



Unilateral Conduct Working Group

Vertical Restraints Multi Year Project 2016-2019

April 2019

Overview – the vertical restraints project

1. In 2016 the Unilateral Conduct Working Group (**UCWG**) began a multi-year project examining the effects on competition of vertical restraints. The project sought to promote increased understanding, and where differences exist, to work towards convergence.
2. The vertical restraints project has three distinct stages
 - Scoping phase: to help guide the development of the vertical restraints project. The scoping work identified:
 - an interest in a focus on online vertical restraints, but caution to not overlook matters arising in offline markets
 - support for theoretical analysis of issues arising with vertical restraints, including theories of harm, market failures, and efficiencies
 - support for analysis that focuses on particular forms of restraint, and
 - support for the development of a selected case study resource.
 - Development phase: design of hypothetical vertical restraint scenarios (parity clause, and bans on online platform sales and online search advertising). The scenarios were examined for their possible effect on competition and potential resulting efficiencies.

A project group of ICN members and NGAs provided individual/jurisdictional-specific responses for each of the hypothetical scenarios. The responses provided by the project group members have allowed UCWG to develop reports highlighting commonalities and divergent factors in the assessment of the vertical restraints scenarios.

A summary of the hypotheticals is provided below.

- Completion phase: to be carried out in 2019-2020, the completion phase will consider how the work products can be effectively implemented. The third phase of the project is to be determined with the UCWG membership and may include:
 - webinar discussions of the key points that emerged in the hypotheticals;
 - adaption of the hypotheticals into training modules to be made available through ICN Training on Demand; and
 - developing a workbook chapter on vertical restraints.

Hypothetical One – online parity requirements

3. The first vertical restraint hypothetical considered the possible effect of online parity requirements included in contractual arrangements between fictional Online Travel Agents (OTAs) and fictional accommodation providers. The full report of this scenario is at [Attachment A](#) to this paper.

Theories of harm – conduct of BestValueBed

4. It was alleged that BestValueBed, an OTA with a market share of 25%, had included in its contracts with accommodation providers a ‘narrow’ room rate parity requirement. The contract required accommodation providers to offer price parity between listings on BestValueBed’s platform and any other online distribution channel controlled by the

accommodation provider. It was also alleged that BestValueBed had required accommodation providers to offer room inventory parity between listings on BestValueBed's platform and other online distribution channels used by the accommodation provider (a 'wide' room inventory parity requirement).

5. The project group considered that parity requirements can have a detrimental impact on competition. It was noted that parity requirements make selective discounting more expensive and thereby reduce the frequency of such discounting (as such discounts must, at a minimum, also be offered to the platform benefiting from the parity requirement).
6. Members of the project group held different views on the potential competitive impact of the parity requirements on accommodation providers.

- View 1: limited or no detrimental impact on competition

Narrow room rate parity requirements

The narrow price parity clause does not restrict price and quality competition among accommodation providers – as it still allows accommodation providers to make differentiated offers across non-proprietary distribution channels.

- View 2: detrimental impact on competition

Narrow room rate parity requirements

The narrow parity requirements soften competition between accommodation providers if they act as a disincentive for accommodation providers to differentiate across distribution channels (e.g. by creating a price floor across some or all distribution channels used by the accommodation provider).

It was considered that narrow parity requirements may not only restrict competition between accommodation providers but may also restrict competition between OTAs.

Wide room inventory parity requirements

It was noted that further information/evidence would be required to establish the existence of, terms, and potential effect of any wide room inventory parity requirement.

It was recognised that wide parity clauses affecting price and non-price offerings can soften competition between suppliers by requiring price and inclusion alignment across all distribution channels (giving rise to a horizontal effect). A wide rate parity requirement creates a 'price floor' below which an accommodation provider cannot offer its rooms on a different distribution channel without breaching the parity requirement, leading to price uniformity. The alleged wide inventory parity requirement restricts price and non-price competition on room features and inclusions.

7. Members of the project group also held different views on the potential competitive impact of the parity requirements on distribution channels.

- View 1: limited or no detrimental impact on competition

Narrow room rate parity requirements

It was noted that the narrow parity requirement is a less intrusive requirement than that of a wide parity requirement and does not affect the relationships between an accommodation provider and other OTA platforms. The narrow price parity clause would not restrict price and quality competition between non-proprietary distribution channels.

- View 2: detrimental impact on competition

Narrow room rate parity requirements

It was noted that narrow parity requirements applied by OTAs may restrict competition between OTAs in cases where they produce equivalent effects to wide parity requirements (see below). Since the narrow parity requirement prohibits the accommodation provider from offering better room prices on its own website than on the OTA which imposes the requirement, if the accommodation provider wishes its own online offer to match a lower price offered on another OTA portal, it will be obliged to reduce the price on the first OTA portal as well. Depending on the particular facts of the relevant market, in particular the share of sales conducted through direct and indirect channels, this price floor effect may reduce the incentive for OTAs to compete on commission rates, by reducing the incentive for accommodation providers to make use of any lower commission rates offered by competing OTAs.

In addition, if accommodation providers and OTAs participate in the same market then the narrow parity requirements would soften competition between the OTA and the distribution channels controlled by the accommodation provider. It was considered that by restricting an accommodation provider from growing direct bookings through more favourable room rate and/or inventory offers, a narrow clause would soften the competitive constraint that the accommodation provider's distribution channels may otherwise have imposed on non-proprietary distribution channels.

Wide room inventory parity requirements

It was noted that wide parity requirements can soften and may foreclose price and non-price competition between distribution channels. Differentiated offers by accommodation providers create incentives for distribution channels to compete for their custom, for example by offering lower commission rates or other competitive benefits as reward for better room rates or inventory being listed with their platform. By requiring accommodation providers to offer them their best inventory the OTA (BestValueBed) diminishes the competitive value of what may be offered to consumers through other online distribution channels. This diminishes the incentives of competing OTAs to offer lower commission rates/benefits to accommodation providers and may reduce the competitive tension that would prevent BestValueBed from introducing excessive commission rates. It was also noted that the parity requirement may affect the take up of services for smaller or more marginal OTAs and have a negative impact on their ability to increase scale or market share through listing more competitive offers. A loss of competitive tension could result in a loss of, or a reduction in, innovation in OTA services.

Arguments about pro-competitive effects that may be presented and factors relevant to these arguments

8. Project group members noted that, in general, their jurisdiction does have regard to pro-competitive effects, although there are differences in the manner in which such effects can be taken into account across these jurisdictions.
 - Parity requirements may prevent free-riding, by competing OTAs and accommodation providers respectively, on the investments made by BestValueBeds. OTAs promote inter-brand competition between accommodation providers through increased price transparency. OTA platforms may also reduce consumer search costs. The parity requirements may support an OTA's business model by increasing conversion rates (the 'look to book' ratio) by ensuring that the room rates and inventory offered through their platform is superior.

- The project group noted that further consideration would need to be given to whether the parity requirement (wide or narrow) is reasonably necessary or indispensable to obtain the benefits provided by BestValueBeds.

Areas of further inquiry by investigators

9. The project group identified a number of areas for further inquiry by investigators.
 - *Parity clauses*: a range of matters including evidence of the scope, market coverage, evidence of enforcement of the clauses, use of alternative business models by OTAs.
 - *Market definition and other considerations*: a range of matters including evidence of consumer search and booking behaviour, evidence of the effect of the parity requirements on OTAs, evidence of the effect of the parity requirements on online distribution channels controlled by the accommodation provider.
 - *Other*: a range of matters including features of hotel websites relative to OTA websites.

Hypothetical Two –online selective distribution models

10. The second hypothetical scenario considered the potential impact of certain online sales restrictions on selective distribution models of three fictional suppliers of infant strollers: Babydream (20%), Wheelies (>30%) and Sport 2001 (>30%). The retail landscape is populated by five large brick-and-mortar retailers, two large third-party platforms and other small online/offline retailers. Online sales have gradually increased (from 20% in 2015 to 35% in 2017) together with online sales via third-party platforms (20% of the total online sales in 2015 to 40% in 2017).
11. The hypothetical scenario considered two restrictions: a ban on selling through online third-party platforms and a wide online advertising ban (incl. an online search advertising ban). Similarly to hypothetical one, the project group has been invited to consider possible theories of harm, arguments about pro-competitive effects and areas of further inquiry. The full report on this hypothetical scenario can be found in Attachment B to this report.
12. Some members did not envisage any competition concerns in relation to this hypothetical scenario since in all distribution channels there are at least three competitors and the retail landscape is populated by several players. In addition, by focusing on inter-brand competition, these members noted that the restrictions imposed by the three manufacturers might be reasonably necessary to maximize efficiency across all distribution channels.
13. According to some other members, the restrictions in question can have detrimental impact on consumer welfare by: (i) reducing intra-brand competition through the protection of existing sales channels from competitive pressure of online channels; (ii) softening inter-brand rivalry when considering the cumulative effects of above restrictions under certain conditions (e.g., if third-party platforms are an important distribution channel for the three manufacturers and their retailers); (iii) finally, in the long run by foreclosing potential entrants in the downstream market for retail sale of baby strollers.

Babydream’s ban on selling to third-party platforms and wide ban on online advertising

14. Babydream prohibits all sales on third-party platforms and has a wide online advertising ban, including on retailers’ own website and through the use of price comparison websites; in particular Babydream retailers are prohibited from using search advertising

(i.e., from using/bidding on search ads for Babydream brand name). Members of the project group held different views on the potential competitive impact of the Babydream's restrictions.

- View 1: limited or no detrimental impact on competition

Some members noted that Babydream's two restrictions are unlikely to have material consequences on competition and the viability of third-party platforms because Babydream's market share is 20%. It was observed that, even when assuming that Babydream's restrictions may undermine the viability of third-party platforms, such scenario is unlikely to materially harm inter-brand competition due to limited market share of the third-party platforms channel (14% of total sales).

Some members carried out a two-step assessment which focused, as a first step, on evaluating the proportionality and necessity of Babydream's two restrictions within the selective distribution system of Babydream, and, in a second step, on the analysis of the potential restriction of competition. With respect to **online sales restriction through platforms**, these members noted that such restriction serves a legitimate aim such as maintaining Babydream's brand image for high quality products and protecting investments by its retailers in pre- and post-sale services. Also, the restriction appears to be applied in a uniform manner and Babydream itself is not selling to third-party platforms. For these reasons, the second step of the assessment, that is, an analysis of the potential restriction of competition, was not considered necessary to carry out by these members. One member, however, held a different view stating that the online sales platform ban was not justified in light of the non-luxury nature of the product (brand image and reputation could be achieved with less restrictive means) and the growing relevance of online platforms as gateways to end customers.

- View 2: detrimental impact on competition

In relation to the **wide online advertising ban**, all members of the project group carrying out an assessment on the necessity and proportionality of the restriction noted that such advertising ban does not appear to pursue any legitimate objective of promoting brand image or investing in safety demonstrations. On the contrary, it appears to reduce the ability of Babydream's authorized retailers to compete with Babydream's own online channel and avoid an increase in Babydream's bidding costs in the case of online search advertising. It would therefore likely amount to a restriction of competition, on its own or in conjunction with the online sales platform ban.

For some other members, an effects-based approach is needed to assess whether the impact of Babydream's two restrictions is detrimental on retail competition, on the basis of one or more theories of harm indicated in paragraph 13 above.

Wheelies "equivalent" criteria required for selling through third-party platforms

15. Wheelies (>30%) permits authorised retailers to sell Wheelies' products on third-party platforms, provided that the platform meets the same qualitative criteria as the retailer or equivalent ones.

- View: no impact on competition

All members of the project group considered that such a restriction is unlikely to raise competition concerns and appears to be justifiable in light of the legitimate objectives of protecting brand image and investments in pre- and post-sale services. In addition, there is no indication that these criteria are applied in a discriminatory fashion or that they are impossible to be met. In the latter event, according to one member, Wheelies

effectively imposes the same restriction on sales on online platforms as the one imposed by Babydream.

Sport 2001 ban on selling high-end products through third-party platforms

16. Sport 2001 retailers are allowed to sell only some of Sport 2001's models (the lower-end models) on third-party platforms, with the exclusion of other models (e.g. the high-end models). Members of the project group held different views on the potential competitive impact of the Sport 2001 restrictions.

- View 1: no impact on competition

According to the members of the project group who did not envisage any competition concerns generally (see paragraph 12), Sport 2001 ban is much less restrictive than those of either Wheelies and Babydream and therefore they would not be investigated.

- View 2: detrimental impact on competition

Members of the project group assessing the necessity and the proportionality of the restriction within the selective distribution system of Sport 2001 considered that such restriction would not serve any legitimate objective such as the protection of brand image. Relevant to this assessment were the fact that this restriction is not applied uniformly since Sport 2001 sells all its product ranges directly to third-party platforms while forbidding the sales by its retailers of high-end strollers. In addition, less restrictive options are available (like in Wheelies). Therefore such restriction has the potential to reduce intra-brand competitive pressure for high-end Sport 2001 products, by limiting the ability of resellers to sell such products to customers, especially if third-party platforms are an important sales channel.

For some other members, an effects-based approach is needed to assess whether the impact of Sport 2001 restrictions is detrimental on retail competition, as indicated in paragraph 13 above.

Arguments about pro-competitive effects that may be presented and factors relevant to these arguments

17. Members of the project group stated that the above restrictions can contribute to the promotion of competition on other factors than price:

- Brand image and brand positioning across the various distribution channels.
- Quality of pre- and post-sale services (e.g., safety demonstrations).
- Other factors such as the reliability of the platforms for delivery and payment.

Areas of further inquiry by investigators

18. The project group identified a number of areas for further inquiry by investigators

- Analysis of intra-brand competition and in particular the competitive constraints posed by the different distribution channels: e.g., whether retail competition from offline sources or non-platform online sources are good substitutes for retailing through platforms.
- Inter-brand competition analysis: substitutability of Babydream baby strollers with rival brands sold through platforms or through any other means, from a consumer perspective.
- Analysis of the intent especially in the case of Babydream and the business justifications.

- The cumulative effects of the restrictions applied by the three manufacturers.
19. In conclusion, the hypothetical scenario has raised issues related to (i) the importance of intra-brand competition versus inter-brand competition in the assessment of the consumer welfare effects and (ii) the trade-off between price versus non-price competition. Some jurisdictions focused their assessment on inter-brand competition and therefore restrictions on online sales can be problematic only if there is market power at the manufacturing level. Other jurisdictions also analysed intra-brand competition to ascertain whether online sales restrictions at the distribution level affecting retailers selling products of the same brand can raise competition concerns.
20. The scenario showed the interplay between price and non-price competition in the online environment. Price competition is often the key parameter for (online) retailers, while manufacturers are more concerned with other factors, such as brand image, quality and innovation, which are potentially undermined by the free-riding problem. As a result, manufacturers may consider (some) online sales restrictions as necessary to better control for these other factors and preserve investments in high-level presale services, promotion and advertising. Therefore, online sales may improve price competition while reducing non-price competition at retail level (absent manufacturers restrictions) and the former effect will not always be more important than the latter, both for firms and consumers.

Vertical Restraints Project

Hypothetical One – Online Parity Requirement

Introduction

1. A small group of volunteers from competition authorities and NGAs¹ (the project group) has considered a limited fact scenario addressing an online parity requirement (set out in **Attachment OPR-A** to this report).
2. This report provides an outline of matters considered relevant by the project group in assessing the hypothetical conduct. The report seeks to highlight approaches to assessing such conduct, including areas of divergence.
3. Project group members have noted that significantly more information would be required before a competition authority would reach a concluded view to prohibit or otherwise take action against the conduct set out in the hypothetical scenario.
4. The project group has been invited to consider
 1. possible theories of harm
 2. arguments about pro-competitive effects that may be presented and factors relevant to these arguments, and
 3. areas of further inquiry by investigators.
5. The hypothetical scenario provided to project group members has four key actors
 - BestValueBed (**BVB**) – an online travel agent (**OTA**), 25 per cent of online accommodation bookings in this jurisdiction are made via its platform. BVB has implemented a ‘narrow’ contractual parity requirement affecting online room rates and is alleged to have implemented a ‘wide’ parity requirement affecting online inventory. The parity requirements of BVB are set out at paragraph 14.
 - Find-A-Room (**FAR**) – a competing OTA, 40 per cent of online accommodation bookings in this jurisdiction are made via its platform. FAR has implemented a ‘narrow’ contractual parity requirement affecting online and offline room rates and inventory. The parity requirements of FAR are set out in footnote 3 to this paper.

The parity requirements of FAR are not the focus of this document.
 - Online Hotel Beds (**OHB**) - a recently launched OTA platform, 10 per cent of online accommodation bookings in this jurisdiction are made via its platform.

¹ Please see **Attachment OPR-B**.

Attachment A

Hypothetical One – Online Parity Requirement

- Accommodation providers – in the hypothetical scenario one accommodation provider (Hoolten Hotels) has provided information to the competition authority.
6. This document does not seek to identify the views of contributing members of the project group. This report has benefited from a diversity of views. Not all members of the project group agree that all of the factors and considerations are appropriate; project group members may evaluate them in different ways.

Overview of online parity requirements

7. Parity requirements like those set out in the hypothetical scenario have been characterised as 'retail most favoured nation' clauses (retail-MFN). A requirement that a supplier ensure parity across different competing platforms is characterised as a 'wide' retail MFN. Where the parity requirement only applies to the direct sales channels controlled by the supplier it is characterised as a 'narrow' retail-MFN. Retail-MFNs can be distinguished from 'wholesale-MFNs'. A wholesale-MFN obliges a supplier to offer a wholesale price to a retailer that is no greater than the wholesale price offered to any other retailer. Under a wholesale-MFN a retailer independently sets the retail price.
8. Online markets have led to both an increase in price transparency and a reduction in switching costs. It was noted by some members of the project group that retail-MFNs appear to have become more common as platforms seek to offer a 'best price guarantee' to consumers.

Legal frameworks

9. Different legal frameworks apply across ICN member jurisdictions, these frameworks generally apply a form of effects test when assessing online parity provisions. An effects-based approach requires analysis of the potential effects of a particular behaviour. **Attachment OPR-C** provides a short non-exhaustive summary of legislative frameworks applying in some ICN member jurisdictions.

Relevant market

10. Responses received from the project group noted that further information would be required in order to formulate the relevant market definition (see *Areas of further inquiry*, below). For the purpose of preliminary considerations the project group noted that the relevant areas of competition may include:
- A market for the provision of online travel agency services to accommodation providers and consumers located within the hypothetical jurisdiction. As with other platform distribution channels, online travel agency services has customer features consistent with a two sided market, linking:
 - accommodation providers who wish to attract customers to their properties
 - consumers seeking to book accommodation.

Attachment A

Hypothetical One – Online Parity Requirement

- The market for the provision of accommodation booking services, including by providers of ‘traditional’ travel agency services and offline channels.
- Local markets in which accommodation providers supply various types of accommodation to consumers.

11. The views of the project group differed on the question of whether accommodation providers and OTAs were likely to participate in the same market. These differing views can be summarised as:

- **Separate markets:** some members of the project group considered that accommodation providers and OTAs offer different distribution services, with the OTAs’ services being broader (search, comparison, and range of properties on offer). It was noted that the differences in distribution services offered by OTAs and accommodation providers impacted upon their likely substitutability for consumers.

Some members also addressed meta search providers, noting that the more limited services provided by these parties would place them outside of the market in which OTAs participate.

It was also noted that in some jurisdictions a distinction is drawn between online retail, in which the website sells its own products, and online marketplaces that act as portals through which buyers and sellers may interact.

On this basis some project group members considered that it was less likely that OTAs and accommodation providers would operate in the same market. It was noted that, for the purpose of analysing the parity requirements, accommodation providers and the OTAs are in a vertical relationship which could give rise to anti-competitive horizontal effects.

- **Same market:** other members of the project group noted that the websites of accommodation providers may act as an important constraint on a concentrated OTA sector – but that the strength of their demand-side substitutability would need to be tested with consumers in considering whether a broader market definition would be appropriate.

It was noted that further information from the OTAs, accommodation providers and consumers would be required to resolve these questions. It was also noted that online services are dynamic and present a range of challenges in determining the appropriate market definition.

12. It is noted that market definition and consequently BVB’s share of that market are of particular relevance when considering the application of safe harbours and legal presumptions. Not all jurisdictions apply safe harbours and/or legal presumptions when analysing the effect of conduct on the competitive process. To allow for a discussion of possible anticompetitive effect and procompetitive benefit the project group has not sought to apply safe harbours or presumptions of illegality in preparing this document.

Attachment A

Hypothetical One – Online Parity Requirement

Theories of harm – conduct of BestValueBed

13. It was recognised by the project group that parity requirements can have a detrimental impact on competition.
14. Project group members noted the information provided by market participants which suggested that BVB has implemented a narrow room rate parity requirement and may have implemented a wide room inventory parity requirement.
 - a) BVB has required accommodation providers to offer room rate parity between listings on its platform and other online distribution channels controlled by the accommodation provider (provided for by contractual arrangements).
 - b) An accommodation provider has alleged that BVB is requiring accommodation providers to offer room inventory parity between listings on the BVB platform and other online distribution channels (conduct falling outside of the contractual arrangements between the parties (non-contractual))².

It was noted that further evidence should be sought to establish whether a non-contractual wide room inventory parity requirement is being enforced by BVB. For the purposes of this report theories of harm relating to a wide inventory requirement have been identified. These are presented below, taking in turn the effect of the conduct on accommodation providers and then the effect on distribution channels.

Effect on accommodation providers

15. As noted the views of the project group differed on the question of whether accommodation providers and OTAs were likely to participate in the same market. It was noted that agreements between entities in a vertical relationship can give rise to anti-competitive horizontal effects, such that the effect of the parity requirements on accommodation providers would be considered regardless of whether a ‘same market’ or ‘separate market’ analysis was conducted.
16. Some members of the project group noted that the parity requirement would make selective discounting by an accommodation provider more expensive and thereby reduce the frequency of such discounting (as such discounts must, at a minimum, also be offered to the platform benefiting from the parity requirement). A number of factors were considered relevant in assessing the potential impact of a parity requirement: (i) the volume of sales affected by the requirement, (ii) the difference between the prevailing price and the potential discount, and (iii) the probability the parity clause will be enforced.

² Hoolten Hotel has alleged that BVB is seeking to achieve pricing and inventory parity across all platforms.

- In March 2016 Hoolten offered a “Family Staycation” promotion – offering rooms with free upgrades to consumers who purchased packages through the FAR platform.
Hoolten advises that it had negotiated an advantageous commission rate and search listing with FAR as part of its participation in the promotion on the FAR platform.
- The Family Staycation promotion was also available through Hoolten’s offline channels.
- Three days after the campaign commenced, Hoolten received an email from BVB which advised it had seen Hoolten’s inventory package on the FAR platform and requested that Hoolten immediately offer the same inventory on the BVB platform.
- Hoolten declined this request and claims that almost immediately it noticed a significant drop in the number of daily bookings received through the BVB platform. Hoolten has claimed that this was the result of BVB ‘dimming’ its listing on the BVB platform – dropping the listing from the first page of search results to the sixth page of search results. Hoolten claims that its bookings through BVB dropped around 40% during the promotional period but returned to normal levels after the promotion ended, and the hotel returned to the first page of BVB’s search results.

Attachment A

Hypothetical One – Online Parity Requirement

17. It was noted that if a parity requirement covers a large portion of the market and is enforced, it generally will be more costly for the accommodation provider to discount. If, however, the parity requirement covers a smaller portion of the market it will have a smaller impact upon competition.
18. Members of the project group held different views on the potential competitive impact of the parity requirements on accommodation providers. These views are summarised below.

View 1: limited or no detrimental impact on competition

Narrow room rate parity requirements

19. Some members of the project group noted that the narrow price parity clause would not restrict price and quality competition among accommodation providers – as it still allows accommodation providers to make differentiated offers across non-proprietary distribution channels. In particular it was noted that the contractual parity requirements form part of a vertical agreement, i.e. an agreement between two parties operating, for the purposes of the agreement, on different levels of the supply chain. Independent businesses active on different levels of the same distribution chain in general have a common interest in increasing sales of the relevant products or services. It was recognised that vertical agreements between businesses that are not competitors can be pro-competitive by solving inefficiencies in the vertical distribution chain. Some members of the project group considered the impact of the narrow parity requirement on interbrand competition, noting that while the requirement affects intrabrand competition, interbrand competition is maintained.

Wide room inventory parity requirements

20. In discussing the conduct described at paragraph 14(b) (above) some project group members noted that there were a range of commercial factors which may have resulted in the reduced ranking of the accommodation provider on BVB's platform – including lower than normal sales on the BVB platform as consumers take up the superior offer being made on FAR's platform. It was noted that OTAs apply a range of factors in determining search rankings on their sites – including volume of sales. It was noted that further information would be required to test whether the alleged conduct is widespread or otherwise represents a wide parity requirement.

View 2: detrimental impact on competition

Narrow room rate parity requirements

21. Some members of the project group considered that narrow parity requirements would soften competition between accommodation providers if they acted as a disincentive for accommodation providers to differentiate across distribution channels (e.g. by creating a price floor across some or all distribution channels used by the accommodation provider). The potential for independently applied narrow price parity requirements to have a cumulative effect in softening competition between accommodation providers was also noted (the narrow price parity requirement of FAR is set out below³). In this context it was noted that where narrow parity requirements

³ FAR's contract with accommodation providers has the following parity requirements:

- accommodation providers must give equal or better rates to FAR as made available through all distribution channels controlled by the accommodation provider (e.g. provider controlled websites, telephone inquiries, loyalty program offerings, walk-ins).

Attachment A

Hypothetical One – Online Parity Requirement

applied by OTAs produce equivalent effects the theories of harm more often associated with wide parity requirements may arise. It was considered that narrow parity requirements may not only restrict competition between accommodation providers but may also restrict competition between OTAs. Since the accommodation providers are still prohibited from offering better room prices on their own website than on the OTA which imposes the narrow parity requirement on them, if they wish their own online offer to match a lower price offered on another OTA portal, they will be obliged to lower the price on the first portal as well. Accordingly, the incentive for competition on low commission rates between OTAs may be lowered since the OTAs are aware that the price floor created by the narrow parity requirements reduces the incentive for accommodation providers to make use of a lower level of commissions that any competing OTA could offer. It was noted that the question of equivalent effect is of growing importance and that further information/evidence including empirical would be required to assess the combined effect of the narrow parity clauses on competition between accommodation providers (see *Areas of further inquiry*, below).

22. It was also noted that, if accommodation providers were found to participate in the same relevant market for distribution services as OTAs, narrow price parity requirements would be likely to soften the competitive constraint on OTAs that may otherwise be offered by the accommodation provider's website. As discussed at paragraph 11 above, this issue of the definition of the relevant market was not settled between members of the project group.

Wide room inventory parity requirements

23. Greater concerns were identified in discussing the conduct summarised at paragraph 14(b) above. It was recognised that wide parity clauses affecting price and non-price offerings can soften competition between suppliers by requiring price and inclusion alignment across all distribution channels (giving rise to a horizontal effect). A wide rate parity requirement creates a 'price floor' below which an accommodation provider cannot offer its rooms on a different distribution channel without breaching the parity requirement, leading to price uniformity. A wide inventory parity requirement such as that alleged in paragraph 14(b) restricts price and non-price competition on room features and inclusions. In assessing the nature and extent of this restriction on competition the factors noted at paragraph 16 above would require modification to allow proper consideration of the non-price restriction. More generally it was noted that further information/evidence would be required to establish the existence of, terms and potential effect of any non-contractual wide parity requirement that may have been introduced by BVB (see *Areas of further inquiry*, below).

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- accommodation providers must provide inventory equivalency, including packages, to FAR as made available through online distribution channels controlled by the accommodation provider.

The project group noted that FAR's parity clause is narrower than that alleged to have been implemented by BVB, with the restriction affecting all distribution channels controlled by an accommodation provider (a narrow retail-MFN). It was also noted that by affecting all distribution channels controlled by an accommodation provider the parity clause introduced by FAR differs from the parity clause commitments applying in some ICN member jurisdictions.

Attachment A

Hypothetical One – Online Parity Requirement

Effect on distribution channels

24. As with the effect on accommodation providers, project group members differed in their views of the effect of the parity requirements on distribution channels. These views are summarised below.

View 1: limited or no detrimental impact on competition

Narrow room rate parity requirements

25. Some members of the project group considered that the narrow price parity clause (paragraph 14(a)) would not restrict price and quality competition between non-proprietary distribution channels. It was noted that the narrow parity requirement is a less intrusive requirement than that of a wide parity requirement and does not affect the relationships between an accommodation provider and other OTA platforms.
26. Under a narrow price parity requirement an accommodation provider can offer a competing OTA a lower price or superior inventory in exchange for a better commission rate or other commercial benefits. This interaction between an accommodation provider and an OTA places competitive pressure on BVB to ensure that its commission rates are not excessive. This competitive tension also ensures that BVB (and other OTAs) are incentivised to maintain and improve the demand enhancing features of their platform – supporting dynamic innovation.

Wide room inventory parity requirements

27. As noted at paragraph 20 above, some members of the project group considered that a range of commercial factors may have resulted in the reduced ranking of the accommodation provider on BVB's platform. It was considered that further information would be required to test whether the alleged conduct is widespread or otherwise represents a wide parity requirement.

View 2: detrimental impact on competition

Narrow room rate parity requirements

28. As has been noted, the views of the project group differed on the question of whether accommodation providers and OTAs were likely to participate in the same market. Some members of the project group considered that if accommodation providers and OTAs participate in the same market then the narrow parity requirements (set out in paragraph 14(a), above) would soften competition between the OTA and the distribution channels controlled by the accommodation provider. It was considered that by restricting an accommodation provider from growing direct bookings through more favourable room rate and/or inventory offers, a narrow clause would soften the competitive constraint that the accommodation provider's distribution channels may otherwise have imposed on non-proprietary distribution channels.
29. It was noted that narrow parity requirements applied by OTAs may restrict competition between OTAs in cases where they produce equivalent effects to wide parity requirements. Since the narrow parity requirement prohibits the accommodation provider from offering better room prices on its own website than on the OTA which imposes the requirement, if the accommodation provider wishes its own online offer to match a lower price offered on another OTA portal, it will be obliged to reduce the price on the first OTA portal as well. Depending on the particular facts of the relevant market, in particular the share of sales conducted through direct and indirect channels,

Attachment A

Hypothetical One – Online Parity Requirement

this price floor effect may reduce the incentive for OTAs to compete on commission rates, by reducing the incentive for accommodation providers to make use of any lower commission rates offered by competing OTAs.

Wide room inventory parity requirements

30. Some project group members noted that wide parity requirements (14(b), above) can soften and may foreclose price and non-price competition between distribution channels.
31. It was noted that the inventory parity conduct alleged to have been engaged in by BVB would prevent an accommodation provider from offering better room inventory and inclusions to other distribution channels. Project group members considered that further information/evidence would be required in considering the existence of, terms and potential effect of the alleged wide parity clause on competition between distribution channels (see *Areas of further inquiry*, below).
32. It was noted that differentiated offers by accommodation providers create incentives for distribution channels to compete for their custom, for example by offering lower commission rates or other competitive benefits as reward for better room rates or inventory being listed with their platform. By requiring accommodation providers to offer them their best inventory BVB diminishes the competitive value of what may be offered to consumers through other online distribution channels. This diminishes the incentives of competing OTAs to offer lower commission rates/benefits to accommodation providers and may reduce the competitive tension that would prevent BVB from introducing excessive commission rates. It was also noted that the parity requirement may affect the take up of services for smaller or more marginal OTAs and have a negative impact on their ability to increase scale or market share through listing more competitive offers.
33. In considering whether the wide inventory parity clause was likely to diminish competitive tension between OTAs, some members of the project group also noted that a loss of competitive tension could result in a loss of, or a reduction in, innovation in OTA services.
34. As noted in paragraph 21 above, some project group members considered that regard should be had to the cumulative effect of the narrow parity requirements of BVB and FAR in assessing whether the theories of harm associated with wide parity requirements are likely to arise. It was considered that further information/evidence would be required to assess the combined effect of the narrow parity clauses on competition between distribution channels (see *Areas of further inquiry*, below).

Other matters

35. Project group members differed on the question of whether dominance should be considered in examining the conduct of BVB. For some members of the project group the market share relativities of BVB and FAR (25 and 40 per cent respectively of total online travel bookings made in this jurisdiction) made it less likely that dominance would be considered in their jurisdiction. While some members of the project group noted that BVB could be dominant, a factor relevant to their consideration was the extent to which BVB is a vital channel for accommodation providers. It was considered that a 'must have' platform will have a greater ability to act without constraint in its dealings with accommodation providers. Balanced against this it was noted that consumers in this market typically multi-home – that is they consider more than one platform when searching for a suitable offer. Multi-homing by customers may reduce

Attachment A

Hypothetical One – Online Parity Requirement

the 'must have' value of a platform that otherwise has high market share. Other factors that would be considered included network effects, barriers to entry and the impact of access to consumer data. Some members of the project group noted that if dominance is substantiated further consideration should be given to whether the room rate and inventory parity requirements could be an abuse of this dominant position. Further information/evidence would be required in considering this (see *Areas of further inquiry*, below).

36. It was also noted by a member of the project group that as a wide inventory parity requirement, such as that alleged in paragraph 14(b), restricts price and non-price competition on room features and inclusions it could, in some jurisdictions, be assessed under the resale price maintenance (RPM) provisions. Views of the project group differed on this, with some noting that the parity arrangements would not meet the requirements for establishing RPM in their jurisdiction.

Pro-competitive effects and factors relevant to these considerations

37. Project group members noted that, in general, their jurisdiction does have regard to pro-competitive effects, although there are differences in the manner in which such effects can be taken into account across these jurisdictions⁴. For some jurisdictions pro-competitive effects would only be considered if competitive harm had been established. As outlined above the views of project group members differed when considering the potential competitive harm of BVB's conduct.
38. It was noted that both wide and narrow parity requirements may prevent free-riding, by competing OTAs and accommodation providers respectively, on the investments made by BVB. It was noted that without the wide parity requirements, consumers may use the websites and hotel portfolios of BVB to search for and compare accommodation offers, but then book more cheaply through other distribution channels. Free riding may deprive BVB of commission revenue and reduce or deter investment in services (e.g., website development, search engine optimisation, online advertising). It was suggested that investigators should consider whether free riding is empirically significant. It was considered that evidence of free-riding conduct should be presented by BVB in support of the parity requirements. It was noted that the pro-competitive effects were more likely when considering narrow parity requirements.
39. It was noted that OTAs promote inter-brand competition between accommodation providers through increased price transparency. OTA platforms also reduce consumer search costs. The parity requirements may support an OTA's business model by increasing conversion rates (the 'look to book' ratio) by ensuring that the room rates and inventory offered through their platform is superior. Displaying uncompetitive room rates or inventory may harm BVB's credibility with consumers.
40. The project group noted that further consideration would need to be given to whether the parity requirement (wide or narrow) is reasonably necessary or indispensable to obtain the benefits provided by BVB. Regarding the indispensability of the restraint consideration should be given to the specific features of the restraint, the parties adopting it, and the market in which the restraint will apply. In particular, consideration of whether other approaches/business models could be used to obtain the same benefits with a less competitively restrictive approach than a parity requirement. It was noted that approaches could include charging hotels a small amount for display in

⁴ See Attachment OPR-C.

Attachment A

Hypothetical One – Online Parity Requirement

each search request or for each 'click through' even if the consumer does not ultimately book the room.

Areas of further inquiry

41. The project group identified a number of areas for further inquiry by investigators assessing BVB's conduct, including:

Parity clauses

- a. Evidence of the scope of the parity clauses implemented by OTAs (e.g. standard terms, individually negotiated agreements)
- b. Market coverage of the parity clauses (e.g. are all accommodation providers subject to such restrictions?)
- c. Evidence of enforcement of the clauses (e.g. de-ranking, dimming, de-listing?)
- d. Evidence of the effect of the narrow parity requirements (e.g. do affected accommodation providers offer differentiated rates or inventory between OTAs? If not, is this because of the narrow parity requirement or for some other reason?)
- e. Evidence of other non-price factors affecting competition (e.g. reputation, quality)
- f. Use of alternative business models by OTAs (including in other jurisdictions)
- g. Evidence of indispensability of parity requirements (e.g. operations of BVB, FAR and other significant OTAs in other jurisdictions)
- h. Evidence of the economic rationale for the parity clause (i.e. investment protection, reputation and others)

Market definition and other considerations

- a. Evidence of consumer search and booking behaviour (are offline sales channels part of the same relevant market as online channels; do consumers consider/search websites of accommodation providers as well as OTA platforms; consumer views on the differences in functionality and ease of use of different distribution channels)
- b. Evidence of the effect of the parity requirements on OTAs (changes in shares of bookings per channel; changes in OTA market shares, including consideration of entrants; changes in OTA commission rates; changes in non-price competition between OTAs)
- c. Evidence of the effect of the parity requirements on online distribution channels controlled by the accommodation provider
- d. Evidence to enable a comparison of relevant distribution channels (functionality; cost; efficiency; consumer willingness to use)

Other

- a. Features of hotel websites relative to OTA websites (online visibility, instant booking functionality etc.)
- b. Impact of cross-channel room price and availability differentiation by hotels on their conversion rate on particular OTAs

Attachment A

Hypothetical One – Online Parity Requirement

- c. Degree of commercial and financial risk undertaken independently by OTAs
(are they genuine agents/independent entities for the purposes of competition law?)

Limited Fact Scenario – online parity requirements

Investigation of the effect on competition of parity provisions introduced by online travel agent (OTA) BestValueBed Pty Ltd.

Background information

OTAs

- OTAs are intermediary platforms that bring together accommodation providers and consumers who wish to book accommodation.
- OTAs provide an interactive search function, presenting results in an online list. An OTA may display up to 50 results on each page and provides multiple pages of results. The search results are often presented as a list of hotels recommended by the OTA, but the consumer can also choose to have the search results presented according to number of stars, location, price or reviews by previous customers. The order in which the hotels are displayed or "ranked" in the search results is determined by various parameters decided by the OTA. Research into consumer behaviour suggests that a significant number of consumers choose accommodation from within the first section of search results.
- OTAs and accommodation providers negotiate a commission that the OTA will receive for its services when a booking is made via its platform, a higher commission may be agreed where an accommodation provider seeks preferential listing.
- Three OTAs are active in this jurisdiction:
 - BestValueBed (BVB) – 25 per cent of total online accommodation bookings in this jurisdiction are made via its platform.
 - Find-A-Room (FAR) – 40 per cent of total online accommodation bookings in this jurisdiction are made via its platform.
 - Online Hotel Beds (OHB) - a recently launched OTA platform, 10 per cent of total online accommodation bookings in this jurisdiction are made via its platform.

Parity Agreements

- Parity agreements can take a number of forms, in the context of OTAs they are a vertical agreement between an OTA and an accommodation provider whereby the accommodation provider agrees to offer the OTA at least the same number and type of rooms, and/or at least as favourable a price, as it offers through any other booking channel, including other OTAs and its own website. There are some variations on this model.

Distribution and Marketing Channels

Accommodation is marketed and distributed in this jurisdiction via a number of online and offline channels.

- Offline: Telephone bookings, 'walk-in' bookings, customer loyalty and reward programs run by accommodation suppliers, bookings made through bricks and mortar travel agents (other than through their online booking platforms) and wholesale tour arrangements.

Online:

- OTAs
- Bricks and mortar travel agencies with an online presence, the number and variety of accommodation providers offered through such agencies is generally more limited than offered by OTA platforms
- Individual hotel websites
- Metasearch websites⁵ and
- Purpose Specific and Package Online Agencies⁶.

Alleged conduct

Online Hotel Bookings

- Online Hotel Bookings (OHB) operates a locally-based online platform, it began trading in 2015. OHB has approximately 10 per cent of total online accommodation bookings made in this jurisdiction.
- OHB has complained that the parity requirements of BVB and FAR are preventing it from competing effectively with BVB and FAR.
- OHB claims that it is offering a lower commission rate in order to attract accommodation providers to its site. OHB considers that its lower cost service allows accommodation providers to offer lower room rates via its site.
- OHB claims that it wants to grow its reputation as a competitive OTA with consumers and the lower commission rate is a key element in its strategy. OHB claims that hotels are willing to list rooms with it on the basis of the lower commissions but have stated that they are unable to offer lower pricing as sought by OHB as the parity agreements in their supply contracts with BVB and FAR prohibit them from doing so.
- OHB alleges that it is unable to gain market share because the room rates listed on its site are the same as those listed with BVB and FAR. It has argued that this cannot be effectively addressed through marketing or other strategies such as search optimisation.

Hoolten Hotels

- Hoolten Hotels (Hoolten) is a well-known, multinational hotel chain.
- It secures 40% of its bookings through OTA platforms; 15% through its offline loyalty reward program; 10% through traditional travel agents; 15% through its own website; and 20% through offline channels.
- Hoolten uses both BVB and FAR, the commission rates payable by Hoolten in 2014 were 14% and 20% for BVB and FAR respectively.
- In May 2015 FAR introduced the following parity requirements

⁵ Metasearch websites allow consumers to search for and compare offers from multiple OTAs and from the hotel itself for the same accommodation product (same hotel, same room type, same dates). Metasearch sites generally do not provide a booking service, but re-direct customers to an OTA or the hotel website to make their booking

⁶ Purpose Specific and Package Online Agencies (PSPOA), which offer search compare and online booking services for a range of travel options, including flights, accommodation, car hire and package deals. In addition to independent PSPOAs, this service can be provided through other online avenues such as airline websites

Attachment A

Attachment OPR-A – Online Parity Requirement Hypothetical scenario

9.2: The Supplier will offer FAR its rooms and packages at pricing levels equal to or less than those offered directly by the Supplier to consumers through the Supplier's own online and offline channels, including (but not limited to) the Supplier's website, telephone, e-mail and walk-in bookings.

9.3: The Supplier will offer FAR the same number of rooms and packages, and the same types of rooms and packages, as those offered directly by the Supplier to consumers through the Supplier's own online and offline channels, including (but not limited to) the Supplier's website, telephone, email, and walk-in bookings.

- In November 2015 BVB introduced the following parity clause:

15.3.1: BVB requires the Supplier at all times to offer its rooms and packages to BVB at pricing levels equal to or less than those offered by the Supplier through online channels controlled by the Supplier.

- In accepting the 2015 agreement Hoolten negotiated a revised commission with BVB of 12%.
- Hoolten alleges that BVB is seeking to achieve pricing and inventory parity across all platforms.
 - In March 2016 Hoolten offered a "Family Staycation" promotion – offering rooms with free upgrades to consumers who purchased packages through the FAR platform. Hoolten advises that it had negotiated an advantageous commission rate and search listing with FAR as part of its participation in the promotion on the FAR platform.
 - The Family Staycation promotion was also available through Hoolten's offline channels.
 - Three days after the campaign commenced, Hoolten received an email from BVB which advised it had seen Hoolten's inventory package on the FAR platform and requested that Hoolten immediately offer the same inventory on the BVB platform.
 - Hoolten declined this request and claims that almost immediately it noticed a significant drop in the number of daily bookings received through the BVB platform. Hoolten has claimed that this was the result of BVB 'dimming' its' listing on the BVB platform – dropping the listing from the first page of search results to the sixth page of search results. Hoolten claims that its bookings through BVB dropped around 40% during the promotional period but returned to normal levels after the promotion ended, and the hotel returned to the first page of BVB's search results.

Inquiries of BVB

- BVB operates a popular online platform which was established in 2012. In 2016 BVB had an annual turnover of \$US300 million. BVB estimates that 25% of all online travel bookings for accommodation in this jurisdiction are booked through its platform.
- BVB submitted that the primary aim of the parity clause was to address the risk of free riding by accommodation providers on its investment. BVB argued that investment in its platform would be sub-optimal in the absence of the parity clause leading to a loss of consumer benefit.
- BVB argued that its platform provides consumers a valuable ‘one-stop shop’ where they can search, compare and book accommodation. BVB maintained that without price parity requirements, some of the benefits to consumers would be lost because consumers would need to spend more time searching other platforms to be sure they have found the lowest price. BVB considers that its platform promotes competition between accommodation providers by increasing transparency about prices, quality and availability. BVB maintains that these pro-competitive benefits would be lost if its business model was undermined by the removal of parity requirements.
- In respect of Hoolten’s concern that it had been ‘dimmed’ as punishment for offering a lower price on another platform, BVB maintained that this was the result of a drop off in sales of Hoolten’s inventory and the ranking of its less competitive offer relative to other accommodation providers on the platform at the same time.

Market Research

- Research suggests that consumers in this jurisdiction typically utilise more than one OTA platform when searching for accommodation, switching between platforms to assess price and non-price offerings. Research also suggests that hotels seek to join multiple OTA platforms in order to gain access to each OTA’s customers.
- Generally, the proportion of bookings made by consumers directly with an accommodation provider is greater for larger providers due to stronger brand-awareness and repeat bookings driven by customer loyalty programs.
- Various factors can affect the share of accommodation bookings made through online channels, including time of year, location of accommodation and type of accommodation.
- On an annual basis online platforms account for 60% of total accommodation reservations within this jurisdiction. Bricks and mortar travel agencies, including those with an online presence, account for 20% of total reservations, proprietary distribution channels, including hotel websites, telephone bookings and ‘walk ins’, account for 20% of total reservations.

Vertical Restraints Project Group

The UCWG Co-chairs would like to thank the following members and NGAs for their contributions to this paper:

Competition Agencies

- Administrative Council for Economic Defense – CADE, Brazil
- Autorité de la concurrence, France
- Authority for Consumers and Markets, Netherlands
- Bundeskartellamt
- Competition and Markets Authority, United Kingdom
- Competition Bureau, Canada
- Competition Commission, Hong Kong
- European Commission
- Federal Trade Commission, United States
- Japan Fair Trade Commission
- New Zealand Commerce Commission
- Swedish Competition Authority

NGAs

- Carolyn Oddie, Australia
- Daniel Andreoli, Brazil
- Martim Della Valle, Brazil
- Silvia Fagá, Brazil
- Bernardo Macedo, Brazil
- Joyce Midori Honda, Brazil
- Antonio Di Domenico, Canada
- Rachel Brandenburger – European Commission
- Rafael Allendesalzar , Spain
- Grant Murray, United Kingdom
- Daniel Sokol, United States of America
- Robert Friedman, United States of America
- Kitri Gupta, United States of America
- Elisa Kearney, United States of America

Short summary of legal framework applying in ICN member jurisdictions

Australia

In Australia the legal framework requires consideration of the effect of the parity requirements on competition, a substantial lessening of competition will give rise to a contravention. The prohibition in Australia does not have direct regard to offsetting efficiencies or pro-competitive benefits. The Australian competition law provides for these factors to be considered under an authorisation (exemption) regime.

Austria

MFN-clauses (price parity agreements) may be subject to Art 1 Austrian Cartel Act ("ACA") or Art 5 ACA (cartels or abuse of a dominant market position), as well as to Art 101 and 102 Treaty on the Functioning of the European Union.

As in many other EU member states there have been investigations into price parity agreements of OTAs in Austria. Following the public discussions a per se prohibition of price parity agreements used by online booking platforms was introduced into the Austrian Unfair Competition Act ("UCA"). In detail, clause no. 32 of the annex regarding aggressive commercial practices states that "the demand of an OTA against a lodging enterprise not to offer more favourable prices or more favourable conditions as displayed on the booking platform on any other distribution channel, including their own website, is void".

Besides the per se prohibition of the UCA for OTAs, MFN-clauses may be in general assumed to restrict competition and will therefore in many cases fall within the scope of the cartel prohibition as well as, if used by a dominant undertaking, to constitute an abuse of a dominant position. However, a case-by-case analysis of the certain conduct in question will be required regarding possibly applicable exemptions.

Brazil

Under Brazilian competition law a company is prohibited from unilaterally abusing its dominant position in the market. A dominant position occurs when a company or group of companies is capable of altering, in a unilateral and concerted manner, the market conditions or when it controls twenty percent or more of the relevant market. In assessing whether unilateral conduct is an abuse of a dominant position economic efficiencies will be weighed against the potential anticompetitive effects.

Canada

In Canada, the Competition Act provides the legal framework for considering parity clauses such as the ones described in this hypothetical. In particular, sections 78 and 79 establish the abuse of dominance provisions. Abuse of a dominant position occurs when a dominant firm or a dominant group of firms in a market engages in a practice of anti-competitive acts, with the result that competition has been, is, or is likely to be prevented or lessened substantially. In order to assess this, the Competition Bureau will look to various factors such as direct and indirect indicators of market power, the primary purpose of the conduct, any pro-competitive or efficiency-enhancing rationale for the conduct, and qualitative and/or quantitative evidence of competitive effects.

European Union

Article 101 of the Treaty on the Functioning of the European Union ('TFEU') prohibits agreements between undertakings which have the object or effect of restricting competition and which may affect trade between EU Member States. The prohibition does not apply to agreements which satisfy the four conditions of Article 101(3) TFEU, i.e. they produce objective efficiencies; they allow consumers a fair share of the resulting benefits; they do not impose restrictions which are not indispensable, and they do not substantially eliminate competition. The burden of proving a restriction of competition lies with the claimant or enforcing authority; the burden of establishing the Article 101(3) efficiency defence lies with the parties to the agreement.

Retail MFN clauses, such as those in the Online Travel Agents hypothetical, are vertical agreements, i.e. the parties operate at different levels of the supply chain for the purposes of the agreement. Vertical agreements are exempted from Article 101 TFEU by the Vertical Agreements Block Exemption Regulation ('VBER'), provided they do not contain specified hardcore restraints (including retail price maintenance) and provided the market shares of the supplier and the buyer under the agreement do not exceed 30%. Retail MFN clauses are not currently treated as restrictions 'by object' and they are not hardcore restraints under the VBER.

The presumption of legality conferred by the VBER may be withdrawn by a competition authority where it finds that an individual agreement has effects which are incompatible with Article 101(3) TFEU, for example because the agreement makes a significant contribution to a cumulative effect produced by parallel networks of similar agreements. Such withdrawal decisions only produce effects *ex nunc*.

Outside the VBER, retail MFN clauses are subject to a full effects analysis, taking into account both actual and potential effects. The clauses are considered in their legal and economic context, including the counterfactual scenario. Any potential restrictive effect must be reasonably probable. Relevant factors include the nature and content of the agreement, whether the parties have market power, and whether the agreement contributes to the creation, maintenance, strengthening or exploitation of that market power. This implies that the relevant product and geographic market(s) must be defined. To fall within Article 101 TFEU, any restriction of competition must be appreciable.

Japan

In Japan the legal framework for considering parity requirements is provided for by the Antimonopoly Act (AMA). Relevantly the AMA provides that a party must not trade with another party on conditions which unjustly restrict any trade or other business activities of that other party. In the context of the parity requirements this requires consideration of whether the provisions have the effect of resulting in substantial restraint of competition, or whether such requirements tend to impede fair competition. This analysis will consider both anti-competitive and pro-competitive effects.

Turkey

The Turkish Competition Authority (TCA) amended of the Guidelines on Vertical Agreements (Guidelines) including the assessment of most favored customer clauses (MFC). The draft Guidelines concentrate on two main aspects of MFC practices; potential

price rigidity problems associated with such practices and general approach to MFC practices from the point of view of vertical agreements.

The TCA considers an MFC to be anticompetitive when the parties to the contract have higher market shares compared to the competitors in the market, the concentration level is high and the MFC beneficiary benefits from the clause at all times or the beneficiary punishes the contracted seller by increasing its costs when the contracted seller provides more favorable conditions to the competitors of the MFC beneficiary.

United States of America

Rule of reason - takes into account both the anti-competitive effects and the pro-competitive benefits of the conduct. Common considerations under a rule of reason analysis include the market power of the entities involved, the scope of the restraint, the number of entities within the market adopting the restraint and the restraint's source. The rule of reason approach considers whether the restraint is reasonably necessary to achieve the pro-competitive benefits.

Vertical Restraints Project

Hypothetical Two – Online Sales Bans

Introduction

1. A small group of volunteers from competition authorities and NGAs (the “project group members”, see **Attachment OSB-A**) has considered the second of the two hypothetical scenarios prepared as part of the vertical restraints project. The second scenario provided to the project group is set out at **Attachment OSB-B**.
2. The hypothetical considers ban on selling through online third-party platforms and online advertising ban. The project group has been invited to consider:
 4. possible theories of harm;
 5. arguments about pro-competitive effects that may be presented and factors relevant to these arguments; and,
 6. areas of further inquiry by investigators.
3. This report provides an outline of matters considered relevant by the project group members in assessing the hypothetical restrictions. The report seeks to highlight approaches to assessing them, including areas of divergence, however without identifying the views of contributing members of the project group.
4. A disclaimer applies: not all members of the project group agree that all of the factors and considerations summarised below are appropriate because project group members may evaluate them in different ways.

Overview of hypothetical scenario and restrictions

5. The hypothetical concerns various selective distribution agreements between three major manufacturers of baby strollers and their authorised retailers (both brick and mortar and online). By assumption, these agreements are generally considered legal. However, complaints have been received alleging that additional restrictions imposed by the three major manufacturers on their authorised retailers are contrary to competition law. The restrictions include the following:
 - a) Babydream (20% market share) prohibits all sales on third-party platforms and has a complete online advertising ban;
 - b) Wheelies (>30% market share) allows sales to third-party platforms if the platforms comply with the same conditions imposed on the retailers themselves; and
 - c) Sport 2001 (>30% market share) only allows lower/discounted goods to be sold by retailers on third-party platforms but sells all products itself on third-party platforms.

Attachment B

Hypothetical Two – Online Sales Bans

6. Between 2015 and 2017, the proportion of online sales of total sales of baby strollers has gradually increased (20% ⇒ 30% ⇒ 35%) and the proportion of online sales via third-party platforms has increased as well (20% ⇒ 30% ⇒ 40%). The retail landscape is populated by five large brick-and-mortar retailers, two large third-party platforms and other small online/offline retailers.

Legal frameworks

7. While different legal frameworks apply across ICN member jurisdictions, these frameworks generally include a form of effects test when assessing the above mentioned restrictions. In some cases, the framework also envisages per se prohibitions, the existence of presumptions of illegality and exemption for certain categories of agreements under certain conditions.
8. The restrictions at stake have been analysed by project group members under the general framework concerning agreements/restraints (in particular vertical). Some other members also applied the framework of abuse of dominance.

Relevant market

9. Responses received from the project group members noted that further information would be required in order to formulate the relevant product market definition while the geographic scope is assumed to be national in the hypothetical scenario. For the purpose of preliminary considerations the project group agreed that the **market for the retail sale of baby strollers** is a differentiated product market where brand image and reputation may play a role. In this regard, relevant issues to be further analysed in the context of market definition are whether:
 - discounted products are viewed to be substitutes to luxury baby strollers;
 - brick-and-mortar retailers are in the same product market as the online distribution channels; and,
 - third-party online platforms are in the same product market as other online distribution channels.

Theories of harm and pro-competitive effects

10. Some members of the project group commented that the above mentioned restrictions can have a detrimental impact on competition. At a high level, members of the project group have indicated the following possible theories of harm which would have to be corroborated by the specific facts of the case at hand:
 - a) **Reducing intra-brand competition:** restricting online sales through third-party platforms and online advertising can soften the pressure on retail prices and protect existing sales channels from competitive pressure from online channels, by directly limiting the choice of online consumers. This theory can be more plausible if the manufacturer sells online, since these restrictions can protect the manufacturer's own online channel from competitive pressure by other online retailers.
 - b) **Softening inter-brand competition:** if sales through third-party platforms is an important means of competition among the three manufacturers and their

Attachment B

Hypothetical Two – Online Sales Bans

respective retailers, the cumulative effects of above restrictions could limit competition across manufacturers under certain conditions, e.g., if brands are in the same relevant product market despite product differentiation and competition from other online channels and offline sources do not provide sufficient competitive constraints (see also paragraph 44).

- c) **Foreclosing existing or potential competition** (in particular, through third-party platforms but also other online channels) in the relevant market, especially in the long run, and this concern was raised by one member adopting a framework based on abuse of dominance. The general theory of harm suggested in this case is whether manufacturers are leveraging their position in the upstream market, i.e., the manufacture and wholesale of baby strollers, to give themselves advantages over their rivals in the downstream market, i.e., the retail sale of baby strollers to final consumers.
 - d) **Market partitioning where appropriate:** in the context of the EU framework, these restrictions may partition national markets according to national borders and frustrate the EU objective of achieving an integrated EU single market for the benefit of consumers.
11. However, some other members did not envisage any competition concerns. In particular, they stated that the complaints do not suggest that there is a horizontal agreement at any level of distribution, or that any of the manufacturers is engaging in anticompetitive conduct (through vertical restraints or other means) that hinders the ability of manufacturers to distribute their products or the ability of any retailers to compete.
12. By focusing only on inter-brand competition, these members stated that the restrictions imposed by the three manufacturers might be reasonably necessary to maximize efficiency across all distribution channels, identified in the number of five: 1) manufacturer websites, 2) large third-party online platforms, 3) smaller websites, 4) large brick-and-mortar retailers, 5) small brick-and-mortar retailers. All identified channels appear to be significant, with at least three competitors: therefore, competition in stroller distribution appears to be structurally competitive. Moreover, these members noted that the interests of retailers and manufacturers are never completely aligned and they might diverge significantly when a large portion of a manufacturer's sales do not go through the retailers.
13. One member recognised that while intra-brand competition is reduced by such restrictions, the information provided suggested that inter-brand competition could be expected to constrain the effect of the restraint in the retail market. This member considered that the effect on competition in the retail market for baby strollers was unlikely to be of a sufficient magnitude to warrant intervention.
14. In terms of **pro-competitive effects or business justifications**, members of the project group stated that the above restrictions can contribute to the promotion of competition on other factors than price:
- a) They can help protect brand image and the position of brand across the various distribution channels (e.g., creation of an environment meeting consumer's expectations on product information, services, etc.).
 - b) They can help to ensure quality of pre- and post-sale services (e.g., safety demonstrations). The services offered by third-party platforms are not controlled by the manufacturers, which often do not have a contractual relationship with the online marketplaces, allowing the former to enforce qualitative criteria on the latter.

Attachment B

Hypothetical Two – Online Sales Bans

- c) Additional potential justification (which could be brought up by manufacturers) could include the reliability of the platforms for delivery and payment.
15. While the above theories of harm and pro-competitive effects apply generally, considerations with respect to the particular restrictions adopted by each of the three manufacturers may differ as described in the subsequent sections. The key issues raised by the hypothetical restrictions in question are related to the impact of e-commerce on distribution networks and competition more generally:
- a) The **trade-off between price versus non-price competition**. E-commerce has the potential to intensify price competition through increasing the number of participants in the market and easier price comparisons by consumers. While price is often the key parameter for (online) retailers, manufacturers are also concerned with other factors, such as brand image, quality and innovation, which are potentially undermined by the free-riding problem. As a result, manufacturers may consider (some) online sales restrictions as necessary to better control for these other factors and preserve investments in high-level presale services, promotion and advertising. In other words, online sales may improve price competition while reducing non-price competition at retail level (absent manufacturers restrictions) and the former effect will not always be more important than the latter, both for firms and consumers.
 - b) The importance of intra-brand competition versus inter-brand competition in the assessment of the consumer welfare effects. In jurisdictions where the focus of the assessment is mainly on inter-brand competition, restrictions on online sales can be problematic only if there is market power at the manufacturing level. In jurisdictions focusing also on intra-brand competition, online sales restrictions at the distribution level affecting retailers selling products of the same brand can raise competition concerns.

Babydream's ban on selling to third-party platforms and wide ban on online advertising

16. Babydream prohibits all sales on third-party platforms and has a complete online advertising ban, including on retailers' own website⁷ and through the use of price comparison websites; in particular Babydream retailers are prohibited from using search advertising (i.e., from using/bidding on search ads for Babydream brand name). Members of the project group held different views on the potential competitive impact of the Babydream's restrictions. These views are summarised below.

View 1: no impact on retail competition

17. Some members of the project group, whose competition law focuses on inter-brand competition, noted that it is unlikely that these restrictions would violate competition law, absent any harm to inter-brand competition. They noted that both restrictions on online sales through third-party platforms and online advertising are unlikely to have material consequences for the viability of third-party platforms because its market share is 20%: the other two manufacturers, accounting more than 60%, allow the sale of baby strollers via third-party platforms under certain conditions. It was noted that, even when assuming that that Babydream's restrictions may undermine the viability of third-party platforms, such scenario is unlikely to materially harm inter-brand

⁷ That is, retailers can sell Babydream products through their webstore/app but only if consumers actively search for them e.g. they are not able to promote them on their own webstore/app.

Attachment B

Hypothetical Two – Online Sales Bans

competition due to limited market share of the third-party platforms (they account for 14% of total sales).

18. Some members of the project group recognised the importance of intra-brand competition and, in relation to the ban on **online sales via third-party platforms**, noted that the investigation would - based on the applicable case law in the jurisdiction - in a first step require an assessment of the necessity and proportionality of the restriction within the selective distribution system and only in the second step an analysis of the potential restriction of competition. They stated that the ban on online sales via third-party platforms is likely to be viewed as a legitimate requirement justifying the reduction in price competition, such as maintaining Babydream's brand image for high quality products and to protect investments by its retailers in pre- and post-sale services. According to the facts of the hypothetical, consumers attach a high importance to brand image and safety of the product and third-party platforms may offer less competition on these non-price dimensions. In addition, the ban is applied uniformly across the distribution network and Babydream itself is not selling to third-party platforms. Therefore, absent any contractual relationship between Babydream and third-party platforms, it might be difficult for Babydream to enforce even less restrictive qualitative criteria and monitor them on third-party platforms. Based on these considerations, the ban would meet the first step requirement and a further analysis of a potential restriction of competition would be unnecessary.

View 2: detrimental impact on retail competition

19. One member of the group noted that the total ban on **online sales via third-party platforms** could be a restriction that is presumed to have severely anticompetitive effects, irrespective of the market share of the firm concerned. In assessing the necessity and proportionality of the restriction, this member considered that such restriction in selective distribution systems could be justified only for luxury goods for which brand image and reputation are a distinct feature, a view that was not shared by other members (see paragraph above). It argued that in the market for the retail sale of baby strollers, brand image and reputation could be achieved with less restrictive means, e.g., quality requirements for the third-party platforms. In addition, it observed that severity of such restriction has to be analysed in light of the growing relevance of online platforms as gateways to end customers, especially for small and medium-sized online retailers, as it can be derived from the hypothetical facts.
20. In relation to the **wide ranging online advertising ban**, some members of the project group conducted a similar type of assessment suggested for the online sales platform ban (see paragraph 18), i.e., an evaluation of necessity and proportionality of the clause within the selective distribution system, concluding that such ban is likely to go beyond what is necessary to achieve a legitimate aim. For these members, such a wide online advertising ban does not appear to pursue any legitimate objective of promoting brand image or investing in safety demonstrations. On the contrary, its main purpose appears to be the reduction of (i) competitive pressure by authorized retailers on Babydream's own online retail activities and (ii) Babydream's bidding costs in the case of online search advertising. It would therefore likely amount to a restriction of competition, on its own or in conjunction with the online sales platform ban.
21. According to these members, while Babydream retailers are in principle able to sell its product on their websites and presumably their websites comply with Babydream's qualitative criteria, they are prevented from actively approaching customers via targeted online advertising or by generally advertising for their website online. Thus, retailers would not be able to generate any meaningful traffic on their websites, as the ban undermines their ability to attract consumers to their websites: consumers searching for Babydream's baby strollers would be unable to locate the online offers of

Attachment B

Hypothetical Two – Online Sales Bans

the retailers. Furthermore, it was noted that such restrictions may distort competition in relation to the acquisition of online search terms, by preventing a retailer from participating in an auction for search terms that are likely to capture the Babydream brand name or its particular products. In conclusion, the advertising ban could limit intra-brand and possibly inter-brand competition and, in the European context, partition markets (by reducing the ability of retailers to advertise and sell to customers outside their area of activity and cross border between Member States of the EU, using internet).

22. One member noted that, if the relevant market is considered to be the online retailing segment comprising manufacturers websites, retailers' websites and third-party platforms, all Babydream's restrictions can be caught under the provisions prohibiting: exclusive dealing with the ultimate objective of excluding online distribution channels (third-party platforms) through input foreclosure; and/or, discriminatory practices. In particular, under the exclusive dealing provision, such restrictions would be "per se" illegal, i.e., without any further examination from the competition agency which would use a rule of reason approach to analyse them under the discriminatory practices framework.
23. Finally, for some members of the project group, an **effects-based approach** is needed to assess whether the impact of Babydream restrictions is detrimental on retail competition as described in paragraph 10 above, points a), b) and c).
24. One member applying the abuse of dominance framework highlighted that it would be necessary to assess whether: i) Babydream has market power in the upstream market according to the leveraging theory mentioned in paragraph 10 c) above; ii) the intent behind Babydream's restrictions is to exclude online third-party platforms in the downstream markets; and, iii) the effects of the conduct.
25. In any event, the effects based approach would require further analysis on factors listed in the section below.

Areas of further analysis

26. For a more comprehensive effects-based analysis on the impact of Babydream restrictions on retail competition, project group members highlighted several factors requiring further investigation which can be grouped as follows:
 - a) Intra-brand competition analysis: e.g., difference in prices between strollers sold directly by Babydream and those sold by authorised retailers; analysis of consumer ability to find the online offers of authorised distributors (e.g., how often consumers use price comparison websites and their relevance); importance of online advertising to intra-brand competition; more generally, analysis of sales data to evaluate the effects of the restrictions, especially on online retailers who do not have brick-and-mortar stores: for instance, the analysis of intra-brand competition for Wheelies baby strollers (which are not constrained) could represent a good counterfactual scenario to assess the effects of Babydream's restrictions; comparison with other geographic markets where restrictions do not apply;
 - b) Competition analysis of the distribution channels: whether retail competition from offline sources or non-platform online sources are good substitutes for retailing through platforms.
 - c) Inter-brand competition analysis: substitutability of Babydream baby strollers with rival brands sold through platforms or through any other means, from a consumer

Attachment B

Hypothetical Two – Online Sales Bans

perspective (the weaker inter-brand competition the larger the anticompetitive effects on intra-brand competition of the above restrictions); the closeness of competition (analysis of prices and margins among manufacturers' rival brands, product positioning and reputation); evolution of market shares over time and evidence of new entry or expansion of the small existing manufacturers.

- d) Analysis of the intent: for example, an analysis of internal records to find whether Babydream uses these restrictions as a means of better controlling prices and discounts being offered in the online environment (and therefore reducing intra-brand competition) with the result that consumers pay higher prices for the products (as is alleged by some retailers).
 - e) Evaluation of the business justifications: for instance, if there are costs savings in implementing these restrictions rather than having to police the conduct of each online retailer to ensure that they have measures and policies in place to protect the quality of each brand.
27. In addition to this analysis of the retail markets, the member of the project group applying the framework for abuse of dominance also indicated several factors for the analysis of dominance in the upstream market of the manufacturing, including the analysis of the stability and durability of market shares, the entry conditions and the countervailing buyer power of retailers (e.g., if there are retailers who refuse to carry the products of Babydream due to the restrictions imposed or retailers who are large enough to obtain more favourable terms in their distribution agreements).

Wheelies “equivalent” criteria required for selling through third-party platforms

28. Wheelies permits authorised retailers to sell Wheelies' products on third-party platforms, provided that the platform meets the same qualitative criteria as the retailer or equivalent ones. All members of the project group considered that such a restriction is unlikely to raise competition concerns and appears to be justifiable in light of the legitimate objectives of protecting brand image and investments in pre- and post-sale services. In addition, there is no indication that these criteria are applied in a discriminatory fashion.
29. However, it was noted that this restriction might soften intra-brand competition, by limiting the ability to sell to customers, if third-party platforms that do not meet the equivalent criteria are an important sales channel, and/or these criteria are applied in a discriminatory manner.
30. Whether third-party platforms can and do comply is not stated in the hypothetical, but it might be impossible for them to comply. In that event, according to one member, Wheelies effectively imposes the same restriction on sales on online platforms as the one imposed by Babydream.
31. Therefore, further analysis might be required on the definition by Wheelies of “equivalent” conditions on third-party platforms and their implementation.

Attachment B

Hypothetical Two – Online Sales Bans

Sport 2001 ban on selling high-end products through third-party platforms

32. While retailers are allowed to sell some of Sport 2001's models (the lower-end models) on third-party platforms, the sale of other models (e.g. the high-end models) is contractually restricted. Members of the project group held different views on the potential competitive impact of the Sport 2001 restrictions. These views are summarised below.

View 1: no impact on competition

33. According to the members of the project group who did not envisage any competition concerns generally (see paragraphs 11 - 13), Sport 2001 ban is much less restrictive than those of either Wheelies and Babydream and therefore they would not be investigated.

View 2: detrimental impact on retail competition

34. Some members of the project group considered there can be an impact on competition. The theory of harm to be investigated by these members is whether such restriction has the potential to reduce intra-brand competitive pressure for high-end Sport 2001 products, by limiting the ability of resellers to sell high-end Sport 2001 products to customers, especially if third-party platforms are an important sales channel. In a first step, the necessity and the proportionality of the restriction within the selective distribution system of Sport 2001 would have to be assessed to ascertain whether such restriction serves a legitimate objective which could be the maintenance and protection of the brand image of high quality goods. In a second step, an analysis would be required to determine whether the restrictions has the object or the effect of restricting competition.
35. According to these members, it is unlikely that the restriction at stake serves the objective of protecting brand image. Sport 2001's argument - that it needs to control the environment on third-party platforms by itself in order to protect its brand and that retailers are unable to do that - appears to be inconsistent: because Sport 2001 is already in a contractual relationship with the major third-party platforms, the manufacturer may also have the means to ensure an environment that protects its brand, thus raising the question as to why its retailers should not be allowed to similarly sell the products in such an environment. In addition, the sales of lower-end products by retailers on third-party platforms will affect the reputation of "all" Sport 2001 products, including the higher-end ones. Furthermore, these members noted that Sport 2001's restrictions are not being applied uniformly (Sport 2001 sells on third-party platforms itself) and less restrictive options are available (like in Wheelies). Finally, the protection of a certain level of quality of pre- and post-sale services and the feedback on brand image cannot be considered a justification since Sport 2001 distributes its products on the major third-party platforms.
36. Given the above considerations, these members concluded that Sport 2001 ban may violate their competition law as the ban may primarily serve the purpose and possibly have the effect of better controlling prices and protecting Sport 2001's offer of high margin products from price competition.
37. One member assessed this restriction under the exclusive dealing prohibition and discrimination practices provision, offering a similar analysis to that one provided for Babydream restrictions (see paragraph 22).

Attachment B

Hypothetical Two – Online Sales Bans

38. For other members of the project group, an **effects-based approach** is needed to assess whether the impact of Sport 2001 restrictions is detrimental on retail competition as described in paragraph 10 above, points a), b) and c).
39. One member applying the abuse of dominance framework highlighted that it would be necessary to assess whether: i) Sport 2001 has market power in the upstream market according to the leveraging theory mentioned in paragraph 10 c) above; ii) the intent behind Sport 2001 restrictions is to exclude online third-party platforms in the downstream markets; and, iii) the effects of the conduct.
40. The effects-based approach would require further analysis on factors listed below at paragraph 41.

Areas of further inquiry

41. For a more comprehensive effects-based analysis of the impact of Sport 2001 restriction on retail competition, project group members highlighted several factors requiring further investigation which can be grouped as follows:
 - a) Analysis of the intra-brand competition for the Sport 2001 high-end products: the competitive constraints posed by retailers' own websites (which are free to advertise without constraint); the extent to which consumers buying high end products switch from third-party platforms to other online channels; the impact of the ban on retail prices (e.g., to check whether the prices set by Sport 2001 on the third-party platforms may possibly influence the prices offered on other sales channel since it holds more than 30% of market shares); the level of substitutability between high-end and discounted products of Sport 2001 (e.g., the lower substitutability the larger the potential anticompetitive effects on intra-brand competition).
 - b) Analysis of inter-brand competition and competition across distribution channels as mentioned for Babydream (see paragraph 26 above).
 - c) Analysis of the intent and business justifications (see points c and d of paragraph 26).
42. In addition to this analysis of the retail markets, one member of the project group applying the framework for abuse of dominance also indicated additional elements for the analysis of dominance in the upstream market of the manufacturing, similarly to those indicated for Babydream in paragraph 27.

Final remarks

43. Specific areas of further investigation have been already indicated in the previous sections and include the definition of relevant markets (see paragraph 9) and the assessment of potential and/or actual effects of the restrictions imposed by each manufacturer.
44. At a more general level, one area of further investigation relates to the cumulative effects on inter-brand competition of the restrictions put in place by the three manufacturers. It is useful to recall that Babydream is not sold through platforms at all, Wheelies is sold through platforms by both the manufacturer and retailer (as long as retailer criteria are met), and only the Sport 2001 manufacturer sells all models of its stroller through platforms while retailers cannot sell high-end models. In this context, the following elements have been suggested:

Attachment B

Hypothetical Two – Online Sales Bans

- a) whether the baby strollers of Wheelies (whose sales are not restricted on third-party platforms) provide a sufficient competitive constraint to the brands of the other two manufacturers;
 - b) whether the costs to Babydream and Sport 2001 of foregoing or limiting sales through third party platforms are outweighed by the benefits of reduced competition among manufacturers;
 - c) to what extent the criteria for selecting authorised retailers within each distribution system may differ across manufacturers and whether there are legitimate reasons for any difference; and,
 - d) reasons why the assessments of whether such criteria can be met by the various retailers may differ across manufacturers.
45. Finally, another area of further inquiry relates to the assessment of collective dominance and this would require assessing whether a group of manufacturers holds market power together and how vigorously they compete with each other.

List of the project group members

This report is based on the assessments received from the following members and NGAs:

Competition Agencies

- Administrative Council for Economic Defense – CADE, Brazil
- Australian Competition and Consumer Commission
- Bundeskartellamt, Germany
- Competition and Markets Authority, United Kingdom
- Competition Bureau, Canada
- Competition Commission, Hong Kong
- Department of Justice and Federal Trade Commission, United States
- European Commission
- Japan Fair Trade Commission
- Indonesian Competition Commission
- Swedish Competition Authority
- Turkish Competition Authority

NGAs

- Urška Petrovčič, NGA for the European Commission

The report has also benefited from additional comments from other agencies and NGAs

- Office for the Protection of Competition, Czech Republic
- Grant Murray, Baker & McKenzie LLP, NGA UK
- Alvaro Ramos, Qualcomm, Spain NGA
- Rachel Brandenburger, EU NGA
- Silvia Fagá de Almeida, Director, LCA Consultores, Brazil NGA

Hypothetical Scenario – online sales bans

Facts of the Hypothetical

- Baby strollers are an important product for consumers:
 - o Most consumers will purchase baby strollers only once or twice.
 - o Brand image plays a significant role in consumer decision-making.
 - o Safety is very important to consumers.
 - o Pre- and post-sales service are deemed important (e.g. safety, ease of use) by consumers.
- Broad range of products on the market
 - o Each manufacturer has products in different price ranges, from discount to luxury products.
 - o Branded and white label products (a white label or private label is manufactured by one company and packaged and sold by other companies, e.g. retailers under various brand names).
- Main manufacturers: Babydream, Wheelies & Sport2001
 - o Wheelies and Sport2001 each have a market share exceeding 30 % and Babydream has a 20 % market share; other niche companies exist that have market shares <5%.
 - o assume market is national.
 - o Manufacturers invest heavily in branding, advertising, online presence and product development.
- Retail landscape
 - o 5 large national retail chains with strong brick and mortar presence .
 - o limited number of independent shops.
 - o Two large 3rd party online platforms (Tiber and eHarbor).
 - o and many more smaller online retailers.
 - o The main stroller manufacturers also have their own websites through which they sell, as described below.
 - o brick & mortar stores are considered important by manufacturers for pre- and post-sales services and building brand image.
- Sales
 - o Total offline sales account for 65% of total baby stroller turnover.
 - o Online stroller sales are increasing - for 2017 they accounted for 35% of turnover (30% in 2016 and 20% in 2015).
 - o 40% of total online sales in this sector are made through 3rd party platforms and 60% through manufacturers and retailers own websites. (This was 30%-70% in 2016 and 20%-80% in 2015.).

Selective Distribution

- Main manufacturers Babydream, Wheelies & Sport2001 all sell directly to consumers and through retailers. All three manufacturers sell through each of the five large retail chains. However, they do not all sell through all of the independent retail shops (i.e., each independent shop may sell only one or two of the three manufacturers products).
- They all use Selective Distribution, that is a distribution system whereby a manufacturer enters into (vertical) agreements with a number of retailers, selected on the basis of certain qualitative criteria set by the manufacturer. According to these agreements, selected retailers are authorised to sell manufacturer's products only directly to final consumers or to other authorised retailers of the same manufacturer.
- All distribution agreements contain criteria which require retailers to take steps to protect and promote the brand's image, e.g. high quality presentation of the strollers, and invest in safety demonstrations (i.e., provision of explanations of the features of the brand and safe operation).
- All retailers employed by the three manufacturers are authorised distributors according to their selective distribution agreements.
- Selective distribution does not involve exclusivity: all large retailers carry all three manufacturers' brands. Some receive better discounts from a particular manufacturer for historical reasons, or because of their willingness to invest in safety demonstrations. However, these distribution agreements do not contain any pricing policy terms (e.g., minimum advertising price or retail maintenance price).
- Retailers are not required to have a brick & mortar store to meet the selective distribution criteria, however they should meet equivalent qualitative criteria in an online environment.

Babydream (20% market share) selective distribution agreements:

- Retailers are allowed to sell Babydream strollers online using their own webstore/app.
- Retailers are not allowed to sell Babydream's stroller on 3rd party platforms (e.g. Tiber and eHarbor); similarly, they are not allowed to use price comparison websites.
- Babydream has its own online distribution channel but does not sell on 3rd party platforms either.
- Additionally, retailers are not allowed to online advertise Babydream brand (including on their own website⁸), and in particular they are prohibited from using search advertising (i.e., from using/bidding on search ads for Babydream brand name).
- Babydream considers the above restrictions important to maintain its brand quality and reputation, and protect its investment in pre- and post-sales services.

Wheelies (>30% market share) selective distribution agreements:

⁸ That is, retailers can sell Babydream products through their webstore/app but only if consumers actively search for them e.g. they are not able to promote them on their own webstore/app.

Attachment B

Attachment OSB – B Online Sales Bans Hypothetical Scenario

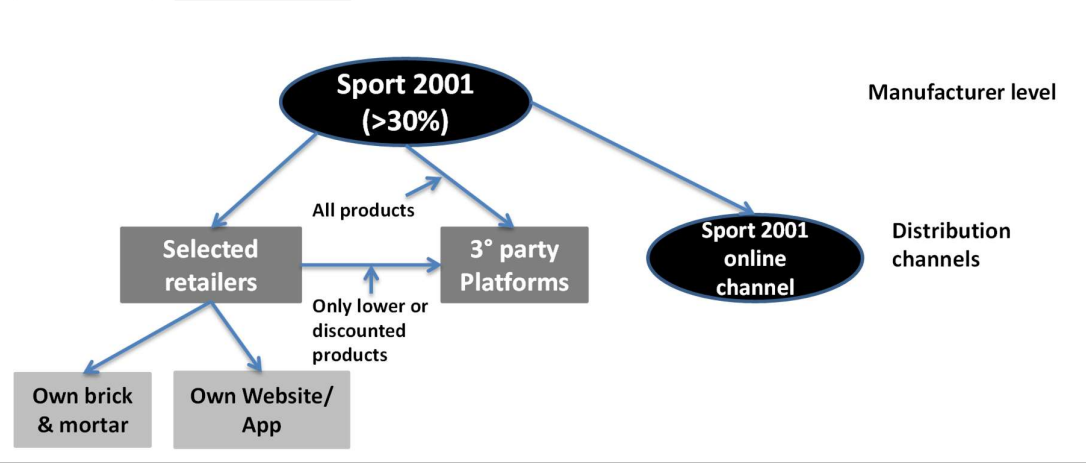
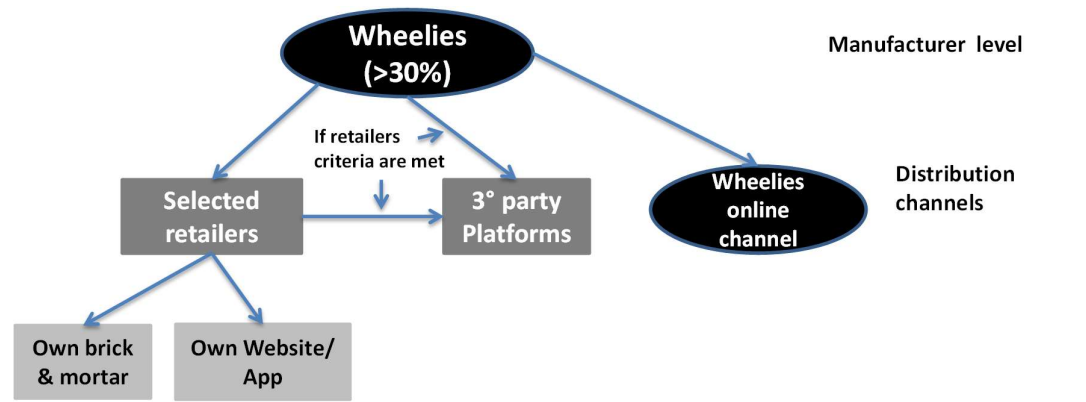
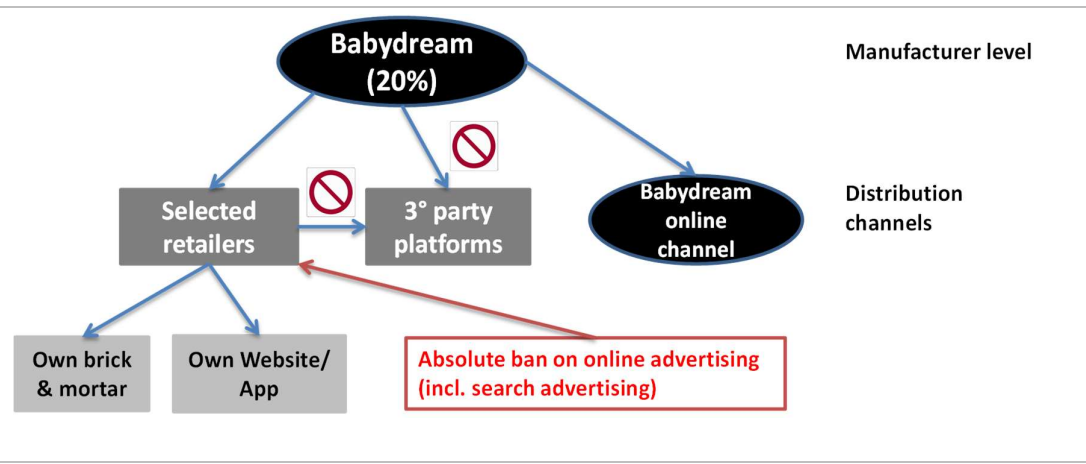
- Retailers are allowed to sell online using their own webstore/app.
- Retailers are allowed to sell Wheelies' products on 3rd party platforms (e.g. Tiber and eHarbor), but only if the 3rd platform meets the same qualitative criteria as the retailer.
- Retailers are allowed to use price comparison websites.
- Wheelies has its own online distribution channel and sells on 3rd party platforms under the same conditions as its retailers.

Sport 2001 (>30% market share) selective distribution agreements:

- Retailers are allowed to sell online in their own webstore/app.
- Retailers are allowed to sell some of Sport 2001's models (mainly lower end products or discontinued models) on 3rd party platforms.
- Retailers are allowed to use price comparison websites.
- Sport 2001 has a strong presence on the major 3rd party platforms and sells its entire catalogue online, including on 3rd party platforms.
- Sport 2001 argues that it needs to control the environment on 3rd party platforms by itself in order to protect its brand and that retailers are unable to do that.

Assume: all three selective distribution agreements are generally considered legal, except for the questions regarding the platform ban clauses they contain. They are summarised below.

Attachment OSB – B
 Online Sales Bans
 Hypothetical Scenario



Stroller Platform Ban Task Force

You have been chosen to head up the Stroller Platform Ban Task Force to investigate complaints your authority received from various retailers:

- Some retailers complain that not being allowed to sell on 3rd party platforms prevents them from competing online. Some prefer 3rd party platforms as it is more difficult and expensive to attract consumers to their own websites, especially if online advertising is also restricted.
- Several retailers of Babydream products complain that the absolute online advertising ban (and in particular the search advertising ban) significantly limit their visibility to potential purchasers in the online environment, thus compromising more generally their ability to compete against the other retailers.
- Some retailers complain that it is unfair that Sport2001 can sell its entire catalogue on 3rd party platforms but retailers are restricted to a smaller part of the catalogue (generally lower margin products). They consider this cherry picking by their manufacturer which doubles as a competitor as a retailer. They argue that Sport 2001's intent is to better "control" prices and discounts being offered in the online environment.

You are invited to assess the compatibility with the competition law of your jurisdiction and in light of the facts of this hypothetical scenario of the 3rd party platform ban on sales and the absolute ban on online advertising (including search advertising), by highlighting in particular:

- their potential anti-competitive effects (theories of harm);
- their potential pro-competitive effects and/or business justifications, and
- areas of further inquiry by your Task Force.

You are encouraged to have regard to the ICN's Unilateral Conduct Workbook as it relates to their analysis.

A report presenting this analysis will be prepared for consideration by the Unilateral Conduct Working Group.