positive and negative effects of vertical agreements on consumer welfare. Using concrete scenarios, ACM shows under what circumstances it would carry out further investigation into a vertical agreement.

Finally, several concluding remarks are discussed in chapter 5.

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[1] Vertical agreements may restrict undertakings' freedom to act independently. It is these kinds of restictions that may have effects on competition. That is why, in the context of competition law, these are also called 'vertical restraints'. In this document, ACM uses the term 'vertical agreement'.

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2 Background

Vertical agreements are subject to Dutch and European competition law. This chapter describes that regulatory framework, and gives a brief overview of Dutch enforcement history in this area. This is followed by a number of developments in markets and international enforcement. These developments prompted ACM to provide more insight into its strategy and enforcement priorities with regard to vertical agreements.

2.1 The regulatory framework

The Dutch Competition Act and the Treaty on the Functioning of the European Union

Vertical agreements fall under Section 6, paragraph 1 of the Dutch Competition Act (Mw) and Article 101, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU). These prohibit agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition in the market. If certain criteria are fulfilled, this 'cartel prohibition' is declared inapplicable to these agreements. These criteria are stated in Section 6(3), Mw and Article 101(3), TFEU.

Alongside the general exception in Section 6(3), Mw and Article 101(3), TFEU, there is also a block exemption for certain categories of vertical agreements. This "block exemption" has been laid down in Regulation 330/2010 on the application of Article 101(3), TFEU (hereafter: the Regulation).[2] The assumption is that the categories of agreements that fall under this block exemption normally satisfy the conditions laid down in Section 6(3), Mw / Article 101(3) TFEU. For example, this is the case if the market share of each of the undertakings involved in the vertical agreement in the relevant market[3] does not exceed 30%. Vertical agreements that contain a 'hardcore' restriction do not fall under this group exemption. Examples are resale price maintenance, and absolute territorial protection.[4]

The rules on the application of Article 101 TFEU on vertical agreements have been laid down by the European Commission ("EC") in the Guidelines on vertical restraints (hereafter: the Guidelines).[5] With these Guidelines, the EC provides more clarity on the competition-law assessment of vertical agreements.

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[2] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

[3] See for more information on the relevant market the Commission Notice on the definition of relevant market for the purposes of Community competition law 97/C 372/03, and sections 86 through 95 of the Guidelines on Vertical Restraints, 2010/C 130/01.

[4] These mean respectively the establishment of a fixed or minimum resale price or price level, to be observed by the buyer, and restricting the territory in which, or the customers to whom, a distributor may sell, with certain exceptions. See also chapter 3.

[5] Guidelines on vertical restraints, 2010/C 130/01.

The competition rules are based on a system in which undertakings must assess themselves whether or not agreements violate the cartel prohibition of Section 6(1), Mw and/or Article 101(1), TFEU *("self-assessment").* Undertakings bear the burden of proof when invoking the exception criteria of Section 6(3), Mw and Article 101(3), TFEU. Therefore, it is for undertakings themselves to invoke this exception, the so-called "efficiency defense". This document is without prejudice to this allocation of the burden of proof.

Highlights of ACM's experience (and that of one of its predecessors, the NMa) with vertical agreements.

In 2000, the Netherlands Competition Authority (NMa) fined fashion house Secon for imposing on its distributors a fixed (minimum) resale price, or "resale price maintenance".[6] The Dutch Trade and Industry Appeals Tribunal (CBb)[7] ruled in 2005 that resale price maintenance had been established but the NMa had insufficiently taken into account the concrete situation in which the agreement had an effect, so that it was unable to establish whether there was also an *appreciable* restriction of competition. There is no appreciable restriction if an agreement, because of the weak position of the parties involved in the relevant market, does not restrict competition to a relevant extent.[8] After the ruling, the NMa decided against further investigation, which meant that the fine for Secon was reversed.[9]

The NMa published the "Sector scan on indications concerning online sales" in 2009.[10] The NMa analyzed 131 indications of possible problems regarding online sales and the results of two extensive surveys in the household appliance sector and the watches sector. The indications related to resale price maintenance, refusal to supply, and suppliers applying various conditions for distributors selling the suppliers' goods offline or online ("dual pricing"). In the end, there were insufficient grounds to launch a competition-law investigation, because, among other reasons, the indications were insufficiently corroborated.

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[6] See the decision in NMa case 757 dated 12 January 2000: https://www.acm.nl/nl/publicaties/publicatie/443/Chilly-en-Basilicum-versus-G-Star-Secon-Groep/ (in Dutch). See also https://www.acm.nl/nl/publicaties/publicatie/6543/NMa-treedt-op-in-kledingbranche/ (in Dutch). See for the decision on objection dated 21 December 2001: https://www.acm.nl/nl/publicaties/publicatie/497/Chilly-en-Basilicum-versus-G-Star-Secon-Group/ (in Dutch).

[7] The CBb is the highest administrative court in the Netherlands for social-economic administrative law. See: http://www.rechtspraak.nl/English/Judicial-System/Special-Tribunals/Pages/default.aspx.

[8] See for the CBb ruling dated 7 December 2005: http://uitspraken.rechtspraak.nl/, enter "ECLI:NL:CBB:2005:AU8309" in the search field. In response to Secon's argument that competition had not been appreciably restricted, the NMa limited itself to the conclusion that it was not sufficiently plausible that the total clothing sector or the total jeans market was the relevant market. The CBb found this insufficient.

[9] See for this ruling of October 19, 2006: https://www.acm.nl/nl/publicaties/publicatie/1782/Gewijzigd-besluit-op-bezwaar-boete-G-Star-Secon-Group/.

[10] See: https://www.acm.nl/nl/publicaties/publicatie/5313/NMa-geen-mededingingsrechtelijk-onderzoek-internetverkoop/.

In both 2002 and 2013, the NMa and ACM respectively looked into the distribution of beer to businesses in the hospitality industry.[11] Breweries made use of vertical agreements with businesses in the hospitality industry for the purchase of beer from a single brewery ("exclusive distribution agreements"). As a result, the businesses could only sell that particular brewery's brands to consumers. Following its investigation, the NMa and ACM saw no grounds to prohibit breweries from including this type of "exclusive purchase agreements" in their contracts. The dynamics of the beer market, mainly the competition between brewers for sales outlets, was a significant argument for this conclusion.

Civil-law jurisprudence regarding vertical agreements

Vertical agreements are regularly the subject of civil proceedings. This is not surprising as vertical agreements involve contracts between undertakings. A well-known example is the case of "Batavus v. Vriend's Tweewielercentrum Blokker".[12] The question was whether Batavus was allowed to unilaterally terminate the distribution agreement with retailer Vriend's. The Supreme Court of the Netherlands found that, first of all, there was a concerted practice between Batavus and the dealers who had urged Batavus to terminate the agreement with Vriend's. In addition, there was also indirect resale price maintenance as the termination was connected to the price level used by the excluded dealer. The Supreme Court of the Netherlands ruled that the termination of the distribution agreement constituted a restriction of competition, but the Court of Appeal had omitted to investigate whether this restriction was also appreciable. After the Supreme Court referred the case back to another Court of Appeal, the latter court considered the restriction of competition to be appreciable.[13]

Other: Dutch Act on fixed book prices

The Dutch Act on fixed book prices mandates publishers in the Netherlands to set consumer prices of new books, and prohibits book dealers from providing discounts on these prices. The recent evaluation of the Dutch Act on fixed book prices has sparked a lively discussion, in part because of a critical opinion article in the Dutch press. [14] Based on recommendations of the Council for Culture, the Minister decided that an independent study should be carried out into the extent to which resale

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[11] See the decisions in NMa case 2036 dated 28 May 2002 and 1 April 2003 at www.acm.nl and "ACM Analysis of the beer market in the hospitality industry" dated 7 June 2013 and the ACM newsletter of the same date: https://www.acm.nl/nl/publicaties/publicatie/11543/Analyse-ACM-horeca-biermarkt/ and https://www.acm.nl/nl/publicaties/publicatie/11542/Meer-duidelijkheid-in-brouwerijcontracten-gewenst/.

[12] See for the rulings in this case (from the District Court of Leeuwarden dated 6 October 2009, the Supreme Court of the Netherlands dated 16 September 2011 and the court in Arnhem-Leeuwarden dated 22 March 2013): http://uitspraken.rechtspraak.nl/, enter "ECLI:NL:GHEE:2009:BJ9567", "ECLI:NL:HR:2011:BR1122" and "ECLI:NL:GHARL:2013:BZ5188" in the search field.

[13] Compare the CBb ruling in the aforementioned Secon case. See footnote 8.

[14] Van Sinderen, Tichem en Vossen, "Die vaste boekenprijs laat de verkoop dalen", *NRC Handelsblad*, 11 June 2014.

price maintenance leads to cross-subsidization between profitable books and less profitable books.[15] Such a study needs to provide insight into the contribution of fixed book prices to the cultural-literary objectives of the legislature.

2.2 Developments in markets and in international enforcement

ACM has observed developments in markets and enforcement of other competition authorities in Europe with regard to vertical agreements it considers relevant.. A brief description can be found below, as it was these developments that prompted ACM to provide more insight into its strategy and enforcement priorities with regard to vertical agreements.[16]

Relevant market developments

In recent years, the online sales of goods and services has developed significantly alongside the sales in brick-and-mortar shops.

Growth in the sale of products and services online has in recent years led to a fast-changing retail market.[17] In 2014, total online consumer expenditure was almost EUR 14 billion. With regard to goods, the share of online purchases was 10.3%.With regard to services such as travel and insurance, the share of online purchases is much higher, at 67% of total expenditure.[18] The sale of goods and services online offers businesses and consumers benefits such as searchability and comparability of suppliers. Consumers may likely seek advice in traditional shops first or use reviews from other consumers found on the Internet.

ACM observes examples of undertakings that make use of vertical agreements in response to these market developments. An example is a selective distribution system for brand-name products, in which a manufacturer wishes to sell its products only through traditional shops. A manufacturer would thus wish to protect its product brand and the margins of retailers. The rise of online distribution also leads to new types of vertical agreements such as restrictive conditions or even a

[15] See: Vaste Boekenprijs: Advies bij tweede evaluatie van de wet, Council for Culture, July 2014, can be downloaded here: http://www.cultuur.nl/upload/documents/adviezen/vaste_boekenprijs-secured.pdf.

[16] For a very extensive document with background information, see OECD publication *"Vertical Restraints on online Sales"*, http://www.oecd.org/daf/competition/VerticalRestraintsForOnlineSales2013.pdf., 2013. See the following recent review: H.H.P. Lugard, "Click & Brick: Competition aspects of Internet sales", *SEW* number 10, October 2014.

[17] Under the term "retail", ACM considers the delivery of services and/or goods to consumers for personal use.

[18] See Thuiswinkel Marktmonitor 2014: https://www.thuiswinkel.org/feiten-en-cijfers/20/Aandeel-online-winkelen-in-detailhandel.https://www.thuiswinkel.org/bedrijven/nieuws/2721/nederlanders-besteden-in-2014-bijna-14-miljard-online?utm_source=pers&utm_medium=website&utm_campaign=TMMQ42014. The share of online sales increases every year by 8% to 10%.

complete ban on online sales .[19] In the case of online platforms (such as comparison sites or hotel booking platforms) for example, we observe the use of so-called "price parity clauses".[20] Price parity clauses mandate providers to use in a specific sales channel, for example a booking website, a consumer price that is at least as favorable as the consumer price in other sales channels. This way, it is possible that sales channels offer a "lowest price guarantee".

Competition authorities deal with the question of assessing the consequences of these market developments for the enforcement practice. In that context, a recurring question is whether or not the laws that competition authorities enforce and their enforcement activities are tailored to this development of online sales. This has also been the subject of studies and debates in scientific circles.[21]

Enforcement activities of competition authorities in Europe

ACM has observed that vertical agreements have recently become clearly more visible in the enforcement activities of other competition authorities. Some authorities in the European Union ("EU") regularly take enforcement action against vertical agreements such as resale price maintenance and dual pricing. Sometimes authorities explicitly announce that, in certain cases, they do not take any enforcement actions, such as the Swedish competition authority (*Konkurrensverket*, Kkv) did in 2013.

Example 1: Various authorities in the EU have recently given their opinions on online platforms[22], where consumers can book hotel rooms such as Booking.com and HRS. These platforms appear to have a strong bargaining position vis-à-vis hotels, enabling them to offer a "lowest price guarantee". This takes the form of an "Across Platform Parity Agreement" (APPA), a vertical agreement applied to platforms. The German competition authority, the Bundeskartellamt (Bka), prohibited the online hotel platform HRS from including a condition in its contracts with hotels stipulating that hotels may not offer a certain overnight stay elsewhere or in another manner at a lower rate.[23] The Bka states

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[19] See the ruling from the Court of Justice dated 13 October 2011 in the case C-439/09 (Pierre Fabre). In this ruling, the Court ruled that a general prohibition on online sales within a selective distribution system has the purpose of restricting competition except when this condition is objectively justified.

[20] Also referred to as "retail MFN".

[21] See among others: http://www.oecd.org/daf/competition/VerticalRestraintsForOnlineSales2013.pdf.

[22] Platforms are actually two-sided markets. Two-sided markets are characterized by bringing together various types of customers. In the case of, for example, hotel booking platforms, there are hotels on the one hand, and, on the other hand, consumers wishing to book hotel rooms.

[23] See: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf?__blob=publicationFile&v=3. The Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) upheld this ruling of the Bka, http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html. The Bka is also investigating similar conditions in the contracts of Expedia and booking.com. In the UK, the Office of Fair Trading (OFT), now the Competition and Markets Authority (CMA), following investigations in the market for hotel

that this condition would restrict competition between online platforms and impede entry to the online "platform market" by other providers of hotel rooms.

Example 2: In 2013, the Kkv investigated a case of resale price maintenance following a complaint. The undertaking "Protein Import AB" imposed on online retailers a minimum resale price for the sale of certain food supplements (e.g., for athletes).[24] Protein Import did so in reaction to a strong competitive online retailer (a so-called "discounter"), which caused problems for the other retailers. The Kkv investigated two possible harmful effects. First of all, they looked into the possibility that this form of resale price maintenance restricted competition between retailers, thereby possibly leading to higher prices for consumers.

In addition, the Kkv investigated whether this resale price maintenance could have been part of a cartel between manufacturers or between retailers in order to increase prices on the market. Based on the facts and circumstances of this case, the Kkv concluded that it was not plausible that competition and consumers were significantly harmed. According to the Kkv, Protein Import's market share was very low, and competition in sports food supplements was fierce. The Kkv also considered it unlikely that there was horizontal coordination as there are many market participants, and no barriers to entry appeared to exist. Given the reduced likelihood of harm, the Kkv felt that this case was not important enough to give priority to a further investigation into a possible violation of competition law.

On several occasions, the EC carried out investigations into vertical agreements. The most recent example is that the EC started an investigation in 2013 into restrictions on the online sale of consumer electronics. As part of this investigation, the EC carried out dawn raids at several undertakings in December 2013.[25]

ACM has observed that, in some commentaries, the enforcement practices of various EU Member States and the EC are construed as diverse.[26] ACM notes in this context that there is a difference in the priorities that various authorities give to vertical agreements. However, another explanation could be the different market circumstances. The network in which the EC and the national competition authorities of all EU Member States cooperate with one another, the "European Competition Network" ("the ECN network")[27] has an important role in the substantive coordination of

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bookings, accepted commitments from a hotel group and two so-called Online Travel Agents (OTAs). However, the commitment decision was overturned on appeal, filed by a third party. See: https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation.

[24] See: http://www.kkv.se/globalassets/english/news/559-2013-besluteng-20141216.pdf.

[25] See: http://europa.eu/rapid/press-release_MEMO-13-1106_en.htm.

[26] See for example: Y. de Vries, N. Rutges - Al-Ani and S. Vollering, "Resale price maintenance not a priority? Elsewhere, yes", *Tijdschrift Mededingingsrecht in de Praktijk*, number 1, February 2014, year 14

[27] See: http://ec.europa.eu/competition/ecn/index_en.html.

activities in this area.

Creating a single internal digital market in Europe is one of the European Commission's priorities. In that context, Margrethe Vestager, EU Commissioner for Competition, announced at a conference on March 26 in Berlin[28] that, in the next few years, special attention in competition policy will be given to online sales (e-commerce). Ms. Vestager mentioned, among other things, restrictions to e-commerce that are the result of contractual arrangements between manufacturers and distributors (vertical agreements). Developments in digital markets follow each other in rapid succession, and the Vertical Guidelines can only give us a general framework, according to Ms. Vestager. That is why she believes that 'more meat on the bones' is needed, which can be achieved by (1) assessing individual cases, and (2) better understanding digital markets, as well as their evolution. As a result, Ms. Vestager announced a sector inquiry into the e-commerce sector. Among other objectives, she hopes it will strengthen and make more uniform the action that the Commission and Europe's national competition authorities take against restrictions of online sales. In addition, the findings will also give better guidance to firms. The inquiry's preliminary findings are expected in mid-2016.

ACM support this initiative of the European Commission, and recognizes the added value of more detailed knowledge about the e-commerce sector for the regulatory efforts of the European Commission and of the national competition authorities. ACM looks forward to the publication of the findings of the inquiry, and will include them in its enforcement priorities with regard to vertical agreements.

[28] See: http://europa.eu/rapid/press-release_SPEECH-15-4704_en.htm.

Authority for Consumers & Markets

3 ACM's strategy and enforcement priorities with regard to vertical restraints

The most important basic principle in ACM's strategy and enforcement priorities with regard to vertical agreements can be found in the "ACM strategy document"[29], and that is the effect that practices of undertakings in the market have on consumer welfare.[30] ACM sets priorities, and consciously focuses on effects. "Focusing on effects" means that ACM selects cases in which ACM believes the harm to consumer welfare is the highest.

Section 6(1), Mw distinguishes (in a legal sense) between restrictions by object and effect. In order to be able to establish a violation, ACM must prove that an agreement, a concerted practice or a decision of an association of undertakings has the object (restriction by object) or has the effect of (restriction by effect) appreciably restricting competition. In this document, where ACM refers to the term "effect", it refers to an estimate of the expected effects of a vertical agreement in a general sense, and does not refer to 'restrictions by effect' as in Section 6(1).

Below is a further explanation of the ACM strategy, and ACM describes what it considers to be the most important economic insights that help estimate the expected effect of a vertical agreement on consumer welfare. That is followed by an explanation of the way ACM sets its priorities.

3.1 ACM strategy: effect on consumer welfare

ACM designs its strategy and enforcement priorities with regard to vertical agreements on the basis of the general ACM strategy, in which consumer welfare is central.[31] ACM's desired result is the sustainable welfare growth in the broadest sense of the word. This includes welfare growth as a result of both financial and qualitative effects for consumers in the short term and in the long term.

The effect that the practices of undertakings have on consumer welfare is therefore the basic principle underlying ACM's actions. With its powers, ACM is able to prevent or to tackle practices that are harmful to consumer welfare. ACM takes a broader perspective, and does not merely investigate the alleged violation, but also determines the root cause of the market or consumer problem in question. ACM subsequently selects the instrument or a combination of instruments that offers the highest probability of producing a structural solution to the problem. In that regard, it is crucial to look

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[29] See: https://www.acm.nl/en/publications/publication/11993/Strategy-Netherlands-Authority-for-Consumers-and-Markets/.

[30] This effect can be either direct or indirect. Undertakings' practices can harm consumers directly, for example, because undertakings conclude cartel agreements and subsequently charge excessive prices or restrict consumers' choices. Consumers can also be harmed indirectly, for example, if undertakings make arrangements among themselves about the costs of products or services that they charge other undertakings, or if undertakings share work among themselves in government tenders.

[31] See "ACM strategy document", page 2.

at the entire range of formal and informal instruments at ACM's disposal.

The general ACM strategy in which the effect of practices on consumer welfare is central, also applies to ACM's strategy and enforcement priorities for vertical agreements. After all, in that case, the outcome for consumers of a possible ACM action will be greatest.

Economic insights help in the estimation of the expected effect on consumer welfare of a given vertical agreement, in the market context in which the practices (actual or potential) take place. For this reason, ACM provides an overview (see below) of what it considers to be the most important economic insights regarding vertical agreements and their effects on consumer welfare.[32]

The effects of vertical agreements from an economic perspective

A vertical agreement is an agreement between two or more undertakings that are active in different levels of a distribution chain. A distribution chain comprises of one manufacturer of a certain product, the retailers that sell this product to consumers, and any wholesale intermediaries. If a retailer sells products of different manufacturers, for example a supermarket, it is part of multiple distribution chains.

Undertakings within a distribution chain produce goods or services that complement one another. This means that each undertaking within a distribution chain contributes to the value of the end product for consumers. This way, the choices that a car manufacturer makes (quality of the materials, fuel consumption, etc.) and the choices that a car salesman makes (whether or not to permit test drives, appearance of the showroom, etc.) determine how highly a certain car brand is appreciated by the consumer. Undertakings within a distribution chain thus depend on one another.

However, this mutual dependence does not mean that the undertakings always act in the interests of the distribution chain as a whole. The reason for this is that companies are focused on their own profitability and not necessarily on the profitability of the distribution chain as a whole. Undertakings sometimes therefore make decisions that are optimal for themselves but that may have negative effects on other undertakings in the distribution chain. A retailer may, for example, decide to provide few services because of cost considerations. This leads to a drop in consumer appreciation of the end product. This in turn leads to a drop in demand for the product, not just for the retailer but for all undertakings in the distribution chain. Undertakings can solve this problem by concluding a vertical

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[32] In this document, ACM will not deal with specific theories on efficiencies and the harmful effects of vertical agreements, except for a few examples. The EC Guidelines in paragraphs 100-109 provide a detailed overview of the possible effects of vertical agreements. Also see Massimo Motta, "Vertical Restraints and Vertical Mergers", in *Competition Policy: Theory and Practice*, ed. Massimo Motta (New York: Cambridge University Press, 2004), Patrick Rey and Thibaud Vergé, "Economics of Vertical Restraints", in *Handbook of Antitrust Economics*, ed. Paolo Buccirossi (Cambridge, MA: the MIT Press, 2008) and Paolo Buccirossi, "Vertical Restraints for Online Sales," OECD Policy Roundtables Background Note, 2013.

agreement in which they stipulate that retailers provide more service.[33]

In general, various vertical agreements are conceivable that may improve efficiency more or less to the same extent. In the abovementioned example, a contractual obligation by the retailer to provide sufficient service may be effective. There are however alternatives. Many vertical agreements have in common that they restrict competition between retailers (*"intrabrand* competition"), thereby increasing the retailer's margin. A higher margin implies that the retailer has a greater interest in the sale of the product. As service increases demand for the product, vertical agreements can act as an incentive for retailers to provide better service, as opposed to a contractual obligation to do so. Moreover, many vertical agreements reduce the opportunities for retailers to "free-ride" on the sales efforts of other retailers.[34]

Depending on the specific circumstances, undertakings may have a preference for a specific vertical agreement. Contractual obligations will generally be more effective if it is easier to verify whether the retailer is fulfilling its obligations. If this is impossible or difficult, a vertical agreement that protects the margins of retailers may be an alternative. As a result, incentives can arise to provide more service. However, higher margins do not necessarily mean better incentives. Sometimes, retailers rather use a higher margin to give discounts on accessories instead of providing the service desired by the manufacturer.[35] The extent to which a certain vertical agreement generates efficiencies therefore varies per situation.[36]

Efficiency improvements of vertical agreements do not just benefit the undertakings involved but can also benefit consumers. In the abovementioned example, a vertical agreement offers the advantage that consumers can enjoy a better level of service. Generally, the stronger the competition between distribution chains (*"interbrand* competition"), the more consumers benefit from vertical agreements. The reason is that, when there is more competition between distribution chains, companies have a greater incentive to act in consumers' interests. In the case of stronger competition between distribution chains, companies therefore have a greater incentive to conclude vertical agreements that serve consumers' interests.

However, vertical agreements, including the ones referred to above, can also harm consumer

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[33] Other possible efficiency improvements are discussed in chapter 4.

[34] As a part of a selective distribution system, for example, a manufacturer could restrict the active sales of retailers in a region that is exclusively reserved for another retailer. As a result, the margins of the retailers increase, and the opportunities for 'free riding' decrease. Another example of a vertical agreement that protects the margins and limits the opportunities for free riding is resale price maintenance.

[35] In this context, see for example: Luc Peeperkorn, "Resale Price Maintenance and its Alleged Efficiencies", *European Competition Journal* 4 (2008): 201-212.

[36] In chapter 4, in which scenarios of vertical agreements are discussed, ACM explains further the relative benefits of various vertical agreements.

welfare. An undertaking can use a vertical agreement simply and only to restrict competition within the distribution chain. Although restricting competition between retailers can improve efficiency, it is in the undertakings' interest to have less competition at their own level of the distribution chain irrespective of whether this leads to improved efficiency. In addition, vertical agreements can also contribute to a restriction of competition between distribution chains. The latter is possible as vertical agreements may support collusion (tacit or explicit) between manufacturers[37] and because vertical agreements can reduce manufacturers' incentives to compete.[38] Vertical agreements are harmful to consumers in such cases. Several examples are described in chapter 4.

The theoretic economic literature on vertical agreements is extensive, and puts forward several pro-competitive and anti-competitive explanations for vertical agreements. On the other hand, the available empirical body of literature about the practical relevance of the various theories is considerably less extensive. Nevertheless, Lafontaine and Slade conclude in their 2008 overview article that vertical agreements usually generate efficiencies that, moreover, are often passed on to consumers.[39] A more recent study by MacKay and Smith looks into the effects of the Leegin ruling[40], in which the US Supreme Court replaced the per se illegality of minimum resale price maintenance with a rule-of-reason standard.[41] The authors report that the relaxation of the legal framework in the United States leads in more of the investigated product groups to a significant price increase than to a significant price decrease, and in more product groups to a significant drop of the sales volume than a significant increase of the sales volume. Moreover, in most product groups, MacKay and

[37] See Lester G. Telser, "Why Should Manufacturers Want Fair Trade?", *Journal of Law and Economics* 3 (1960): 86-105 and Bruno Jullien and Patrick Rey, "Resale Price Maintenance and Collusion", *RAND Journal of Economics* 38 (2007): 983-1001.

[38] See for example, the literature on strategic delegation summarized by Andreas Irmen, "Precommitment in Competing Vertical Chains", *Journal of Economic Surveys* 12 (1998): 333-359. See also Daniel P. O'Brien and Greg Shaffer, "Vertical Control with Bilateral Contracts", *RAND Journal of Economics* 23 (1992): 299-308, Paul W. Dobson and Michael Waterson "The Competition Effects of Industry-Wide Vertical Price Fixing in Bilateral Oligopoly", *International Journal of Industrial Organization* 25 (2007): 935-962, Patrick Rey and Thibaud Vergé, "Resale Price Maintenance and Interlocking Relationships", *Journal of Industrial Economics* 58 (2010): 928-961 and Greg Shaffer, "Anti-Competitive Effects of RPM (Resale Price Maintenance) Agreements in Fragmented Markets", prepared for the Office of Fair Trading, 2013.

[39] In their review of the empirical literature, Francine Lafontaine and Margaret Slade conclude that "*[..] the empirical evidence concerning the effects of vertical restraints on consumer well-being is surprisingly consistent. Specifically, it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.*" Francine Lafontaine and Margaret Slade, "Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy", in *Handbook of Antitrust Economics*, ed. Paolo Buccirossi (Cambridge, MA: The MIT Press, 2008), pp. 408 and 409.

[40] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[41] Alexander MacKay en David Aron Smith, "The Empirical Effects of Minimum Resale Price Maintenance", Kilts Booth Marketing Series, Paper No. 1-009, 2014.

Smith observe the combination of price increases and volume drops. These results can be interpreted as evidence that a more relaxed legal standard with regard to resale price maintenance more often has negative effects on consumer welfare than positive effects. However, critics point out that the combination of a significant price increase and a significant volume drop only occurs in very few product groups. Moreover, price increases combined with constant volumes are consistent with efficiency theories.[42]

Based on the above, ACM concludes that i) the effects of vertical agreements on consumer welfare can be both positive and negative, and can differ from case-to-case, and ii) that vertical agreements, generally speaking, and especially in the absence of market power, more often than not benefit consumer welfare. Vertical agreements therefore differ from horizontal agreements. These insights form the basis of the legal framework, which is particularly evidenced by the existence of the block exemption such as laid down in the Regulation (see section 2.1). Prioritization by ACM of vertical agreements, which will be discussed further in the remainder of this document, therefore only concerns vertical agreements that do not fall under the block exemption.

3.2 ACM's priorities

Given its limited capacity, ACM must always choose what market problems and consumer problems it will tackle. The effect on consumer welfare is one of the three criteria which ACM uses to set its priorities.[43] The other criteria are public interest (for example, taking away consumer concerns or creating clarity regarding a legal standard), and whether ACM is able to take action effectively and efficiently.

When choosing whether to carry out further investigation into a vertical agreement, the effect on consumer welfare is central. This means that, following indications and complaints about vertical agreements, ACM makes an initial assessment of the possible harmful effects on consumer welfare. This is similar to an "initial substantive investigation". Based on economic insights, the effects of vertical agreements can be either positive or negative given the market context in which the practices (actual or potential) take place. ACM therefore ascertains on a case-by-case basis whether there is a plausible "theory of harm," and accords a case a higher or lower priority.

In practice, ACM's other prioritization criteria, which are the public interest and the effectiveness and efficiency of any action by ACM, are also taken into account in the decision to carry out a further

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[42] Thomas Lambert en Michael Sykuta, "Why the New Evidence on Minimum Resale Price Maintenance Does Not Justify a Per Se or "Quick Look" Approach", *Competition Policy International Antitrust Chronicle*, November 2013 (1).

[43] See "ACM strategy document", page 11. In decision requests, ACM takes into account the basic principles of the CBb in the VVR case in which the NMa had rejected a request for enforcement. These basic principles are: (1) always carrying out an initial substantive investigation; (2) assessing ex-officio investigations and complaint-driven investigations using the same criteria, and (3) taking into account the complainant's individual interests. See: http://uitspraken.rechtspraak.nl/, enter "ECLI:NL:CBB:2010:BN4700" in the search field.

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investigation into a vertical agreement. Moreover, ACM looks at each case in relation with other types of behavior into which ACM could launch investigations (such as cartels, and abuse of dominant positions).

As an illustration: Taking ACM's other two prioritization criteria into account, may, in an exceptional case, result in a further investigation into a vertical agreement, even though there is no clear likelihood of harm based on the preliminary investigation. An important public interest, such as setting a normative example, may be a reason to conduct a further investigation. Such a further investigation may lead to enforcement actions, but it could also lead to ACM establishing that no violation of competition law had taken place. That, too, would lead to a result, but then in the sense of the normative effect of the enforcement.

When ACM, on the basis of its prioritization, launches a further investigation into a possible violation of competition law, the regulatory framework described in chapter 2 determines the standard of proof for demonstrating a violation, and the opportunities for claiming an efficiency defense by invoking the exception criteria of Section 6(3), Mw or Article 101(3), TFEU, respectively. As mentioned earlier, some vertical agreements in the EC Regulation are designated as "hardcore restrictions". In such cases, because of the lower standard of proof for hard core restrictions, ACM may be able to establish an infringement of competition law sooner.[44]

ACM's prioritization also dovetails with another basic principle of the regulatory framework, namely that of "self-assessment". The legal framework stipulates that the burden of proving an efficiency defense falls on companies. If using a vertical agreement, undertakings will be required to take into account the agreement's effects, and will have to ask themselves whether the efficiency improvements resulting from the agreement are greater than the harm to consumer welfare. Should it come to a proceeding (legal or otherwise), they will have to prove this themselves.

4 Vertical agreements in practice

ACM provides further insight below into how it would in practice estimate the expected effects of vertical agreements on consumer welfare. First, several relevant factors are discussed that, generally speaking, are important in that estimation. This is followed by a description of several scenarios in which ACM explains as concretely as possible how it assesses the effects of a vertical agreement on consumer welfare.

[44] In these cases too, ACM however cannot simply assume there has been an appreciable violation of competition law. In any case, ACM will have to make a plausible case for such a violation, based on the economic and legal context in which the respective undertakings operate.

4.1 Relevant factors for assessing the effects on consumer welfare

In the preliminary substantive investigation, in every case, ACM uses the following factors to estimate the effects of a vertical agreement on consumer welfare.[45]

Level of market power in the case of a vertical agreement in a single distribution chain
The more market power undertakings have, the more possibilities there are to impose unfavorable conditions on consumers or other undertakings. This means that a vertical agreement can also be harmful as soon as at least one of the undertakings involved has market power. In this situation, market power is a necessary condition for harm, but is not sufficient on its own.[46]

In this context, when determining market power, the level of competition between distribution chains (*interbrand* competition) is important. The reason is that competition from other brands acts as an incentive for undertakings within a distribution chain to conclude vertical agreements that promote consumer interests, or at least not harm them. Furthermore, when *interbrand* competition is strong, consumers generally have more opportunities to switch to products that are not affected by any harmful vertical agreements. When determining interbrand competition, relevant factors include the number of distribution chains in the market, the market shares of the individual distribution chains, the existence of distinctive product features, brand name recognition, the extent to which undertakings are able to retain customers, possible switching barriers for consumers, or possible barriers to entry for new entrants, and whether the market changes quickly due to innovations.

Broad (or market-wide) application of similar vertical agreements
In addition, it is also important to ascertain whether the vertical agreement is applied within several distribution chains. As a result, the agreement may cover a large part of the market without the individual distribution chains having any market power. Together, the distribution chains involved may have market power. In that case, consumers have fewer options to purchase products that are not affected by any harmful vertical agreements (cumulative effects).[47] In addition, a broad application of a vertical agreement can also indicate collusion between manufacturers or retailers.[48]

Vertical agreements imposed by retailers

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[45] The Guidelines, in paragraphs 111-127, list relevant factors that are used in the assessment of vertical agreements. ACM may also use these factors when estimating the expected effects of vertical agreements in a preliminary substantive investigation.

[46] In this context, ACM applies the concept of 'market power' in an economic sense. ACM does not refer to market power within the meaning of Article 102 TFEU or Section 24 Mw, nor to the 30% market share threshold in the Regulation. See also section 2.1.

[47] In this context, see point 105 of the Guidelines, in which it is stated that the possible negative effects of vertical restraints are amplified if multiple manufacturers and their retailers do business in the same manner, as a result of which so-called cumulative effects arise.

[48] However, this is not direct actual proof of any collusive practices. In this context, see also scenario 5 in section 4.2.

If a vertical agreement is imposed by retailers against the manufacturer's wish, this could be an indication that the vertical agreement is harmful to consumer welfare. The reason is that retailers have an incentive to restrict competition among themselves irrespective of whether this restriction of competition also generates efficiency improvements for the manufacturer or consumer. The manufacturer however has no interest in a vertical agreement of which the only effect is the restriction of competition between retailers. The reason is that restricted competition between retailers leads to a higher end price of the product, thereby reducing demand for the product. If the wholesale price remains constant, the manufacturer's profit will be reduced. A vertical agreement forced by retailers against the manufacturer's wish is therefore more likely to be harmful to consumer welfare.

Possible efficiency improvements
ACM assesses whether efficiency improvements may apply in a concrete case, based on, for example, market circumstances and product features. Possible efficiency improvements include: (a) the prevention or reduction of a "free-riding problem" on service, as a result of which retailers would have no incentive to invest in service (the *"free-rider"* problem), (b) the stimulation of opening up new markets, (c) preventing a so-called "*hold-up*" problem as a result of which undertakings are not prepared to make valuable investments, (d) protecting the product's image by setting quality standards, and (e) achieving economies of scale in distribution.[49]

4.2 Vertical-agreement scenarios

ACM describes a few scenarios below in order to give more insight into the facts and circumstances that indicate the expected effects of a vertical agreement on consumer welfare.

In the description of the scenarios, the following aspects are discussed: the practices, the theory of harm if applicable, possible efficiency improvements, and ACM's considerations.[50] 'ACM's considerations' should be understood as considerations which are part of the 'initial substantive investigation', on the basis of which ACM determines whether or not it should launch a full investigation into a specific vertical agreement. For each scenario, ACM indicates whether it would launch such an investigation into the practice, or under what circumstances it would do so. These scenarios are for informational purposes only. ACM emphasizes that situations that may look similar do not necessarily have to lead to the same results in practice. ACM assesses on a case-by-case basis to what extent harm to consumer welfare may occur or has occurred as a result of the vertical agreement.

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[49] For an extensive overview of possible efficiencies as a result of vertical agreements, ACM refers to the EC Guidelines, in particular to sections 106 through 109 of the Guidelines.

[50] The assessment based on other prioritization criteria (as mentioned in 3.2.) are not discussed here.

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Scenario 1: Bicycle retailers urge bicycle manufacturer not to supply a competing retailer[51]

A bicycle manufacturer sells its bicycles to consumers through a network of retailers. One of the retailers mainly sells the bicycles online at a much lower price than the price in the other retailers' brick-and-mortar shops. The offline bicycle retailers manage to get the bicycle manufacturer to exclude the online retailer from its distribution network. They threaten with a boycott if the bicycle manufacturer does not accede. They maintain that the online retailer is a threat to their business models, in which service prior to the sale is an important aspect. The brick-and-mortar retailers maintain that there is a free-rider problem: consumers look for bicycles in their showrooms, and have their measurements taken but then purchase the bicycle from the online retailer.

Theories of harm: (1) by excluding the online retailer, consumers cannot benefit from the lower price that this bicycle retailer offers; (2) exclusion of the online retailer possibly restricts innovation on the bicycle retail market regarding the way in which online retailers offer valuable service to the consumer; (3) exclusion of the online retailer could lead to reduced price transparency for bicycles, and thus raise the search costs for consumers.

Possible efficiency improvement: protecting offline retailers can lead to better service for consumers prior to the sale.

ACM's considerations: First, ACM estimates the possible harm to consumers. The level of competition between bicycle manufacturers (interbrand competition) is a relevant factor here. Where there is strong competition from alternative bicycle manufacturers, consumers have the option of purchasing other bicycle brands at an attractive price offline or online.[52] In that case, excluding the online retailer has only a modest effect on the price that consumers pay for their bicycles. In that case, it is also relevant to what extent this bicycle manufacturer restricts online bicycle sales. If this bicycle manufacturer continues to supply alternative online bicycle shops, the extent of the price increase and the reductions in price transparency as a result of this exclusion will be smaller. There are, after all, other online bicycle retailers that could supply bicycles at attractive prices. With sufficient interbrand competition and limited exclusion of online retail, it is less likely that online retailers reduce innovation in service. Finally, ACM also assesses the value of the argument that protection of the brick-and-mortar retailers leads to more consumer service prior to the sale. There are indications in this case that the service argument is not valid: (1) it is not a priori inconceivable that online retailers are also able to develop a valuable service model. Online retailers could possibly offer service by measuring the bicycle at the customer's home. Complete exclusion of the online retailer hinders the development of such initiatives; (2) the threat to boycott the manufacturer is an indication that the manufacturer was not convinced of the efficiency argument. After all, if the manufacturer was of the opinion that the offline retailer's service model was a valuable instrument

[51] This is based on the case of "Batavus vs Vriend's Tweewielercentrum Blokker", as described in section 2.1.

[52] This argument also comes to the fore in the earlier cited Swedish case on Protein Import. See section 2.2, example 2.

for competing against other bicycle manufacturers, coercion would not be necessary to persuade the manufacturer to protect the offline retailer.[53]

Conclusion: ACM would give priority to this case, provided that the bicycle manufacturer covers a non-negligible part of the bicycle market and that online retail is also restricted to a non-negligible extent.

Scenario 2: Stimulating service in the case of strong interbrand competition[54]
A manufacturer of electrical tools gives its dealers price recommendations. The dealers are part of a selective distribution system, and sell these tools under the same name. Dealers that do not adhere to the price recommendations are given less favorable supply conditions and their contracts are cancelled. This practice therefore constitutes resale price maintenance. Many manufacturers are active in the market for electrical tools. The manufacturer applying resale price maintenance has a small market share in the entire market, and faces fierce competition from other manufacturers.

Possible efficiency improvements: Several positive properties of tools such as minimal vibration cannot be easily verified by consumers. Retailers can convince consumers of these positive properties by giving demonstrations, providing the tools on a "try before you buy" basis, and sending staff to product-specific workshops. The manufacturer can stimulate such services by protecting the retailers' margins through resale price maintenance. The protection of margins is necessary, because otherwise a free-rider problem would occur: consumers enjoy the service from retailers, but purchase the products at a lower price from other retailers who do not incur any service costs. Moreover, the protected margin may serve as an incentive for the retailer to offer more service. The resale price maintenance may thus raise the consumers' appreciation of the product, as a result of which the tool manufacturer sells more tools.

ACM's considerations: In this scenario, the tool manufacturer faces strong competition from other suppliers. That is why the manufacturer cannot simply increase the price. Consumers would then switch to an alternative product. Net harm of resale price maintenance to consumers is therefore not

[53] As observed in chapter 3, several vertical agreements are often conceivable that have a similar effect. In this scenario, the bicycle manufacturer protects the offline retailers against price competition of the online retailer. Imposing a minimum sales price on the online retailer or applying a higher wholesale price for the online retailer (dual pricing) would also be appropriate for this. Moreover, these vertical agreements appear to be less harmful than excluding the online retailer, because it still remains possible that the online retailer innovates in terms of service.

[54] This case is based on the decision by the Australian competition authority (ACCC) to exclude resale price maintenance by Tooltechnic, a manufacturer of high-quality electrical tools from the per se prohibition on resale price maintenance applicable in Australia. See: https://www.accc.gov.au/media-release/accc-proposes-to-conditionally-authorise-minimum-retail-prices-on-festool-power-tools. In Australia, it is possible to file an application with the ACCC for an exemption from the cartel prohibition under Australian competition law based on "public benefits".

plausible. In fact, due to the lively interbrand competition, the manufacturer has an incentive to serve the consumer as much as possible, and therefore to conclude vertical agreements serving the consumer's interests. This means that the manufacturer only has an interest in resale price maintenance if, as a result, retailers do indeed provide extra service, and if consumers appreciate this service. In the case of interbrand competition, ACM therefore believes that resale price maintenance by an individual manufacturer is beneficial for consumers.[55]

Conclusion: ACM would not prioritize this case.

Scenario 3: Stimulating service in the case of restricted interbrand competition

In this case, ACM assumes the same situation as in the previous scenario, namely that a manufacturer imposes a vertical agreement on its dealers in order to stimulate the provision of service. Several vertical agreements are conceivable (see footnote 55). We also assume, as in the previous scenario, that at least some consumers appreciate the service enough to pay the higher price as a result of the vertical agreement. These consumers therefore benefit from the vertical agreement. The difference with the previous scenario is that the manufacturer now has market power, for example, because there are few competing manufacturers, and there are barriers to entry for new entrants. In situations of market power, consumers who do not appreciate the service have limited opportunities (or none at all) to switch to a cheaper product for which a lower service level is provided. The implication is that the stimulation of service by a manufacturer with market power can be beneficial to some consumers but harmful to others. Therefore, two possibilities are conceivable in this scenario: (1) the benefits of the vertical agreement that one group of consumers enjoys are smaller than the harm of the vertical agreement that the other group of consumers enjoys[56]*, and (2) the benefits that the first group of consumers enjoys are larger than the harm that the other group of consumers enjoys.*

Theory of harm: the manufacturer with market power imposes a vertical agreement that stimulates service. However, some consumers appreciate the service insufficiently so that consumers as a group are worse off.

[55] In this (stylized) case, it is conceivable that the tool manufacturer concludes an alternative vertical agreement in order to stimulate service such as a contractual obligation to provide service, a prohibition on online sales or introducing territorial exclusivity. In its ruling, the ACCC assessed these conceivable alternatives. The ACCC ruled that it would be too difficult in this concrete case for Tooltechnic to monitor the retailers' compliance with any contractual obligations, which meant that contractual obligations were not a good alternative to resale price maintenance. With regard to a prohibition on online selling and territorial exclusivity, the ACCC found that this would restrict the availability of Tooltechnic's products, rendering these vertical agreements not beneficial for consumers nor financially feasible for Tooltechnic.

[56] See for example, Motta (2004), pp. 321 and 322, which demonstrates the existence of this possibility in a simple theoretic model.

ACM's considerations: Relevant factors to assess the effects of a vertical agreement that stimulates service on consumers are, among other factors, the extent of upward pressure on prices as a result of the vertical agreement, the effect of the agreement on the level of service provision, how much consumers appreciate service, and the relationship between the number of consumers benefiting or being harmed by the vertical agreement.

Conclusion: A vertical agreement that stimulates services is prioritized if ACM has strong indications that consumers as a group suffer harm from this vertical agreement.

Scenario 4: Lowest price guarantee on platforms (APPA)

Manufacturers offer a similar product through various online platforms. One platform lays down (or more platforms lay down) the condition that manufacturers do not advertise their products through other sales channels at a lower price.[57] *Such vertical agreements are also referred to as "Most Favored Nation clauses" (MFNs) or more specifically, for platforms, "Across Platform Parity Agreements" (APPAs).*[58] *Such a condition guarantees that the lowest price in the market is available on the platform. The implication is that the APPA enables the platform to offer consumers a lowest price guarantee. Another implication is that APPAs impede manufacturers from charging lower prices when selling through their own sales channels to buyers.*

Theories of harm: (1) APPAs impede entry to the platform market since lower product prices than on existing platforms cannot be used on an entering platform. As a result, it may be difficult for a new platform to acquire market share; (2) APPAs can increase the commissions that platforms charge manufacturers for using the platform. The idea is that, with an APPA, an increase in the commission for manufacturers does not lead to higher prices on the platform than through other platforms. After all, the APPA requires manufacturers to charge the most favorable price. APPAs can therefore give platforms an incentive to increase their commissions. [59]

Possible efficiency improvements: (1) APPAs protect platforms against "free riding" by manufacturers on the platform. Without APPAs, manufacturers can advertise their products on the platform, and reach buyers that way, but subsequently complete transactions at a lower price through their own sales channels. That way, manufacturers are able to avoid having to pay commissions to the platform. As a result however, the platform misses revenue, which could threaten the quality of the platform or even its existence; (2) APPAs can promote price competition

[57] Well-known examples of platforms are Booking.com and Marktplaats.nl. See also section 2.2, example 1.

[58] See for example Matthijs Visser and Jan Kees Winters, "Apple's APPA: Nieuwe wijn in oude zakken of oude wijn in nieuwe zakken? Een economisch commentaar", *Markt en Mededinging,* June 2014, No. 3.

[59] See for a more extensive discussion of the possible harmful effects of APPAs, for example, Amelia Fletcher and Morten Hviid, "Retail Price MFNs: Are they RPM "at its worst?", CCP Working Paper 14-5. See also a report issued by the Office of Fair Trading (OFT) by Lear (*Laboratorio di economia, antitrust, regolamentazione*): "Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements", OFT1438, 2012.

between manufacturers. The reason is that consumers are able to compare prices of many manufacturers on a single platform, and thus search for the lowest price. This serves as an incentive for manufacturers to use more competitive prices.

ACM's considerations: In a preliminary substantive investigation, ACM would take into account the concrete circumstances in which the APPA is applied such as the product market and consumer behavior. Another possible point for attention in this context is whether or not there are market-wide clauses, also called "wide APPAs." A "wide APPA" implies price parity with all other platforms and sales channels. This could make the harm to consumer welfare more plausible than with a so-called "narrow APPA" where price parity is only negotiated for the manufacturer's own sales channel. After all, in the case of a "narrow APPA", consumers can choose the sales channel or platform with the lowest price. In addition, it can be important whether platforms are able to bind consumers to the platform in other ways than low product prices, for example through discount coupons. If such options do exist, there may be sufficient opportunities for entry despite the presence of an APPA. Another important aspect could be whether manufacturers use one or more platforms. If manufacturers only use a single or a few platforms, then platforms may compete with one another in order to bind as many manufacturers as possible to the platform. In that case, platforms can only increase their commissions to a limited extent, as manufacturers will otherwise switch to an alternative platform. Finally, ACM would estimate the value of the efficiency arguments. For this question, one of the relevant aspects is whether consumers take the trouble to compare products within several sales channels. If consumers actively compare products, the free-rider argument gains in strength. In addition, it must be assessed whether and to what extent APPAs promote competition between manufacturers.

Conclusion: It is quite conceivable that, in practice, APPAs are both potentially harmful and able to produce efficiency improvements. Important aspects that are taken into account when estimating these effects have been described above. The more plausible it is that an APPA impedes entry to the platform market permanently or that it increases platform commissions, and the less plausible it is that efficiencies occur, the more reason there is for ACM to launch a further investigation. The considerable amount of public attention for APPAs may also play a role in that assessment of whether or not to launch a further investigation. However, the fact that other competition authorities were active in this area does not automatically mean that ACM would take action.

Scenario 5: Market-wide application of resale price maintenance

In this case, several manufacturers of a certain product apply resale price maintenance to such an extent that this practice covers a large part of the relevant market or the entire market.

Theories of harm: (1) resale price maintenance may facilitate a cartel or tacit collusion between manufacturers as resale price maintenance makes it easier to monitor prices[60]*; (2) resale price maintenance can facilitate a cartel between retailers as resale price maintenance masks and enforces horizontal agreements between retailers.*[61] [62]

Possible efficiency improvements: several efficiency improvements are conceivable even in this scenario. See for example, the efficiency improvements that are stated in section 4.1.

ACM's considerations: First of all, ACM estimates the level to which the market is susceptible to collusion, both at a manufacturer level and a retailer level. Generally speaking, the possibilities of effective collusion are greater if fewer companies are involved, homogeneity of products is greater, and buyer bargaining power is smaller. With regard to the second theory of harm, in addition to the abovementioned factors, the level to which retailers are able to force resale price maintenance onto manufacturers is relevant. The reason is that supporting a cartel between retailers is not automatically in the interests of an individual manufacturer. A cartel among retailers increases the product's end price, reducing demand for the product. If the wholesale price remains constant, the manufacturer's profit will therefore decrease because of a dealer cartel. ACM will also estimate the potential efficiency improvements. What is important is that, if resale price maintenance produces an efficiency improvement, it can be expected that resale price maintenance is applied market-wide. Moreover, these efficiency improvements can also be passed on to consumers. Therefore, the impact of the effect of market-wide resale price maintenance (pro-competitive or anti-competitive) can be as ambiguous as the impact of the effect of a single resale price maintenance. Nevertheless, it is generally the case that if resale price maintenance has a harmful effect in a concrete case, market-wide application thereof amplifies the harm of the resale price maintenance.

Conclusion: in the absence of a convincing efficiency argument, or if there is a real possibility of collusion, ACM would give priority to a complaint of market-wide application of resale price

[60] See Telser (1960) and Jullien and Rey (2007). Effective collusion is more plausible if undertakings are able to monitor each other's prices. The reason is that any deviations from the above-competitive price can be identified faster and subsequently be followed by disciplinary actions against the 'cheater'. Resale price maintenance can improve the possibilities of monitoring if retail prices are easier to observe than wholesale prices.

[61] See for example, Thomas R. Overstreet, "*Resale Price Maintenance: Economic Theory and Empirical Evidence*", Bureau of Economics Staff Report to the Federal Trade Commission, 1983. Please note that the dealer collusion theory is also consistent with the market-wide application of other vertical agreements than resale price maintenance.

[62] Next to these collusion theories, there are alternative theories that may apply in this scenario. See for example, O'Brien and Shaffer (1992), Dobson and Waterson (2007), Rey and Vergé (2010) and the non-technical discussion of these theories and their implications for competition law enforcement by Shaffer (2013) (for complete references, see footnote 37). At the core of these theories is that, under specific circumstances, resale price maintenance can reduce the incentive for manufacturers to compete with one another. For the reader's sake, ACM restricts itself in this scenario to a review of the collusion theories.

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maintenance. This conclusion also holds for the situation where an alternative theory of harm applies (for alternative theories of harm, see the references in footnote 62). However, if collusion or an alternative theory of harm is unlikely, and there is a convincing efficiency argument, ACM would not give priority to a market-wide application of resale price maintenance.

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5 Concluding remarks

The scenarios described by ACM show that the assessment of the expected effects of vertical agreements depends greatly on the circumstances of the concrete case. There can be cases in which, based on a preliminary substantive investigation, on balance, harm to consumer welfare is plausible, which gives ACM reason to launch further investigation, and possibly to take enforcement action. There can however also be cases in which efficiency improvements are likely to outweigh the possible harm to consumer welfare. In such a case, ACM could conclude that the expected harm to consumer welfare is too small to prioritize it.

The scenarios also reveal that ACM uses several factors that are generally helpful in estimating the effects of a vertical agreement on consumer welfare: i) the extent of market power, ii) the extent to which the vertical agreement covers the market, iii) whether retailers forced the agreement and iv) the possible efficiency improvements. Information about these four factors enables ACM to carry out a preliminary substantive investigation into the possible effects of the vertical agreement effectively.

ACM is much helped if those who submit tip-offs, indications and complaints about vertical agreements to ACM describe the possible problem's underlying facts as concretely as possible. In addition, ACM is able to act more effectively if complaints, tip-offs, and indications are more corroborated by evidence.

For tipping-off ACM, see: https://www.acm.nl/en/contact/tip-offs-or-indications/submitting-your-tip-off-or-indication-to-acm/.