



International Competition Network

Online Vertical Restraints Special Project Report

2015 International Competition Network Annual Meeting



Prepared by the Australian Competition and Consumer Commission



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ICN 2015 Online Vertical Restraints Special Project

Executive summary

In late 2013, the International Competition Network (ICN) decided to commence a project focussed on the internet economy and practical issues regarding the application and interpretation of competition laws to e-commerce. It was decided that this topic—motivated by significant growth and development in online commerce over recent years—would be most appropriately dealt with as a multi-year project limited to online vertical restraints, which were considered to be the issues of highest practical relevance for agencies.

The ICN Steering Group decided that the online vertical restraints project should cover:

- the extent to which online vertical restraints are, or should be, prioritised by the ICN membership
- whether, and to what extent, existing legal frameworks, investigative tools, and analytical tools in ICN member jurisdictions are able to deal with online vertical restraints effectively
- what recommendations could or should be made by the ICN in relation to online vertical restraints.¹

2015 ICN Annual Meeting special project

The Australian Competition and Consumer Commission (**ACCC**) agreed to undertake the stocktaking aspects as the 2015 ICN Annual Meeting special project.

Following feedback from ICN members and NGAs, the following types of online vertical restraint conduct were selected as the focus of the project:

- (i) Resale Price Maintenance (RPM)
- (ii) Resale Price Maintenance facilitating conduct (RPM facilitating conduct) including Minimum Advertised Price Agreements (MAPs) and dual pricing restrictions
- (iii) Across Platform Parity Agreements (APPAs)
- (iv) Online sales bans or limitations.

The project also considers Geographic Price Discrimination (GPD).

By conducting this special project, the ACCC seeks to provide the Steering Group with a clearer understanding of:

¹ICN Steering Group teleconference, 15 January 2014.

- the differences and similarities of the legal frameworks in ICN jurisdictions in relation to online vertical restraints
- the prevalence of online vertical restraint conduct within ICN member states
- the degree to which the ICN members consider online vertical restraints to be a priority issue
- the degree to which ICN members are able to address online vertical restraints, or would be able to if they chose to do so, using existing analytical frameworks and investigative tools and within their existing legal framework.

The findings in this paper are based on the views, data and case examples provided by a broad range of ICN members in responses to a survey conducted by the ACCC (to which 47 responses were provided). The ACCC has also reviewed the economic framework used to evaluate vertical restraints and done additional research on relevant case studies to supplement the survey data. In particular, this paper integrates the survey results into the economic framework, in order to consider options for future ICN work in this area.

This paper builds on previous international work undertaken in this area, including the Organisation for Economic Development and Cooperation's (OECD) Roundtable on Vertical Restraints for Online Sales (2013).²

Why are online markets important?

Rapid developments in online commerce provide substantial opportunities for enhancing competition, and thus efficiency and welfare, by making markets more transparent, lowering consumers' search costs, expanding the boundaries for trade and facilitating the emergence of new business models. As a result, consumers are likely to benefit from an expanded range of suppliers, goods and services, as well as a greater ability to shop around, compare prices and find the products and suppliers that best meet their needs.

A key issue for this project is the impact that the use of vertical restraints has on the realisation of the potential benefits of online markets. In particular, does the use of online vertical restraints raise new issues that cannot be dealt with adequately by existing analytical, investigative and legal tools? If this is the case, the potential benefits of developments in online markets may not be fully realised.

Economic framework for assessing online vertical restraints

The ACCC's review of the economic literature, survey responses and case studies suggests that the economic framework used to assess the competitive effects of vertical restraints in traditional offline markets is also used for assessing vertical restraints in online markets. This

²Organisation for Economic Development and Cooperation's (OECD) Report on the Roundtable on Vertical Restraints for Online Sales (2013) DAF/COMP(2013)13.

framework indicates that vertical restraints can be pro-competitive, benign or anti-competitive, depending on the particular circumstances.

In this regard, vertical restraints in online markets can be pro-competitive if they improve coordination through the distribution chain by addressing market failures and aligning incentives. There are a number of possible sources of market failure that can arise in both online and offline markets and it does not appear that new sources are emerging in online markets. However, the nature and form that these market failures take in online markets may differ. Four main types of potential market failure are most commonly raised in relation to online markets:

(a) The potential for free-riding on the provision of retail services

- i. A free-rider problem in the provision of retail services may arise if a retailer cannot fully appropriate the returns from providing these services. The most common scenario is the potential for free-riding by low-cost, price discounting online sellers on the retail services provided by traditional offline sellers, such as in-store demonstration and trained sales staff.
- ii. Low-cost platforms (and direct supply) may also be able to free-ride on rival platforms' investments in retail services such as online reviews and advice in relation to products sold. These investments might themselves be a response to the problems consumers can otherwise face dealing with potential "information overload" in the online marketplace, as well as the difficulties that online sellers can face in competing effectively to sell experience and credence goods.³
- iii. Faced with potential free-riding on retail services, suppliers might consider the use of vertical restraints that reduce price discounting, such as RPM, or restrict the supply of a product to retailers that provide the required retail services. Restrictions on selling outside a particular territory may also be used. However, the effectiveness of exclusive territories may be reduced by growth in online markets, which make it easier for consumers to locate and trade with lower-price online sellers located outside the particular exclusive territory in which they are located.
- iv. It is unclear the extent to which developments in online markets have changed the potential for free-riding on the provision of retail services by offline retailers. On the one hand, the ease and convenience of online shopping could increase the prevalence of free-riding on offline stores' investments in services that enable consumers to experience a product prior to purchase. This may be a particular issue if sensory experiences are important to generate sales. On the other hand, the ease of searching online and the large quantities of information available online may weaken the potential for free-riding by displacing or reducing the role of traditional retail sales persons in effectively promoting complex products.

³ The term 'experience goods' refers here to those goods and services whose value can only be assessed upon consumption, such as a dining experience. 'Credence goods' refers here to goods whose value consumers cannot accurately assess even after consumption and for which they must rely on expert opinion or representations by the seller in order to assess, such as organic foods.

- v. In addition, as online sellers increasingly focus on non-price aspects of competition and make investments in services which assist consumers to navigate the vastly increased choices available in online markets, it is possible that free-riding may actually work in the opposite direction: that is offline retailers might free-ride on retail services provided by online sellers. For example, consumers might spend time researching products using information and reviews provided by online sellers, but ultimately purchase a product from an offline retailer.
- (b) The potential for free-riding on retailers' investments in quality certification and protection of brand image
- i. Some retailers have an established reputation that consumers trust. This can provide consumers with certification as to the quality of products stocked by the retailer. In a similar way to free-riding on retail investments, market failure may arise if retailers that do not have an established reputation are able to free-ride on the reputation and quality certification made by other retailers. If retailers have inadequate incentives to invest in quality certification, then manufacturers whose products are stocked by the certifying retailer and consumers who value the quality guarantee provided by the retailer would be harmed. The use of RPM and restrictions on online sales might be considered in these circumstances.
 - ii. Brand image is often a particular concern for luxury or prestige brands, particularly if the price of a product, relative to other products, and the retail environment in which it is sold, conveys information about quality to some consumers. If this is the case, then price discounting can actually reduce the value of the brand to those consumers, by reducing perceptions of the product's quality or status. Vertical restraints such as RPM or some restrictions on online sales might be considered in these circumstances in order to protect the brand's prestigious image. However, the effect of higher prices on other consumers also needs to be considered.
 - iii. Developments in online markets might raise new issues for quality certification and protection of brand image if the main focus of online sellers is price competition. Suppliers of prestige brands, in particular, may be concerned about a potential loss of image and a reduction in sales in the longer term as a result. However, as online business models continue to evolve, it appears that some online sellers are also focusing on non-price aspects of competition including investments in reputation.
- (c) Information asymmetries
- i. Developments in online markets might create new sources of information asymmetries between buyers and sellers in online markets, particularly for experience and credence goods. In particular, online sellers may have more information than consumers about the quality and attributes of products and services available online because consumers are not able to physically inspect a product prior to purchase.

- ii. In addition, as many online retailers do not have an established offline presence, consumers might have relatively less information about the quality and reputation of some online sellers than they do about offline sellers. In these circumstances, more resources might be directed to low-quality products and retailers than is optimal.
 - iii. As with concerns about quality certification and protection of brand image, it is not evident that information asymmetries will ultimately be of greater concern in online than traditional markets. In particular, online sellers appear to be increasingly competing on non-price aspects that could help to reduce information asymmetries. For example online retailers may offer favourable delivery and returns policies that help to develop confidence in the retailer's quality. Online platforms are also increasingly offering consumers the opportunity to provide feedback about online sellers on the platform. Over time, as consumers' experience with online sellers increases, it might become easier for consumers to identify reputable online sellers, thus reducing the prevalence of information asymmetries.
- (d) Demand uncertainty
- i. It can sometimes be difficult for entrants to find a retailer/distributor to sell a new product, particularly if the seller has to incur sunk promotional costs and demand for the new product is uncertain. The potential for other sellers to free-ride on the initial seller's promotions can mean that the product will not enter the market. Alternatively, if entry does occur, the potential for free-riding could mean that the new product is inadequately promoted and thus ultimately fails, to the detriment of inter-brand competition.
 - ii. Entrants might consider the use of vertical restraints such as minimum-price RPM or MAPs and/or selective distribution (including some restrictions on online sales) when seeking to launch a new product. These vertical restraints might help to provide better incentives for retailers to stock and promote a new product adequately.
 - iii. Developments in online markets might also help to address some of the difficulties of entering new markets, and thus the incidence of vertical restraints in response. For example, in online markets it is increasingly wholesalers / manufacturers rather than retailers who ship a product direct to the consumer. This can reduce the need for retailers to hold inventories of a new product. Suppliers are also increasingly using social media to raise awareness of a product prior to its launch. This helps to reduce demand uncertainty, particularly if a product has already been released in a different market. It also encourages consumers to actively seek out the new product and reduces the need for traditional promotional activity.

Where evolving market mechanisms alone are insufficient to address potential market failures, the use of vertical restraints might be considered. However, as in traditional offline markets, the use of vertical restraints in online markets can also raise competition concerns if they are used to protect or enhance incumbents' market positions.

The main theories of harm in relation to online vertical restraints are:

(a) Foreclosure of rivals

- Foreclosure concerns typically focus on online sellers (including direct sales). In this regard, vertical restraints, such as limitations on online sales and dual pricing, may reduce online retailers' access to products, thus raising prices and restricting consumer choice. If the product is a 'must have' product, an online retailer's ability to compete effectively to sell other products may also be reduced.
- Rival suppliers' access to customers may be foreclosed if a supplier enters into exclusive distribution arrangements with key distributors and the rival consequently has to use less efficient distribution or set up its own distribution network.
- Rival platforms may be foreclosed if their ability to access suppliers and/or customers is restricted. For example, an APPA may raise barriers to entry of a new platform by restricting an entrant's ability to compete by offering sellers lower commissions/fees. An APPA can also protect a platform from disintermediation and competition from a seller selling directly to consumers through its own website.

(b) Softening of competition

Vertical restraints such as RPM can directly soften competition between retailers that sell a particular product. This is the reduction in intra-brand competition. However, vertical restraints might also be used to soften competition between suppliers of competing brands (inter-brand competition) if they enable a supplier to commit to higher prices and rival suppliers respond by also competing less aggressively.

(c) Facilitate collusion

- Vertical restraints, such as RPM, can facilitate upstream collusion between suppliers by making prices more transparent, reducing the incentive to deviate from a collusive arrangement and making any such deviations easier to detect.
- In downstream markets where retailers collectively have sufficient market power to induce upstream suppliers to impose vertical restraints, those restraints (particularly RPM) can provide a focal point for retailers and increase their ability to coordinate on higher, more profitable retail prices. In addition, RPM makes it easier to detect retailers that 'cheat' or deviate by reducing retail prices. Finally, as it is the supplier that punishes deviating retailers, the stability of retail collusion could be facilitated in markets where it might otherwise be difficult for punishment to occur.
- An APPA may facilitate collusion between platforms by reducing a platform's incentives to deviate from a collusive arrangement by offering lower fees to sellers on the platform. An APPA may also improve a platform's ability to detect cheating from a collusive arrangement as sellers are more likely to complain about high fees on a non-cheating platform if they are not able to price discriminate across platforms.

The case studies provided by survey respondents indicate that ICN members' main competition concerns about vertical restraints in online markets are:

- foreclosure of rivals at the retail level, particularly as a result of restrictions on online sales
- raising entry barriers at the platform level (particularly APPAs)
- softening of competition.

Competition concerns are particularly evident in those industries that are undergoing a process of disintermediation, whereby service providers are increasingly dealing directly with consumers online at the expense of traditional intermediaries, such as travel agents.

Disintermediation is also increasingly bringing retailers and suppliers, that have traditionally operated in a vertical distribution arrangement, into direct competition with each other. In these circumstances, vertical restraints between a retailer and a supplier might be used to achieve similar effects as traditional horizontal agreements and can deter the emergence of low-cost online distribution methods.

Issues of agency and its interactions with competition laws also often arise in the investigation of online vertical restraints, particularly APPAs. Agency arrangements can take a number of forms but may attract exemptions from restrictions on vertical restraints in competition law. Whether parties are in an agency relationship is a question of fact and law that goes beyond the description used and sometimes the terms of the agreement and may involve an examination of the behaviour of each party. The Apple e-books investigations in Europe and the United States demonstrate that the mere descriptor of an 'agency' agreement is not necessarily sufficient to exclude vertical restraints contained in such an agreement from the reach of competition law.

As noted above, developments in online markets have significantly expanded the potential geographic reach of online sellers. This should result in a substantial increase in consumer choice and competition across traditional and online suppliers to meet consumers' needs. Nevertheless, it appears that the majority of consumers do not fully exploit the virtual global reach of many online sellers. Some research suggests that this may be partly due to cultural preferences and concerns about their ability to enforce, and cost for enforcing, contractual and consumer rights.⁴

The European Commission (EC) recently announced a proposal to launch a competition inquiry in the e-commerce sector, noting that while more and more goods and services are traded over the internet in Europe, significant cross-border barriers to e-commerce still exist within the EU. This inquiry would seek to better identify and address measures that restrict

⁴ See for example, Hortasçsu, A., F. A, Martinez-Jerez and J. Douglas, 2009, "The Geography of Trade in Online transactions: Evidence from eBay and Mercadolibre," *American Economic Journal: Microeconomics*, pp. 53-74; and Blum B. S. and A. Goldfarb, 2006, "Does the Internet defy the Law of Gravity?" *Journal of International Economics*, Vol. 70, No. 2, pp. 384-405.

cross-border e-commerce, in line with the EC's priorities to create a connected Digital Single Market.⁵

Vertical restraints that limit online sellers' ability to deal with consumers outside a given territory may hinder consumers' opportunities to realise the benefits of the increased geographic scope for sales. Sometimes, such restrictions may be a necessary trade-off to ensure that consumers are provided with retail services that are valued by them when making purchasing decisions. However, sometimes the main purpose of such restrictions is to support a manufacturer's geographic price discrimination (GPD) strategy by segmenting markets and preventing arbitrage from low-price to high-price regions.

Ready access to information about prices offered by overseas sellers has increased the awareness of consumers in higher-priced countries of discriminatory pricing practices that cross national boundaries. This sometimes creates political pressure to address concerns about perceived consumer 'exploitation'. Reflecting this, GPD is of particular concern to Australia, Switzerland and Canada. The Government of Canada has recently introduced legislation aimed at addressing the so-called 'US-Canada price gap'. Similarly, in January 2015, the Swiss Council of States accepted a parliamentary initiative aimed at lowering prices of imported products in Switzerland. In Australia, political concerns about international price discrimination often arise, particularly in relation to IT products. However, a recent review of Australia's competition policy recommended that attempts to prohibit international price discrimination should not be introduced into Australia's competition law. Instead, market solutions should be promoted, including removal of restrictions on parallel imports and ensuring that consumers are able to take lawful steps to circumvent geo-blocking mechanisms that seek to restrict their access to cheaper legitimate products.⁶ The EC has also announced that it will address geo-blocking in parallel with a review of copyright laws as part of its broader Digital Single Market Strategy.⁷

However, the mere observation of GPD does not necessarily mean that competition has been harmed. Indeed, GPD may allow some low priced markets to be supplied and higher prices in some regions may create the necessary incentives for entry into those regions to compete for more lucrative customers. Of relevance to this report, however, is the potential use of vertical restraints that facilitate geographic segmentation and also potentially raise barriers to entry and exclude efficient competitors, particularly those operating online. Vertical restraints that facilitate GPD may also enable a price discriminating firm to engage in specific targeted exclusionary pricing strategies, such as predatory pricing and/or mixed bundling and tying, in particular regions where it faces competition from new entrants.

⁵ *Commissioner Vestager announces proposal for e-commerce sector inquiry*, Brussels, 26 March 2015.

⁶ *Competition Policy Review, Final Report: Australia*, 2015. Available at: <http://competitionpolicyreview.gov.au/final-report/>

⁷ European Commission, Press Release, 25 March 2015, *Digital Single Market Strategy: European Commission agrees areas for action*.

The extent to which online vertical restraints are (or should be) prioritised by ICN members

As in traditional markets, whether vertical restraints in online markets are ultimately efficiency enhancing, benign or anti-competitive will depend on the facts of a particular case. In most instances, there will be trade-offs to consider.

In considering the extent to which online vertical restraints are (or should be) prioritised by ICN members, important issues are:

- the extent of ICN members' concerns about vertical restraints in online markets
- the number of investigations of online vertical restraints
- insights from the case studies
- the extent to which the assessment of online vertical restraints does (or should) differ from the assessment of offline vertical restraints.

The extent of ICN members' concerns about online vertical restraints

ICN members have differing levels of concern about particular vertical restraints in online markets, as shown in **Table 1**.

Table 1: Extent of concern about various online vertical restraints (by percentage of respondents)

	RPM	RPM facilitating conduct	APPAs/ MFNs	Online Sales Bans/ Limitations	Geographic Price Discrimination
It is one of our top priorities	4	4	4	4	4
It is of concern	49	41	43	49	29
It is not yet prevalent enough to be of concern but is increasing in prevalence	34	36	38	26	24
It is not a concern	11	17	11	19	39
It is not a competition issue	2	2	4	2	4
Total	100%	100%	100%	100%	100%

Key points evident from Table 1 are:

- Only a small number of respondents indicated that any of the five vertical restraints are currently a top priority. While four per cent of respondents (two respondents)

indicated in each case that one of the online vertical restraints was currently a top priority, these were not the same two respondents for all conduct types.⁸

- However, almost half of all respondents indicated that RPM, RPM facilitating conduct, APPAs or online sales bans or limitations were of current concern or a top priority. A further third of all respondents indicated that, while the conduct was not yet a concern, it is increasing in prevalence.
- Online RPM and online sales bans/limitations are of relatively greatest concern, with 53 per cent of survey respondents identifying these types of restraints as a concern or top priority. RPM facilitating conduct and APPAs are also of concern to a high percentage of survey respondents.
- In contrast, GPD is of concern or a top priority for only one third of respondents. Almost half of all respondents indicated that GPD is not of concern, or not a competition issue. This was higher than for any other conduct considered in this paper.
- Online RPM, RPM facilitating conduct and APPAs/Most Favoured Nation Clauses (MFNs) are increasing in prevalence in over one third of ICN member jurisdictions that responded to the survey. Online sales bans/limitations and GPD are increasing in prevalence in around a quarter of survey respondent jurisdictions. However, 21 per cent of respondents are not concerned about online sales bans/limitations or do not consider these to be a competition issue.

Number of investigations

Although survey respondents generally indicated a degree of concern about online vertical restraints, few investigations into such restraints were commenced by survey respondents in 2013.

Figure 1 shows a breakdown, by conduct type, of online competition-related investigations commenced in 2013 by survey respondents.

This breakdown is consistent with the extent to which a particular type of vertical restraint is of concern to survey respondents. For example, the most common type of investigation was in relation to online RPM conduct which is the online vertical restraint of most concern to survey respondents. More than half of all online competition investigations commenced in 2013 (32 investigations, or 53 per cent) fell into this category.

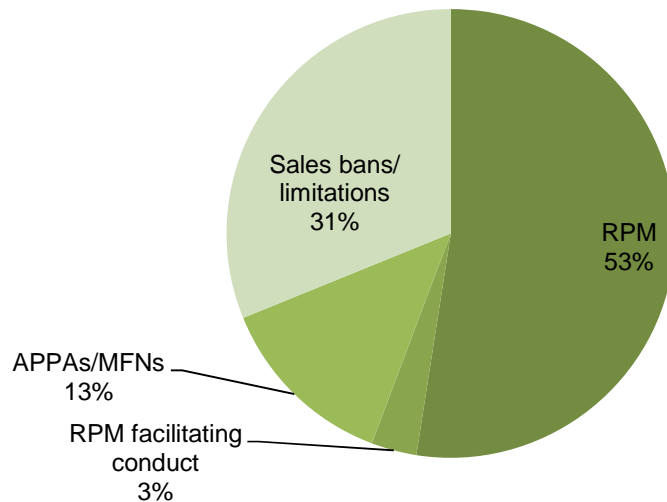
Most of these investigations were commenced in Europe, where concern about online RPM conduct is relatively high. In 2013, a number of investigations into online RPM were also commenced in Oceania. In contrast, no investigations into online RPM were commenced in the United States.

⁸ Ireland responded that each of the five online vertical restraint conducts are a top priority. In addition, Switzerland indicated GPD, RPM and RPM facilitating conduct are a top priority. Ecuador indicated online sales bans/limitations are a top priority and Sweden indicated APPAs are a top priority.

Almost one third of investigations related to online sales bans or limitations, reflecting the relative degree of concern with such conduct. The vast majority of these investigations were commenced in Europe, with ICN members in Oceania also active in this area.

Despite the relatively high level of concern expressed about RPM facilitating conduct, very few investigations were commenced in 2013. Similarly, none of the survey respondents commenced an investigation into online GPD in 2013.

Figure 1 – online competition issues investigations commenced in 2013 (type of conduct)



Insights from case studies

Survey respondents provided a number of case studies to inform this issues paper. The ACCC has also reviewed a number of other relevant cases. A number of insights can be gleaned from these.

APPAs/Retail MFNs

The APPA case studies, particularly those involving hotel bookings⁹, Amazon Marketplace¹⁰, and Apple e-books¹¹, highlight that investigations of APPAs frequently cross international boundaries and involve large, multinational companies.

The case studies suggest that APPAs are of particular concern in industries that are undergoing a process of disintermediation. As a result, suppliers and retailers are increasingly becoming direct competitors as suppliers deal directly with consumers online.

⁹ See Box 6, page 75

¹⁰ See Box 4, page 67

¹¹ See Box 1, page 33

These interrelationships between vertical agreements and horizontal effects associated with APPAs and retail MFNs have been considered in the context of the ACCC's Flight Centre case¹² and the hotels bookings matters that are being investigated in several ICN member jurisdictions.¹³ The matters raise concerns about the competitive effects of the use of APPAs in travel related markets, where suppliers are increasingly dealing directly with consumers online. In particular, the vertical restraint may be used to protect the market position of traditional or incumbent online intermediaries and restrict competition from new online distribution methods, including direct sales to consumers. This could have the effect of raising prices, reducing the number of suppliers and raising barriers to the entry of new distribution models.

Although the competition concerns raised by these APPA case studies are similar, the remedies achieved or proposed differ. In particular, the UK Competition and Markets Authority's Private Motor Insurance market investigation drew a distinction between so-called 'narrow' and 'wide' APPAs/retail MFNs.¹⁴ The distinction between narrow and broad APPAs also underlies commitments offered to several European agencies by Booking.com to remedy competition concerns identified in online hotel booking markets. The use of 'wide APPAs', which require a supplier to charge the same price across all platforms, is, or is proposed to be, banned whereas 'narrow APPAs', which only require a supplier to charge the same price direct to consumers as it offers through a particular platform, would be permitted in some circumstances. In contrast, the ACCC's Flight Centre matter and the Bundeskartellamt's hotel bookings matter did not draw a distinction between narrow and wide APPAs. These different approaches may reflect different fact situations and/or different views as to the possible efficiencies arising from APPAs.

Online sales bans/limitations

The online sales bans/limitations case studies provided by survey respondents highlight the competition concerns associated with these types of online vertical restraints. Unsurprisingly, these relate primarily to the exclusion of online sellers and the potential for retail prices to be higher as a result. The ACCC's consideration of a proposal to restrict sales of KitchenAid products on the internet illustrates these concerns.¹⁵ In particular, the ACCC's preliminary view was that KitchenAid products are likely to be a 'must have' brand for kitchenware retailers and that an inability to supply those products would restrict retail competition and consumer choice.

The potential efficiencies associated with online sales bans/limitations usually focus on the potential for free-riding on retail services or the need to protect a brand's image. The French Pierre Fabre case suggests, however, that a desire to protect brand image may not be sufficient to justify a ban on online sales.¹⁶

¹² See Box 7, page 78

¹³ See Box 6, page 75

¹⁴ See Box 5, page 74

¹⁵ See Box 2, page 38

¹⁶ See Box 13, page 100

Online RPM

Survey respondents presented various case studies that highlight the potential competition concerns associated with RPM in the online context. The main theory of harm in the case studies was that the imposition of RPM raises prices above competitive levels and restricts the ability of online sellers to compete effectively.

Fewer case studies highlighted the potential efficiencies arising from the use of RPM. This may reflect the observation that RPM is treated as per se illegal in many ICN jurisdictions.

The case studies presented are typically of branded goods markets where concerns with brand image and reputation may arise, but several of the case studies involve the types of complex products for which free-riding on retail services or quality certification are most likely to be of concern. In the first case of its kind in Australia, the ACCC granted conditional authorisation¹⁷ for RPM conduct to Tooltechnic Systems (Aust) Pty Ltd to set minimum retail prices on Festool power tools.¹⁸ The ACCC considered that the power tools are complex products that require a high level of pre and post sales services. Thus, absent RPM, the potential free-riding on retail services may harm competition overall.

RPM facilitating conduct

RPM may be facilitated by vertical restraints in a number of ways. However, the case studies presented in response to the survey suggest that the use of Minimum Advertised Price (MAP) restraints and dual pricing are the two types of RPM facilitating conduct that are most relevant in online markets.

In relation to MAPs, in its investigations of mobility scooters, the (then) UK Office of Fair Trading considered that the use of internet minimum advertised prices (iMAPs) can soften intra-brand competition, reduce price discounting and raise prices to consumers.¹⁹ The use of iMAPs also reduces price transparency and increases consumer search costs.

The ACCC also considered the use of iMAPs in its consideration of an application for authorisation by Narta International to apply a MAP to a wide range of electrical goods.²⁰ In denying authorisation, the ACCC considered that imposition of a MAP would reduce competition between retailers and raise retail prices. It was considered that it would have a particular impact on online retailers which generally do not discount below advertised prices to the extent that offline retailers do.

In contrast to the competition concerns raised in relation to MAPs, the ACCC allowed Games Workshop Oz Pty Ltd (GWOP) to impose a form of dual pricing in relation to the

¹⁷ Authorisation to engage in certain anti-competitive arrangements or conduct can be granted when the public benefit outweighs the public detriment, including from any lessening of competition.

¹⁸ See Box 2, page 38, Tooltechnic Systems (Aust) Pty Ltd, A91433 (5 December 2014).

¹⁹ See Box 8, page 86.

²⁰ See Box 9, page 88, Narta International Pty Ltd, A91335 (11 April 2013).

supply of its various hobby kits and games to independent retailers.²¹ GWOP proposed that the wholesale price offered to its retailers would depend upon the extent to which the retailer satisfied certain service-based criteria. The pricing arrangements applied equally to online and offline retailers. The ACCC accepted that the GWOP products are complex and thus may be subject to free-riding by those retailers that do not provide pre- and post-sales retail services.

However, the Bundeskartellamt's investigation into Bosch's rebate system illustrates the potential anti-competitive effects of dual pricing.²² The Bundeskartellamt considered that the rebate system placed dealers who sold Bosch's household appliances online at a disadvantage to traditional retailers, thus reducing competition from online sales. Bosch has since replaced its rebate system with one that does not discriminate between online and offline sellers.

The extent to which the assessment of online and offline vertical restraints does (or should) differ

The overwhelming majority of survey respondents indicated that online vertical restraints are treated the same way in their jurisdiction as the equivalent offline vertical restraint (where relevant).²³

However, the way in which a particular online vertical restraint is treated varies across jurisdictions. In addition, a particular jurisdiction may also treat one type of online vertical restraint differently to other online vertical restraints.

APPAs, online sales bans/limitations and RPM facilitating conduct are primarily addressed in survey respondents' jurisdictions by general competition law provisions, typically either a rule of reason approach²⁴ or rules based on Article 101 of the Treaty of the Functioning of the European Union (TFEU).²⁵ In contrast, RPM is covered by a specific provision in 38 per cent of survey respondents' jurisdictions. It is also more likely to be treated as per se illegal or subject to a rebuttable presumption of illegality than the other types of online vertical restraints.

The relatively strict legal approach to RPM in some countries is in contrast to the move towards a rule of reason approach in others, particularly North American jurisdictions. The strict approach to RPM is also in contrast to the legal treatment of APPAs in many jurisdictions. This has raised issues about whether APPAs might be used in an attempt to

²¹ See Box 10, page 89, Games Workshop Oz Pty Limited, N97404 (19 November 2014).

²² See Box 11, page 90.

²³ A similar question was not asked in relation to APPAs as the conduct predominantly arises in online markets only.

²⁴ A rule of reason approach involves the factfinder weighing all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint of competition.

²⁵ Article 101(2) TFEU declares an agreement null and void if it appreciably restricts competition. However, those agreements which create sufficient benefits to outweigh the anti-competitive effects are 'exempted' under Article 101(3). Article 101 applies to vertical agreements and vertical restraints; however, the European Commission has adopted a 'block exemption regulation', which provides a safe harbour for most vertical agreements. Under certain conditions, the block exemption will not apply.

achieve similar horizontal outcomes to RPM and thus whether different legal treatment of RPM and APPAs is appropriate.

A significant proportion of respondents indicated that their legal frameworks do not address at least one of the surveyed vertical restraints. In particular, 23 per cent of respondents indicated that their competition laws do not cover APPAs, 11 per cent said that their competition laws do not cover RPM facilitating conduct and 17 per cent said that their competition laws do not cover online sales bans/limitations. In contrast, the vast majority of respondents indicated that their competition laws address RPM.

As has been noted earlier, vertical restraints may be used to facilitate GPD strategies. The legal framework for addressing such restraints is outlined in the issues paper. A small number of jurisdictions (15 per cent) have specific provisions addressing GPD.

Are existing tools sufficient to deal with each type of online vertical restraint?

Most respondents considered that existing legislative, analytical and investigative tools are sufficient to address vertical restraints in online markets and GPD. It was noted by some respondents that this was also the conclusion reached by the OECD Roundtable on Vertical Restraints for Online Sales (2013).

Nevertheless, some respondents identified issues with their existing legislative, analytical and investigative tools, which reduce the effectiveness of those tools in dealing with competition issues associated with vertical restraints in online markets. The issues and possible methods of improvement identified by respondents included:

- Five respondents—most of which have developing economies—identified the need for a specific provision or specific guidelines dealing with particular types of online vertical restraint conduct and related experience dealing with such cases and/or training for investigators. Online RPM, in particular, was highlighted in this regard. It was noted by some respondents that their understanding and experience in handling online vertical restraints will improve as the incidence of such cases increases.
- One respondent cited a lack of cooperation on cross border issues, which may increase in significance as online commerce continues to grow.
- One respondent noted the need for more empirical work and data to be able to better assess the impact of online vertical restraints, and also guidance on how to treat efficiencies and the extent to which these should be factored into investigations. These were identified particularly in relation to APPAs where the competitive effects are less well understood relative to other types of online vertical restraints.
- One respondent also noted that the dynamic, rapidly changing nature of online markets can make it challenging to distinguish between the pro- and anti-competitive effects of such restraints.

- One respondent noted the need for greater decision-making powers, specifically:
 - to be able to make binding decisions on administrative fines
 - to compel parties under investigation to cooperate with the authority
 - for parties to be sanctioned for providing incorrect or misleading information.
- Two European respondents—both with developed economies—identified the allocation of additional resources to agencies as a desired improvement.
- One respondent noted the need for better tools to proactively identify online vertical restraint conduct (rather than relying primarily on complaints).

Conclusions

This report reaffirms the findings of previous studies which indicate that vertical restraints in online markets can generally be assessed using the frameworks that apply to vertical restraints in offline markets. Such restraints can be efficiency enhancing or anti-competitive depending on the particular circumstances and can sometimes be both so that an appropriate balance must be struck.

The report shows that there is a degree of concern about online vertical restraints across ICN members, although the extent of concern varies between types of online vertical restraint. Online RPM and online sales bans/limitations are of relatively greatest concern. In contrast, GPD is not of concern to a large percentage of survey respondents.

Although survey respondents are generally confident that existing tools are sufficient to deal with competition issues associated with the use of vertical restraints in online markets, some issues have been identified that may warrant further consideration by the ICN.

In this regard, the survey responses suggest that some ICN members would benefit from further guidance as to the economic assessment of some online vertical restraints, particularly online RPM. In addition, the economics literature and survey responses suggest that the potential efficiencies and competitive implications of the use of APPAs are generally less well understood than for the more traditional types of vertical restraints. This might suggest that online RPM and/or APPAs could be a priority area for the ICN going forward.

Suggestions for further work could include:

- Developing a workbook or guidelines for the assessment of the particular type of vertical restraint.
 - For online RPM, the guidance could consider

- whether the prevalence of online RPM suggests that a reconsideration of the potential efficiencies of RPM in online markets is necessary
 - whether RPM is mainly used to protect incumbent retailers from competition from online sellers.
- For APPAs, the guidance could consider
 - the potential efficiencies arising from APPAs and the extent to which the scope of an APPA ('narrow' and 'wide') can be tailored to ensure that vertical restrictions are no wider than necessary to deal with market failure concerns
 - the extent to which APPAs could be used to achieve horizontal outcomes similar to RPM
 - Monitoring market outcomes where commitments are reached to address competition concerns with APPAs.

Alternatively, the ICN might wish to focus on particular forms of market failure and consider the extent to which these are likely to arise in online markets and the effectiveness of particular types of online vertical restraints in addressing these, including the potential for offsetting competitive harm.

For example, potential free-riding on retail services is often cited as a rationale for a number of online vertical restraints including RPM, online sales bans/limitations, RPM facilitating conduct and APPAs. A greater understanding of the likelihood and nature of free-riding in online markets may enable ICN members to better understand the implications of online vertical restraints that are claimed to address free-riding.

It is also evident from survey responses that there are considerable differences in legal approaches across ICN jurisdictions, particularly in relation to RPM. Further consideration of the potential efficiencies and competitive harm of online RPM may also inform consideration of the consequences of different legal approaches to RPM enforcement and the way in which any associated efficiencies are taken into account. Is a more consistent legal approach appropriate? What are the impediments to achieving consistency?

ICN 2015 Online Vertical Restraints Special Project

Establishment of the project

At the International Competition Network (**ICN**) Steering Group Meeting on 4 December 2013, the ICN Chairman, Andreas Mundt, proposed that the ICN commence a project focussed on the internet economy and practical issues regarding the application and interpretation of competition laws to e-commerce.

The Steering Group formed the view that the topic did not fit thematically in any of the existing working groups and that it would be dealt with as a Steering Group project, an annual meeting special project or as the first project for a newly created working group.

Steering Group members expressed broad support for taking the topic further as a Steering Group project and directed that the first step should be determining the scope of the project.

On 21 January 2014, the topic was again considered and there was a broad view expressed within the Steering Group that the topic would be best dealt with as a multi-year project and that in view of the other work it should be focussed on groups of cases with the highest practical relevance for agencies. Members considered that it should therefore be limited to online vertical restraints. The Steering Group considered that the project should cover:

- the extent to which online vertical restraints are, or should be, prioritised by the ICN membership
- whether, and to what extent, existing legal frameworks, investigative tools, and analytical tools in ICN member jurisdictions are able to deal with online vertical restraints effectively
- what recommendations could or should be made by the ICN in relation to online vertical restraints.²⁶

As host of the 2015 Annual Meeting, the Australian Competition and Consumer Commission (**ACCC**) agreed to undertake the stocktaking aspects of the special project. In progressing the project, the ACCC has sought to provide the Steering Group with a clearer understanding of:

- the differences and similarities of the legal framework in ICN jurisdictions in relation to online vertical restraints
- the prevalence of online vertical restraint conduct occurring within ICN member states

²⁶ICN Steering Group teleconference, 15 January 2014.

- the degree to which the ICN members consider online vertical restraints to be a priority issue
- the degree to which ICN members are able to address online vertical restraints, or would be able to if they chose to do so, within their existing legal framework.

Purpose of the project

The significant and expected continued growth in online commerce and the resultant impacts on competition—including those which resemble competitive effects in offline markets and those which are unique to the online context—has provided the impetus for this project.

According to the OECD's recent 'Measuring the Digital Economy' report, the number of internet users in OECD countries increased from fewer than 60 per cent of adults in 2005 to about 80 per cent in 2013 and it has reached about 95 per cent among people under the age of 25.²⁷ There are large differences between and within countries; in 2013, more than 90 per cent of individuals accessed the internet in Luxembourg, the Netherlands and Switzerland, compared with 60 per cent or less in Greece, Italy, Mexico and Turkey.

About half of individuals in OECD countries purchase goods and services online, and almost 20 per cent in Denmark, Korea, Sweden and the United Kingdom use a mobile device to do so.²⁸

In 2012-13, 77 per cent of enterprises in the OECD area had a website or home page and 21 per cent sold their products electronically.²⁹

Higher speed internet, lower unit prices and smart devices have favoured new and more data-intensive applications. Wireless broadband subscriptions in the OECD more than doubled in four years – in December 2013 almost 75 per cent of individuals in the OECD had a mobile wireless broadband subscription.³⁰

Mobile broadband is also widely available in many emerging and less developed countries. In sub-Saharan Africa, for example, subscriptions grew from 14 million in 2010 to 117 million in 2013.³¹

Between 2007 and 2013, individuals who made at least one online purchase increased from 31 per cent to almost 50 per cent of the adult OECD population. Progress for enterprises has been less striking: in 2012 only 21 per cent of OECD enterprises with ten or more persons were engaged in e-sales (versus 16 per cent in 2008).³²

²⁷Measuring the Digital Economy, A New Perspective Published on December 08, 2014, OECD.
<http://www.oecd.org/sti/measuring-the-digital-economy-9789264221796-en.htm>

²⁸ ibid

²⁹ ibid

³⁰ ibid

³¹ ibid

³² ibid

The global volume of e-commerce is much harder to estimate and estimates vary between \$USD 960 million - \$USD 1.3 trillion for 2013.³³

However, it is clear that e-commerce is growing fast. By way of example, Amazon, whose net sales increased from \$USD2.5 billion to \$USD61 billion between 2001 – 2012. Forty three per cent of these sales were to consumers outside of North America. More generally, recent growth estimates from eMarketer report that business-to-consumer e-commerce sales worldwide will reach \$1.5 trillion in 2014, increasing nearly 20 per cent over 2013.³⁴

There is expected to be a significant increase in the proportion of global e-commerce sales in the Asia Pacific region between 2011 and 2016 (from 28 per cent to 40 per cent of global sales) and small increases for the Middle East and Africa, Latin America and Eastern Europe. While the volume of sales is also expected to increase in Western Europe and North America, their proportion of global sales is expected to decline moderately.³⁵

In China, e-commerce has grown by 120 per cent per annum since 2003 and Latin America has increased from \$USD1.6 billion to \$USD43 billion in the past decade, with Brazil accounting for the largest share of e-commerce sales within Latin America (at approximately 59 per cent).³⁶

For the increasing proportion of the world's consumers who regularly access online markets, there is a wider variety and greater volume of information available about the products they buy and the retailers from whom they are buying. Online marketplaces, for example, draw many products together for sale on one website, enabling consumers to conveniently compare the range, price and quality of several products at once.

Similarly, the geographic scope of online markets extends well beyond the reach of those that traditionally exist offline, bringing together a greater number of competitors and providing a wider choice of products and retailers to a larger group of consumers.

As the volume of online commerce grows and online markets become increasingly commonplace, manufacturers have less reliance on traditional distribution channels and are increasingly able to deal directly with consumers. The disintermediation of these markets is resulting in suppliers dealing directly with consumers in more and more cases, removing the need for agents or retailers in many circumstances where they would otherwise have been required.

These developments in online commerce provide substantial opportunities for enhancing competition, efficiency and welfare, by making markets more transparent, expanding the boundaries for trade and facilitating the emergence of new online business models.

³³ E-commerce and Development *Key Trends and Issues*, Torbjörn Fredriksson Chief, ICT Analysis Section UNCTAD, Division on Technology and Logistics, Workshop on E-Commerce, Development and SMEs, 8-9 April 2013 WTO, Geneva, Switzerland: https://www.wto.org/english/tratop_e/devel_e/wkshop_apr13_e/fredriksson_ecommerce_e.pdf

³⁴ *E-Commerce: Evolution or Revolution in the Fast-Moving Consumer Goods World?* Nielsen, August 2014.

³⁵ E-commerce and Development *Key Trends and Issues*, Torbjörn Fredriksson Chief, ICT Analysis Section UNCTAD, Division on Technology and Logistics, Workshop on E-Commerce, Development and SMEs, 8-9 April 2013 WTO, Geneva, Switzerland: https://www.wto.org/english/tratop_e/devel_e/wkshop_apr13_e/fredriksson_ecommerce_e.pdf

³⁶ *E-Commerce: Evolution or Revolution in the Fast-Moving Consumer Goods World?* Nielsen, August 2014.

In particular, greater price competition between retailers may produce lower prices for consumers, notwithstanding that the intensity of non-price competition in online markets may be less than in offline markets, where the influence of service levels and other elements of non-price competition may be greater. The range of other potential benefits for consumers includes immediacy, convenience and opportunities for innovative business models.

Aside from the benefits of increased competition for consumers, the potential gains for retailers and manufacturers are also significant, with opportunities for innovative business models, reduced distribution costs and exposure to a wider range of consumers among the key benefits. Further, the broader economic benefits of increased competition are also notable, with competitive markets leading to lower prices, better quality products and services, greater efficiency and more choice.

However, the potential benefits of enhanced competition may not be realised if online markets are susceptible to the well-known market failures that characterise many traditional markets. In addition, new sources of market failure may arise in online markets. The types of market failure are most commonly raised in relation to online markets are: free-riding on the provision of retail services; free-riding on retailers' investments in quality certification and protection of brand image; information asymmetries between buyers and sellers in online markets where consumers have less information than online sellers because consumers are not able to physically inspect a product prior to purchase; and demand uncertainty for new products being sold online. These are each discussed in more detail later in this paper. If unaddressed, these market failures may offset some of the potential benefits of enhanced competition arising from developments in online markets.

On the other hand, the potential gains to consumers from developments in the online world may be undermined by anti-competitive conduct, including the use of vertical restraints that limit or foreclose competition.

As in traditional markets, market mechanisms may evolve to address potential market failures in online markets. For example, the vast amount of information that is available on the internet might help to reduce consumers' search and information costs. However, these benefits may not be achieved if consumers are overwhelmed by the volume of information available online and thus suffer 'information overload'. Market mechanisms, such as 'shopbots'³⁷ or buyers' agents which present comparative information, such as price quotes from multiple online sellers, have emerged as a way for consumers to benefit from the ready availability of online information and to find the online deal that best meets their needs. However, the benefits of these types of market mechanisms may also be eroded if information is inaccurate or misleading or if suppliers adopt tactics that make it difficult for shoppers to readily compare online offers.³⁸

³⁷ Shopbots are a software program or script designed to search the Internet or other forms of data and obtain pricing information on products and services. Commonly, the data obtained is then used as a comparison tool to find the lowest price on a product or service.

³⁸ For example, the use of complicated product descriptions, drip pricing, creating multiple versions of the same product or adopting 'bait and switch' methods. See Ellison G. and S.F. Ellison, 2009, "Search obfuscation and price elasticities on the Internet", *Econometrica*, Vol. 77, No. 2, pp. 427-452.

Where market mechanisms are insufficient to deal with market failures in online markets, suppliers might sometimes consider the use of vertical restraints. For example, developments in online markets that focus on low-cost, discounting business models could create free-riding concerns and weaken retailers' incentives to provide a variety of costly retail services that are valued by customers when purchasing some—typically complex—goods. If this is the case, vertical restraints such as RPM and/or exclusive or selective distribution might help to reduce the potential free-riding.

However, as in traditional markets, the use of vertical restraints in online markets can also raise competition concerns. This has been particularly evident in industries that are experiencing disintermediation as a result of the growth in suppliers dealing directly with consumers online, rather than through an agent or retailer (including online).

Disintermediation and the growth of online direct sales also mean that suppliers are increasingly becoming competitors with their traditional agents. In these circumstances, vertical restraints can be used to achieve similar effects as traditional horizontal agreements, and protect traditional intermediaries from competition from direct sales and other new distribution methods.

As discussed above, developments in online markets have significantly expanded the potential geographic reach of online sellers. This should result in a corresponding increase in consumer choice and competition between offline and online sellers. However, vertical restraints that limit online sellers' ability to deal with consumers outside a given territory could hinder the realisation of these benefits and facilitate GPD by preventing arbitrage from low-price to high-price regions. The welfare and efficiency effects of GPD are ambiguous. However, consumers in high-priced regions are clearly worse off. Thus where GPD crosses international boundaries it can raise concerns in those regions about the potential exploitation of consumers and create political pressure to address GPD. There are differing views among ICN members as to whether GPD is a competition issue. Nevertheless, competition concerns could arise if the vertical restraints that facilitate GPD also enable an incumbent to engage in exclusionary conduct, such as predatory pricing in a region where entry may otherwise occur.

Scope of the project

Vertical restraints may operate at any stage of the supply chain and are prevalent in offline and online markets. However, most focus in the economic literature has been on contractual vertical restraints between manufacturers and/or their distributors and retailers. This is also the stage of the supply chain that is most relevant in the context of online markets.

Initially the ACCC drafted a document (the economic framework document) discussing the effect e-commerce can have on competition and the potential pro-competitive and anti-competitive consequences of online vertical restraints, as an aide to discussion. The ACCC distributed the economic framework document to volunteer NGAs and volunteer ICN members for feedback.

After feedback from ICN members and NGAs, the ACCC incorporated changes to the economic framework document, selected five key areas of conduct to focus on for the project and drafted a survey to the ICN membership.

The five areas of focus are as follows:

- i. Resale Price Maintenance (RPM)
- ii. Resale Price Maintenance facilitating conduct (RPM facilitating conduct)³⁹
- iii. Across Platform Parity Agreements (APPAs)
- iv. Online sales ban or limitations
- v. Geographic Price Discrimination (GPD)

This issues paper integrates the survey results with an overview of the economic framework that is typically used to assess the benefits and costs of vertical restraints, with a particular focus on the use of vertical restraints in online markets. It draws conclusions for each type of vertical restraint conduct with respect to each of the key questions outlined above (on page 18).

The survey of ICN members

The survey was divided into three parts. The first part was designed to elicit a profile of each respondent including its budget, remit, legal framework and location. **Annexure A** provides a summary of responses received to these questions.

The second part was designed to solicit data about the prevalence of online vertical restraints and member views on whether and to what extent online vertical restraints are of concern and are currently being addressed. Due to the inherent nature of survey questions in which respondents are asked to 'select an option' and the subjective interpretation of some questions, some respondents may have interpreted certain questions differently than others and there are likely to be varying degrees of concern among respondents who selected the same response. For example, where a number of respondents indicated a certain type of vertical restraint conduct was 'of concern' in their jurisdiction, the extent of concern is likely to differ somewhat among these respondents.

The final part sought to solicit relevant case studies.

A copy of the template survey is at **Annexure B**.

Survey responses

The ACCC distributed the survey to the 130 ICN member agencies and was pleased to receive 47 responses from the agencies listed at Annexure C. The ACCC thanks all members who responded to the survey.

³⁹ For the purposes of the survey RPM facilitating conduct refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

Responses by region

As shown in **Table 2** below, the majority of responses were received from European members, followed by Asia, Central and South America, Africa, North America and Oceania. The numbers of responses received from each region are broadly reflective of the regional breakdown of ICN members, with slightly more responses received from Europe, Central and South America and Oceania than the proportion of their overall membership.

Table 2: Survey responses by region

Region	Respondents (number) ⁴⁰	Responses (percentage)	Proportion of ICN membership (percentage)
Africa	5	11%	17%
Asia	7	15%	21%
Europe	23	49%	39%
North America	3	6%	11%
Central and South America	6	13%	9%
Oceania	3	6%	3%
Total	47	100%	100%

Extent of concern about online vertical restraints

The survey responses indicate that online vertical restraints are of concern to many ICN members. **Table 3** indicates that ICN members have differing levels of concern about these particular vertical restraints in online markets.

Table 3: Extent of concern about various online vertical restraints (number of respondents)

	RPM	RPM facilitating conduct	APPAs/MFNs	Geographic Price Discrimination	Online Sales Bans/Limitations
It is one of our top priorities	2	2	2	2	2
It is of concern	23	19	20	13	23
It is not yet prevalent enough to be of concern but is increasing in prevalence	16	17	18	11	12
It is not a concern	5	8	5	18	9
It is not a competition issue	1	1	2	2	1
Total	47	47	47	46	47

⁴⁰ In some instances more than one response was received from members within the same jurisdiction.

Key points evident from Table 3 are:

- Only a small number of respondents indicated that any of the five vertical restraint conducts are currently a top priority. While 4 per cent of respondents (2 respondents) indicated in each case that one of the online vertical restraints was currently a top priority, these were not the same two respondents for all conduct types.⁴¹
- However, almost half of all respondents indicated that online vertical restraints of some kind are of current concern or a top priority. A further third of all respondents indicated that, while the conduct was not yet a concern, it is increasing in prevalence.⁴²
- Online RPM and online sales bans/limitations are of relatively greatest concern, with 53 per cent of survey respondents identifying these types of restraints as a concern or top priority. RPM facilitating conduct and APPAs are also of concern to a high percentage of survey respondents.
- In contrast, GPD is of concern or a top priority for only one third of respondents. Almost half of all respondents indicated that GPD is not of concern, or not a competition issue. This was higher than for any other conduct considered in this issues paper.
- Online RPM, RPM facilitating conduct and APPAs/MFNs appear to be increasing in prevalence in over one third of ICN member jurisdictions that responded to the survey. Online sales bans/limitations and GPD conduct is not yet prevalent enough to be of concern, but is increasing in prevalence in around a quarter of survey respondent jurisdictions. Twenty one per cent of respondents are not concerned about online sales bans/limitations or do not consider these to be a competition issue.

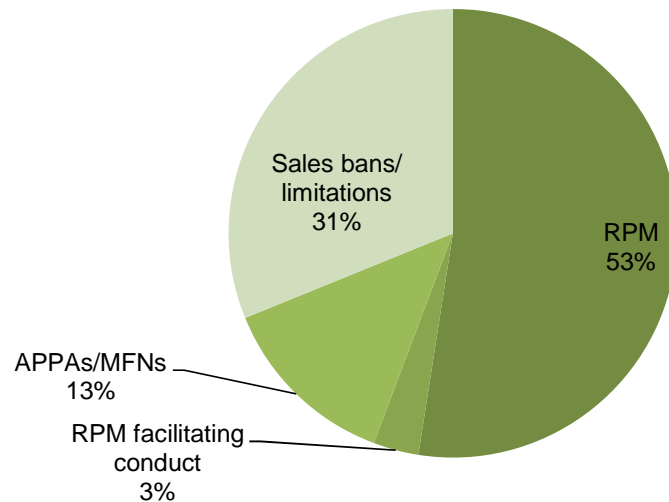
Investigations into online vertical restraints

To some extent, the degree of concern about particular types of online vertical restraints is reflected in the number of investigations relating to online competition issues commenced by survey respondents during 2013. **Figure 3** shows a breakdown, by conduct type, of these investigations.

⁴¹ Ireland responded that each of the five online vertical restraint conducts is a top priority. In addition, Switzerland indicated GPD, RPM and RPM facilitating conduct are a top priority. Ecuador indicated online sales bans/limitations are a top priority and Sweden indicated APPAs are a top priority.

⁴²By way of example, reflecting the increasing prevalence of many types of vertical restraint conduct, the Netherlands Authority is preparing to publish a document outlining its enforcement priorities concerning vertical restraints.

Figure 3: Online competition issues of focus – investigations commenced in 2013 (type of conduct)



The most common type of investigations related to online RPM conduct, with more than half (53 per cent) of all online competition investigations commenced in 2013 falling into this category. (A total of 32 online RPM investigations were commenced by survey respondents in 2013.) As noted above, online RPM is the category that is of greatest overall concern to survey respondents. Several investigations (19 investigations or 31 per cent of total online investigations commenced in 2013) into online sales bans/limitations were also commenced in 2013. A smaller number of investigations (eight) into APPAs/MFNs were commenced; while two investigations were commenced for RPM facilitating conduct and zero investigations into GPD.

Legal Frameworks

This section provides an overview of the various legal frameworks that are used to assess online vertical restraints in ICN member jurisdictions.

Table 4 shows that the vast majority of respondents' legal systems address online vertical restraints in some way or other. However, there is some variation in relation to specific types of restraints. For example, while only one respondent indicated that its jurisdiction does not address online RPM, almost a quarter of all respondents indicated that their law does not address online APPAs.

Respondents' competition laws generally treat online and offline vertical restraints in the same way, except for two respondents who indicated that online sales bans/limitations are treated differently to sales bans/limitations in traditional markets (discussed further later in this paper).

Table 4: Responses for each type of vertical restraint conduct (number of respondents)

Response	Online RPM		Online RPM facilitating conduct		APPAs		GPD		Online Sales Bans / Limitations	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Does your law address the conduct?	46	1	40	7	37	10	41	6	40	7
Is online conduct treated differently to offline conduct?	0	47	0	47	0	47	0	47	2	45

European Approach

Agencies from member states of the European Union (EU) make up 49 percent of responses. These agencies have identical or very similar legal frameworks. A summary of the EU's legal framework is provided below.

Article 101(3) of the TFEU provides that the prohibition in Article 101(1) will be inapplicable in certain circumstances: there is an exception to the prohibition where the conduct contributes to improving the production or distribution of goods or promotes technical or economic progress, while passing on a fair share of the benefits to consumers, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101 applies to both vertical and horizontal agreements and is the provision under which vertical restraints are considered in the EU. The scope of the exemption in Article 101(3) allows for a consideration of the fact that vertical restraints may have both negative and positive effects on competition and efficiency.

In addition to parties being able to individually assess any agreement under Article 101(3), the EC has adopted a number of block exemption regulations which provide a safe harbour for vertical agreements that meet certain criteria. In 2010, the EC adopted a new vertical block exemption regulation (VBER) with general application to vertical agreements (Commission Regulation (EU) No 330/2010).

Article 101 of the TFEU and the VBER apply to both online and offline conduct.

Agreements will benefit from the VBER if they meet certain requirements. Any vertical restraints in an agreement which meet the requirements of the VBER are, pursuant to Article 101(3), exempted from the prohibition in Article 101(1).

In order to benefit from the VBER, an agreement must not contain any hardcore restrictions, as set out in Article 4 of the VBER. If the agreement contains one or more hardcore restrictions, the VBER will not apply. In addition, the VBER will not apply if either the supplier or buyer has a market share of 30 per cent or more.⁴³

One of the hardcore restrictions that removes the protection of the VBER (see Article 4(b)) relates to restrictions regarding the territory into which, or the customers to whom, the seller may sell. This hardcore restriction relates to market partitioning by territory or by customer. A distinction between active and passive sales is made for both online and offline sales when considering exclusive distribution.⁴⁴ Of most relevance to online markets is the prohibition on restrictions on passive sales outside an exclusive territory. If a manufacturer wants to operate an exclusive distribution system, the exclusive distributors can be protected from each other's active sales, i.e. they can be required not to actively approach customers in each other's exclusive territories. However, passive sales in response to unsolicited orders including delivery cannot be restricted. The distinction between active and passive sales is made for both online and offline sales.

In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach distributors. If a customer visits the website of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that sale is considered passive selling.

Another exemption relevant to selective distribution systems allows a manufacturer to prohibit its selected authorised distributors from selling, both actively and passively, to non-authorised distributors. The VBER thus covers setting up a closed distribution system, where selling by the authorised distributors to non-authorised third party traders is prohibited. In such a system it is particularly important to ensure that the authorised distributors themselves are not restricted in their (active and passive) sales to consumers.

Minimum or fixed RPM is treated in the EU as a hardcore restriction. However, maximum RPM is not a hardcore restriction, provided that it does not result in fixed or minimum RPM.

⁴³ However, exceeding the market share threshold of 30 per cent does not create a presumption of illegality. This threshold serves only to distinguish those agreements which benefit from a presumption of legality from those which require individual examination.

⁴⁴ Active sales means actively approaching individual customers by, for instance, direct mail, including the sending of unsolicited email, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customer group or customers in that territory.

Passive sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.

The rule of reason approach

The majority of respondents not applying the TFEU adopt a rule of reason approach when considering one or more online vertical restraints. A summary of the US legal framework is provided below as an example of the rule of reason approach.

The Supreme Court decision in *Leegin* held that the rule of reason applies to RPM.⁴⁵ Under the rule of reason, ‘the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint of competition.’⁴⁶ The ‘criterion to be used in judging the validity of a restraint on trade is its impact on competition.’⁴⁷ Thus the fact finder must consider both the anti-competitive effects as well as the pro-competitive benefits of the conduct. Factors relevant to the 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. Under the definition in use for the project, RPM, RPM facilitating conduct, APPAs, GPD and online sales bans and limitations are likely to require a rule of reason test, which takes into account both the anti-competitive effects and the pro-competitive benefits of the conduct, as potential violations of either Section 1 or Section 2 of the Sherman Act.⁴⁸

Other approaches

In addition to the European and American approaches—which are mirrored in the legal frameworks of many jurisdictions—a range of other legal frameworks are also applied to online vertical restraints in ICN member jurisdictions. These legal frameworks include a combination of both general provisions which are applied to various types of vertical restraint conduct, and specific provisions relating to particular types of conduct. There is widespread usage of some form of competition test when assessing online vertical restraints. The following sections provide more information about the legal frameworks that are used to assess each type of online vertical restraint conduct considered in the survey.

Authorisation – Australia and New Zealand

In Australia, online vertical restrictions can potentially be challenged under a number of general provisions of the *Competition and Consumer Act 2010* (CCA), including section 46 (misuse of market power) and the provisions that prevent anti-competitive contracts, arrangements or understandings.

There are, however, two sections of the CCA that deal directly with particular types of anti-competitive vertical arrangements.

- Section 47 of the CCA prohibits exclusive dealing, which broadly involves one trader imposing restrictions on another’s freedom to choose with whom, in what, or where, it

⁴⁵*Leegin Creative Leather Products v PSKS, Inc.*, 551 U.S. 877 (2007)

⁴⁶*Continental T.V., Inc v GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

⁴⁷*NCAA v Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 (1984).

⁴⁸At the federal level, but not in some States.

deals. Most exclusive dealing is prohibited if it has the purpose, effect or likely effect of substantially lessening competition. However, third line forcing, is a per se breach of the CCA.

- Section 48 deems resale price maintenance (RPM) to be a per se breach of the CCA.

Australian competition law recognises that anti-competitive arrangements between businesses can provide efficiency gains that may offset or outweigh the detrimental effects on competition. Thus the CCA contains provisions that allow parties to these arrangements to apply for protection from legal action where the public benefits (largely efficiencies) outweigh any public detriment (largely anti-competitive effects); thus providing flexibility and recognising that, in certain circumstances, arrangements which restrict competition can nonetheless generate net benefits (efficiencies).⁴⁹

The ACCC may grant authorisation if it is satisfied that the relevant statutory test has been met.⁵⁰ There are two statutory authorisation tests, with the test to be applied depending on the nature of the proposed conduct for which authorisation is sought.⁵¹

As an alternative to authorisation, statutory protection for exclusive dealing conduct, can be achieved by lodging a notification with the ACCC. Unlike the authorisation regime, the statutory protection provided by a notification comes into force automatically and parties do not have to wait for a decision from the ACCC to grant the protection, but the ACCC may act to revoke the protection. As with authorisations, the notified conduct is subject to a public benefit test. The nature of this test depends on the type of conduct for which immunity is sought.⁵²

New Zealand's Commerce Act prohibits certain agreements that harm, or are deemed to harm, competition. However the Act recognises that in some circumstances, an anti-competitive agreement may lead to sufficient public benefits that would outweigh the competitive harm. The New Zealand Commerce Commission (NZCC) can authorise the agreement under Part 5 of the Commerce Act.⁵³

⁴⁹ The ACCC exercises the powers under the CCA to grant immunity to arrangements and other conduct that may otherwise breach the competition provisions of the CCA. The Australian Competition Tribunal is the judicial body responsible for exercising the powers under the CCA to authorise mergers and thus provide immunity from section 50 of the Act CCA.

⁵⁰ The decision as to whether or not to grant legal protection is an administrative decision and is subject to review by the Australian Competition Tribunal and appeal to the Federal Court of Australia.

⁵¹ For authorisation to engage in a contract, arrangement or understanding, including cartels (other than boycotts), exclusive dealing (other than third line forcing) or disclosure of information for the purpose of SLC, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition. For authorisation to engage in a primary or secondary boycott, resale price maintenance, third line forcing or a private disclosure to competitors of information relating to price where the disclosure is not in the ordinary course of business, the ACCC may not grant authorisation unless it is satisfied in all the circumstances that the relevant conduct would result or be likely to result in such a benefit to the public that it should be allowed.

⁵² The ACCC can object to a third line forcing notification if it is satisfied that the likely public benefit will not outweigh the likely public detriment from the conduct. The same test applies when considering whether to revoke a notification for the private disclosure of information to competitors. For other types of exclusive dealing, the ACCC can revoke a notification if it is satisfied that the notified conduct is likely to result in a SLC and the likely benefit from the conduct will not outweigh the likely detriment to the public.

⁵³ See Commerce Commission New Zealand, Authorisation Guidelines, 2013 for further information

There are two tests for authorisation that are relevant to anti-competitive online vertical restraints. For online vertical restraints that have the purpose or effect, including the likely effect, of substantially lessening competition in a market (section 27), the NZCC must authorise the transaction if it is satisfied that the transaction will likely result in a benefit to the public that would outweigh the lessening in competition. For RPM, the NZCC must authorise the transaction if it is satisfied that the transaction will result in such a benefit to the public that it should be permitted.

Agency relationship – effect on legality of conduct

The existence or otherwise of an agency relationship between a supplier and reseller can influence the legality of conduct in which a supplier sets the price at which a reseller sells a product. This is because agency arrangements may attract exemptions from restrictions on vertical agreements in competition law, recognising that in a properly constituted agency relationship, the supplier is legally the reseller. For this reason, the assessment of what type of relationship exists between a supplier and a reseller is an important question when analysing several types of vertical restraint conduct.

In a properly constituted agency relationship, the agent represents and has duties to the principal. In turn, the principal is liable for the actions of the agent.

However, not all vertical arrangements which claim to be ‘agency arrangements’ adhere to these principles and may instead be ‘sham’ agency agreements used to bypass competition laws.⁵⁴ Whether parties are in a genuine agency relationship is a question of fact and law that goes beyond the terms of the agreement and examines the behaviour of each party.

Under EU (and other) competition law, in order for a relationship between a supplier and reseller to be recognised as a genuine agency agreement, the reseller must not bear the financial or commercial risk of the sale to the end user, including in relation to any relationship-specific investments that may be required. Once it is recognised as a genuine agency agreement, though, the supplier is entitled to control the sale price.

Ownership of a product is a key consideration for the evaluation of whether a relationship is a genuine agency relationship. Related to this concept is the question of who bears the risk related to ownership of the products. If an agent holds all the risk, it is more likely to make decisions which are independent of the principal.

However, even if the principal bears all of the commercial and financial risk, an agency agreement may still raise competition issues and for this reason, the EU Guidelines on Vertical Restraints provide a second limb to the test for genuine agency agreements. This limb prescribes that provisions that concern the relationship between the principal and the agent may infringe Article 101(1) of the TFEU if they lead to foreclosure in the relevant market, or facilitate collusion, for example by excluding others from using the same agents.

⁵⁴ Bennett, M. 2012, “Online Platforms: Retailers, Genuine Agents or None of the Above?”, Competition Policy International.

The Guidelines make it clear that ‘even if the principal bears all the relevant financial and commercial risks’, an agency agreement may fall within the scope of Article 101(1).⁵⁵

The interrelationship between vertical agreements, the potential horizontal effects of such agreements and agency issues in online platform markets are central aspects of several recent cases involving RPM and APPAs, particularly the hotel bookings cases (see Box 6, page 75) and e-books (see Box 1, page 33). These issues were also considered in the ACCC’s Flight Centre case (see Box 7, page 78) although the conduct did not involve RPM or APPAs as such.

The implications of switching from the wholesale model to the agency model of distribution for e-books was an important issue in the e-books investigations in Europe, Canada and the US (see Box 1, page 33). The cases are particularly interesting as it appears that the move by publishers from a traditional wholesale business model to an agency model was intended to restrict discounting and raise retail e-book prices. The e-books case study below demonstrates how the existence of an agency relationship is not necessarily sufficient to exclude an agreement from the reach of vertical restraint competition law provisions. Instead, the conduct was subsequently found to have breached European and US competition laws.

The agreements were found to have been characterised by a degree of horizontal collusion between the publishers, not merely bilateral agency agreements between each publisher and Apple. The EC found that the publishers had “engaged in direct and indirect (through Apple) contacts aimed at ...raising the retail prices of e-books above those of Amazon...”⁵⁶ This exchange of information and price collusion between competitors is an infringement of EU competition law regardless of whether the arrangement between the publisher and seller is one of agency.

In reaching a similar conclusion, the US District Court found that by switching from a wholesale to an agency model, the publishers had engaged in a horizontal price-fixing agreement and that “Apple not only willingly joined the conspiracy but also forcefully facilitated it.”

The remedies proposed in the various jurisdictions are similar and require termination of the agency agreements and restoring retailers’ ability to price discount. The Canadian remedy has, however, been challenged by an e-book retailer that asked the Canadian Competition Tribunal to rescind or amend the Consent Agreement reached between the Competition Bureau and book publishers. That retailer argues that there was no violation of the civil competitor collaboration provisions of the Competition Act and that the remedy would cause it to suffer significant losses.

⁵⁵ European Commission, 2010, “Guidelines on Vertical Restraints”, 2010/C 130/01, paragraph 20.

⁵⁶ http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26804_4.pdf, p 9 paragraph 29 and 30.

Box 1: Apple e-books

In early 2011, the European Commission and US Department of Justice started parallel investigations into the pricing of e-books. The investigations focused on the iBookstore, Apple's e-book online retailer, which was a new entrant to retail online bookselling, and five global publishers, Hachette, France; HarperCollins Publishers UK; Simon & Schuster US; MacMillan Germany, and Penguin Group UK.

Before iBookstore's entry, publishers typically entered into wholesale contracts with retailers whereby retailers paid publishers a wholesale price but were free to set retail prices. Sometimes retail prices were lower than wholesale prices to stimulate sales of related products such as e-readers.

In 2009, Apple entered the e-books retail market with its iBookstore, shortly after the launch of the iPad. Shortly after Apple's entry, publishers sought to renegotiate distribution agreements with retailers by imposing agency agreements on them. Under the agency agreements, the publishers determined the retail prices of e-books subject to the pricing rules in the agency contracts. Apple received a 30 per cent commission as selling agent. The agency agreements between Apple and each of the four publishers contained a retail MFN clause. This clause provided that, in the event another retailer were to offer a lower price for a particular e-book - including in situations where that retailer was operating under a wholesale model and thus was free to set retail prices - the publisher would have to lower the retail price of that e-book in the iBookstore to match the lower retail price of this other retailer.

Combined with the other key pricing terms in the agency agreements with Apple, the retail price MFN clause would have resulted in substantially lower revenues for publishers if other retailers had continued to offer e-books at the prices then prevalent in the market. Therefore, the retail price MFN clause acted as a joint "commitment device" which ensured that the four publishers would have the same financial incentives to make Amazon and other retailers switch to the agency model during the same time period.

The effect was to reduce price competition between both retailers and publishers leading to higher prices for e-books.

In April 2012, the Department of Justice (DoJ) filed a civil antitrust action against the five publishers and Apple for violating section 1 of the Sherman Act by restricting competition in the market for e-books. The DoJ ultimately settled with the publishers who agreed to terminate existing agreements with retailers that restricted their ability to offer discounts or promotions and to not enter into MFN agreements for five years. Apple chose to litigate. In July 2013, the US District Court found that the publishers and Apple had conspired to eliminate retail competition and raise prices in the United States. The Court ruled that Apple had participated in and facilitated a horizontal price fixing agreement and as such was guilty of a per se violation of the Sherman Act. The Court dismissed the argument that the arrangements had pro-competitive effects. Apple appealed the decision to the Second Circuit in October 2013; a decision is pending.

The European Commission opened formal proceedings in December 2011, investigating whether the agreements between the publishers and Apple had the object or effect of restricting competition within the European Union, or European Economic Area. Hachette, HarperCollins, Macmillan and Simon & Schuster, and Apple, proposed commitments that involved terminating existing agency agreements, not entering into MFN agreements for five years and allowing retailers to discount up to their annual aggregate commission for two years. The Commitments were accepted in December 2012. Penguin submitted separate commitments which included similar principles. The EC accepted Penguin's commitments and closed its proceedings.

In Canada several major publishers were alleged to have contravened the civil competitor collaboration provisions in section 90.1 of the Competition Act. Specifically, the Competition Bureau had alleged that the publishers used APPAs in their distribution agreements with individual e-book retailers to prohibit those retailers from offering discounts to customers. The effect was to restrict retail price competition for e-books in Canada. The APPA in question ensured that publishers were pricing e-books in the e-book retailer's online trading platform for not more than the price the publisher charged for the same title elsewhere.

On 7 February 2014, the Competition Bureau entered into a Consent Agreement where four of the five publishers agreed to remove/amend clauses in their distribution agreements that restrict the ability of e-book retailers to offer discounts to customers. The commitments also include a four and a half year ban on APPAs. The Consent Agreement is currently stayed pending an application to the Canadian Competition Tribunal by an e-book retailer, Kobo, to rescind the agreement. Kobo operates under an agency model with each of the publishers and considers that the Consent Agreement would harm its business model.

Issues arising from differences in legal approaches

There are varying views as to what types of vertical restraints are likely to be beneficial, benign or harmful to competition and the circumstances in which these outcomes may occur. These views are reflected in the different legal approaches taken. At the one extreme, per se illegality suggests that vertical restraints, such as RPM, are almost inevitably detrimental to competition such that they should be banned outright with no need to show competitive harm. On the other hand, a rule of reason approach recognises the potentially efficiency-enhancing benefits of vertical restraints while prohibiting anti-competitive restraints. The different approaches have implications for business certainty and also the resources needed to enforce competition law.

The above discussion highlights the similarities and differences in legal approaches to online vertical restraint conduct across ICN member jurisdictions. Differences in legal approach across jurisdictions may not be an issue if the conduct is confined to national boundaries. However, if distribution practices are international then differences in the legal approach may mean that a vertical price restraint that is banned in one jurisdiction is permitted in another. Different outcomes may be the result of differences in market conditions in each jurisdiction. Nevertheless, the differences may raise issues for business certainty and in particular whether potentially efficiency-enhancing restraints will be challenged under competition law. Several issues may arise from this:

- What are the consequences of different approaches to online vertical restraints?
- Is a more consistent approach appropriate? If so, what are the impediments to achieving consistency?

One outcome may be that parties adopt compliance with the stricter approach of treating such conduct as a hardcore restriction and abstain from online bans/limitations where it may otherwise be permitted. Alternatively, parties may tailor their conduct for each jurisdiction according to its respective restrictions.

Recognising that online GPD will not necessarily raise competition law concerns, some jurisdictions are looking at different approaches in addressing consumer concerns – the recent proposal in Canada is an example of this. If implemented as currently proposed, the Canadian approach seeks to address, at least in part, the information asymmetries that can be experienced by consumers. The Canadian proposal includes a five year review mechanism to consider the operation of this approach.

Sufficiency of laws, investigative and analytical tools

An important issue for this project is to understand whether, and to what extent, existing legal frameworks, investigative and analytical tools in ICN member jurisdictions are able to deal effectively with anti-competitive online vertical restraints.

Approximately a quarter of agencies consider that their laws, investigative or analytical tools are insufficient to appropriately address online RPM and online RPM facilitating conduct. About a fifth of agencies consider that their laws, investigative or analytical tools are insufficient to appropriately address APPAs and GPD.

Economic framework for evaluating vertical restraints in online markets

This section provides an overview of the economic framework that is used to evaluate the effects of vertical restraints in traditional and online markets. As noted above, developments in online markets offer substantial scope for strengthened competition and thus enhanced efficiency and welfare by lowering consumers' search costs, facilitating the entry of lower cost distribution methods and substantially expanding the geographic scope of transactions. However, these potential benefits might not be fully realised if the market failures that sometimes arise in traditional markets are also possible in online markets, or if there are new sources of market failure in these markets. In this regard, the potential for free-riding on investments in retail services (particularly online retailers free-riding on traditional retailers), investments by online platforms, quality certification and brand image are often raised as particular issues that could result in market failure in online markets. New forms of information asymmetry about the quality of goods and services available online, and of online sellers themselves, might also arise in online markets. Similarly, developments in online markets might raise new issues for how demand uncertainty is addressed when

entering new markets or releasing new products. This section considers each of these potential market failures in more detail.

Sometimes, market mechanisms emerge to address market failures. However, where these are inadequate, suppliers might consider the use of various vertical restraints to better align incentives. In this regard, vertical restraints can be pro-competitive.

On the other hand, vertical restraints might also be used to protect incumbents from competition from new online sellers and distribution methods and thus have anti-competitive effects. This seems to be a particular issue in markets that are undergoing disintermediation and for sellers that have traditionally been able to segment geographic markets but are now facing greater competition from online sellers in distant locations. The key competition concerns are the potential for foreclosure, softening of competition, and collusion at various stages of the supply chain.

Sometimes, vertical restraints can have both pro-competitive and anti-competitive effects. An issue for this project is whether the balance between these effects is different in online compared with traditional markets.

Market failures and efficiency rationales for vertical restraints

Vertical restraints are a common feature of vertical production and supply chains. In some cases, the restraints act to improve coordination throughout the supply chain by addressing market failures, thereby enhancing efficiency and competition. Market failure can arise in both online and traditional markets. An issue for this project is to consider whether particular types of market failure are likely to be more prevalent in online markets. In addition, does a particular type of market failure manifest itself differently in online markets compared with traditional markets so that there may be greater consideration of vertical restraints in response? If so, should the way that a particular vertical restraint is evaluated be reassessed?

The following potential market failures are most commonly discussed in the context of online markets:

- horizontal externalities
 - free-riding in provision of retail services
 - free-riding on investments by platform owners
- brand image and quality certification
- information asymmetries particularly in relation to the quality of goods and services available online and the reputation of online sellers
- demand uncertainties when seeking to open-up or enter new markets.

Horizontal externalities

Vertical restraints might be used to address horizontal externalities between participants at the same level of the supply chain that would otherwise result in inefficient outcomes for the supply chain as a whole. For example, absent a vertical restraint there might be free-riding on pre-sales services at either the retail or wholesale level. In online markets, there may also be free-riding on investments by platform owners.

Free-riding on retail service provision

The provision of retail services such as in-store demonstrations and the ability to ‘try-before-you-buy’ can provide benefits for both consumers and suppliers. Consumers benefit by being able to better assess the product’s attributes while manufacturers benefit from being able to better explain these attributes to consumers. The benefits are likely to be greater for complex products or those which consumers wish to experience before purchasing. Although there may be other ways for these benefits to be realised, the provision of retail services may be the lowest cost alternative in some instances.

Distributors and/or retailers incur costs in providing retail services, including advertising and promoting a product and/or training staff to provide technical advice to consumers. A free-rider problem might arise if the retailer cannot fully appropriate the returns from providing the retail services because other retailers who also carry the brand can benefit from the service provision. A commonly cited example is that of a consumer obtaining information and advice from a high-service/high-price offline retailer and then purchasing from a discounting online seller that does not provide these retail services. If the free-riding problem is large enough, there may be inadequate incentives for retailers to provide retail services. Consequently, consumers may not have access to the information and services they need to make well-informed purchase decisions and suppliers could find it harder to inform consumers about the product’s attributes. This may ultimately lead to a reduction in competition between competing products (a reduction in inter-brand competition).

A free-rider problem may also arise at the manufacturer/distributor level if manufacturers are required to invest in retail services such as technical support, promotion and the provision of equipment and financing to retailers. Other manufacturers may be able to free-ride on such investments if the investments enhance the overall appeal of the retailer, and not just the manufacturer’s brand. For example, the investments may attract a customer to the retailer who ultimately sells the customer a rival brand.

In addition, as online markets develop, it is evident that some online sellers and platforms are investing in retail services. These investments may themselves be in response to difficulties that online sellers encounter when competing with offline retailers to sell so-called experience and credence goods (see further discussion below). For example, some online sellers invest in the provision of reviews and product information. Some platforms and retailers invest in services that make it easier for consumers to find and compare and select products available online. These investments help to address both information asymmetry and ‘information overload’ that some consumers might experience when trying to use the vast quantities of online information to make better purchasing decisions.

Free-riding problems could potentially arise in relation to these online investments. For example, consumers may be able to use a platform that has invested in providing detailed product information to search for a particular product and then buy that product from a retailer on a platform that has not made similar investments. As rival platforms benefit from investments in pre-sales services, the investing platform may be unable to fully appropriate the returns from its investments by attracting buyers and sellers to the platform. Thus there may be inadequate incentives for investments in such services, to the detriment of platform competition.

The use of vertical restraints in response to free riding on retail service provision

Several types of vertical restraints might be considered if there is a potential for free-riding on the provision of retail services.

For example, minimum-price RPM can help to reduce free-riding by preventing retailers who do not provide the necessary retail services from discounting the product. In these circumstances, RPM can better align retailers' incentives to provide retail services with the interests of consumers and suppliers by guaranteeing the retailer a margin on its sales of the supplier's product. This shifts the focus of intra-brand competition from price-based to service-based with consumers rewarding the retailer that provides the retail services that are of most value to them. Suppliers also benefit from better promotion of their product. If the efficiency and competitiveness of the vertical supply chain is enhanced, minimum-price RPM can improve inter-brand competition.⁵⁷

The ACCC's Tooltechnic case study is an example of RPM that was given immunity from Australia's competition law because the RPM conduct is expected to address the potential for free-riding by low-service discounters (both online and offline) on the provision of retail services by high-service, high-price retailers.⁵⁸

Box 2: Potential free riding on retail services – case studies

The Tooltechnic authorisation involves a highly complex product, the sales of which are likely to benefit from the provision of pre- and post-sales retail services. However, absent the RPM conduct, there was the potential for low-service, price discounting retailers to free-ride on the retail services provided by higher-service retailers. Interestingly, in this case the high-service retailers included online retailers. Thus the conduct was not aimed at protecting offline retailers from new forms of distribution. The ACCC decided to authorise the RPM conduct for four years. However, as it considered the balance between potential efficiencies and anti-competitive detriment to be finely balanced, authorisation is conditional on Tooltechnic providing the ACCC with certain information on an annual basis. This information will enable the ACCC to evaluate the competitive effects of the RPM conduct. Its findings will help to inform an evaluation of the impact of the particular RPM. Furthermore, the specific evaluation may help to inform the debate about whether the market

⁵⁷ Telser, L.G., 1960, 'Why should manufacturers want fair trade?', *Journal of Law and Economics*, Vol. 3, pp. 86-105, examines RPM in this context.

⁵⁸ RPM is a per se breach of the Competition and Consumer Act 2010 but can be authorised (granted immunity) by the ACCC if it satisfies the public benefit test set out in the CCA.

characteristics that were observed in this matter, such as the market shares of parties to the RPM, barriers to entry and market innovation are useful indicators of the likelihood of RPM having efficiency enhancing or anti-competitive effects.

The potential for free-riding by online sellers of retail services provided by offline retailers was also used by Peter McInnes Ltd to justify its proposals to restrict online sales and prevent distributors selling beyond a particular territory. In this instance, the ACCC formed the preliminary view that the purpose of the conduct was to limit access to discounted 'must have' KitchenAid products from internet retailers, thus restricting competition and consumer choice. The ACCC did not reach a concluded view on this issue as the notification was subsequently withdrawn.

In contrast, the ACCC allowed Games Workshop Oz Pty Ltd (GWOP) to impose various vertical restraints on independent retailers. GWOP claimed that the restraints are necessary to prevent free-riding by low-service retailers on retail services provided by other retailers. The restraints included a requirement for independent retailers to have at least one offline outlet (that is, online only retailers would not be supplied), restrictions on the use of third party platforms and restrictions on supply beyond Australia and New Zealand. GWOP also proposed a pricing model that linked wholesale prices to a retailer's scores against various criteria. The criteria applied equally to online and offline outlets.

See also Mobility Scooters case study, Box 8, page 86.

Exclusive territories that increase the cost of consumers' shopping around and reduce the risk of a low-service retailer free-riding on a high-service store, are a traditional way that suppliers seek to deter potential free-riding on offline retailers' investments in retail services. However, the effectiveness of exclusive territories may be reduced by growth in online markets which make it easier for consumers to shop around and increase the likelihood of a consumer purchasing from a lower-priced online seller located outside the exclusive territory. Restrictions on online sales may then be employed to protect exclusive territories, including the use of geo-blocking and vertical restraints.

Dual pricing, where a retailer's wholesale price depends on the extent to which the retailer meets certain criteria, can also be used to reduce the potential for free-riding on retail services. For example, in the Games Workshop Oz Pty Ltd (GWOP) case study, the ACCC allowed GWOP to use a pricing model that linked wholesale prices to a retailer's scores against various service-based criteria. The criteria applied equally to online and offline retailers.

Potential free-riding on a manufacturer/supplier's investments in retail services might be addressed by vertical restraints that restrict a retailer's ability to supply competing brands. This may also induce the retailer to promote the manufacturer's brand to a greater extent than if a range of competing brands were stocked. It is not clear whether developments in online markets change the potential for free-riding at the manufacturer/distributor level.

Platforms might consider the use of an APPA that prevents suppliers from offering lower prices on rival platforms as a way of reducing the potential for free-riding on its investments

in retail services by platforms that do not make such investments. For example, a platform may invest in services that help consumers find valuable information about a supplier's product, such as product specifications and reviews. Investments may also be made in IT systems which enable searching across a large number of products or suppliers. Consumers may use this information but ultimately purchase the product from a lower-priced platform that does not offer this information. An APPA may overcome this free-riding by restricting the ability of suppliers to offer lower prices to rival platforms. This may provide better incentives for platforms to invest in service provision that is valued by consumers, to the benefit of inter-brand competition.

A free-riding argument was made by Hotel Reservation Service Robert Ragge GmbH (HRS), an online hotel booking portal, during the Bundeskartellamt's (BKartA) investigation of APPA/MFN clauses in its contracts with hotels. The BKartA rejected HRS's arguments, concluding instead that the restraints threatened competition by reducing incentives for participants to offer discounts and by raising barriers to entry for new online hotel booking portals (see Box 6, page 75).

In contrast, a potential free-riding concern appears to have been acknowledged by the Competition and Markets Authority (CMA) in its Private Motor Insurance Market Investigation (see Box 5, page 74). However, the CMA considered that the use of an APPA to reduce the potential for free-riding should be limited to restrictions on competition between a price comparison website and the supplier's own website (a 'narrow' APPA). The distinction between 'narrow' and 'broad' APPAs has also been made in some, although not all, European investigations into online travel agents (See Box 6, page 75).

Prevalence of free-riding on provision of retail services in online markets

The potential for free-riding on provision of retail services arises in traditional offline markets, but developments in online markets may create opportunities for new forms of free-riding to emerge. For example, an offline retailer may incur costs showing a consumer how to use a new electronic product. However, the consumer might ultimately purchase the product from a lower-priced/cost online retailer who does not provide these retail services. This potential free-riding may reduce the offline retailer's incentive to demonstrate the product as it must share the benefit of its sales effort with other online retailers. Consumers will be worse off if they do not receive the optimal level of retail services that are of value to them when making purchasing decisions and consequently purchase a product that does not best meet their needs.

It is unclear, however, the extent to which this new form of potential free-riding by online sellers on the provision of retail services by traditional retailers actually arises. On the one hand, if sensory experiences are important to generate sales—for example, trying on clothes—the ease and convenience of online shopping could increase the prevalence of free-riding on offline stores' investments in services that enable consumers to experience the product prior to purchase.

On the other hand, the ease of searching online and the large quantities of information available may weaken the potential for free-riding by displacing or reducing the role of

traditional retail salespersons in effectively promoting complex products. For example, instead of in-store demonstrations, an online retailer can post on its website demonstration videos, photographs and detailed information on the product's features and specifications. The ready availability of detailed information about product quality online, posted by the supplier or through user reviews, may also reduce or displace the role of any particular retailer as a quality certifier even for lesser-known brands.⁵⁹

In addition, free-riding may work in the opposite direction in some circumstances; that is offline retailers might be able to free-ride on online sellers' investments in information and retail services. In this regard, some studies suggest that more consumers research online and then purchase from an offline store than browse at offline stores and then buy online.⁶⁰

Brand image and quality certification

Some retailers have an established reputation that consumers trust. This provides consumers with a 'quality certification service' that implicitly guarantees the quality of the products stocked.⁶¹ However, quality certification is costly. Consequently, prices offered by these retailers might be relatively high. As with provision of costly retail services, it can be difficult for quality certifying retailers to prevent other retailers from free-riding on these investments in reputation. The free-riders might consequently be able to offer lower prices for products that are also stocked by the quality certifying retailer and divert sales from that retailer. If this is the case, there may be insufficient incentives to invest in quality certification. This would harm manufacturers whose products are stocked by the certifying retailer and consumers who value the quality guarantee provided by the retailer.

Sometimes, the price of a product—particularly relative to other products—can also convey information about quality to consumers. A higher price may actually lead to higher sales volumes if it gives consumers confidence that a product is high-quality or prestigious. If such a product is discounted, consumer's perceptions of its quality or status may change, leading to a loss of sales. These types of issues are particularly relevant for prestige and luxury brands.

Developments in online markets might raise new issues for brand image and quality certification services if the focus of online growth is on low-cost price discounting models. Suppliers of prestige brands, in particular, could be concerned about the potential reduction in brand image, and thus sales, if the relative price of the brand falls due to online discounting. These suppliers might consider the use of minimum-price RPM as a way to maintain a product's reputation and signal quality to consumers by preventing lower-quality retailers discounting prices.

⁵⁹Lao, M., Internet Retailing and 'Free Riding': A Post-Leegin Antitrust Analysis (November 29, 2010). Journal of Internet Law, Forthcoming;

⁶⁰Jie Zhang et al., *Crafting Integrated Multichannel Retailing Strategies*, working paper, Harvard Business School, available at <http://hbswk.hbs.edu/6181.html>; Verhoef, P. C., S. A. Neslin and B. Vroomen, 2007, "Multichannel Customer Management: Understanding the Research-Shopper Phenomenon", *International Journal of Research in Marketing*, Vol. 24, No. 2, pp. 129-148.

⁶¹Marvel H. P. and S. McCafferty, 1984, 'Resale price maintenance and quality certification', *Rand Journal of Economics*, vol. 15, pp. 346-359.

Alternatively, selective distribution, whereby only a certain 'type' of retailer with necessary characteristics is able to sell the product, might be considered. Selective distribution is a particular feature of luxury goods markets. Absent selective distribution, retailers might have insufficient incentives to invest in providing the desired shopping experience, as retailers who sell the product but do not make this investment may also be able to benefit. Alternatively, if a retailer does not meet the required quality standard, this may negatively impact buyers' valuation of the brand which will spill over to other retailers selling the brand.

The Pierre Fabre case (see Box 13, page 100) indicates that a 'brand protection' rationale may not be sufficient to justify an outright ban on online sales.⁶² In that case, the European Court of Justice ruled that the need to maintain a prestigious image was not a legitimate reason for banning online sales.⁶³

Quality information asymmetry

Developments in online markets may create quality information asymmetries between buyers and sellers in the online world that do not arise in traditional retailing. Quality information asymmetries may arise in online markets because consumers are not able to physically inspect a product prior to purchasing online. Furthermore, as many online retailers are relatively new entrants, particularly those that do not have an existing offline presence, they might have developed less brand equity than traditional stores. Consequently it may be harder for consumers to identify reputable online sellers than it is for offline stores.

Thus in some online markets, online sellers may have more information than consumers about the quality of the goods and services they sell and also the quality of the seller itself. Suppliers may have an incentive to lower product quality and service if consumers cannot assess quality prior to purchase. If consumers learn to expect lower quality, they will reduce their willingness to pay for a product, even if it is actually high quality. If this happens, a seller cannot capture all of the benefits of selling high-quality products, or investing in its own reputation. Instead, the benefits are shared with low-quality products and retailers leading to a reduced incentive to sell high-quality products and invest in reputation. In these circumstances, it is possible that more resources will be directed to low-quality products and low-quality retailers than is optimal.⁶⁴ Potentially, the reduction in quality could continue until only low-quality products are supplied (a so-called 'market for lemons') even though consumers would be willing to pay more for better quality products.⁶⁵

There is a perception that the focus in online markets is on price competition rather than the aspects of non-price competition that might help to overcome information asymmetries, such as investments in retail services that enable consumers to better experience a product online prior to purchase or investments in reputation. If these perceptions are accurate, then concerns about information asymmetries may be increased in online markets.

⁶² In Pierre Fabre, the selective distribution conduct involved a *de facto* ban on online sales as distributors were required to supply the product in a physical space where a pharmacist was present.

⁶³ Court of Justice of the European Union, Press Release No. 110/11, Judgment in Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Others, 13 October 2011.

⁶⁴ It is theoretically possible that a market will fail to exist at all.

⁶⁵ Akerlof, G, 1970, "The market for "Lemons": Quality uncertainty and the market mechanism", *The Quarterly Journal of Economics*, Vol. 84, No. 3, pp.488-500.

However, it is not evident that these perceptions are accurate as market solutions to information asymmetries about the quality of products and sellers online are emerging. Online sellers are increasingly competing on non-price as well as price dimensions by offering, for example, favourable delivery and returns policies which might enhance their reputation for quality. Online platforms are also increasingly giving consumers the opportunity to provide feedback about online sellers on the platform.⁶⁶ Over time, as consumers' experience with an online seller increases, either through repeat purchases or the experience of other consumers, it is likely to become easier for consumers to identify reputable online retailers.

In addition, online sellers are increasingly offering detailed information about the goods or services on offer, thus making it easier for consumers to assess the quality of products available online. In addition, it is sometimes possible to sample a product online prior to purchase, such as reading extracts of a book, or listening to an excerpt of music.⁶⁷

However, as with retail services provided by traditional sellers, there is the potential for free-riding on the provision of these online investments. If this is the case there may be inadequate incentives for investments in these services, to the detriment of platform competition. An APPA might be used to provide better incentives for investments in information, quality and reputation that are valued by consumers. An APPA might help to prevent free-riding on a platform's investments in information provision and reputation by preventing sellers from offering lower prices on rival platforms that have not made these investments.

Demand uncertainty when opening up or entering new markets

It can be difficult for entrants, or incumbents who are introducing new products, to find a retailer to sell the new products because of the risk that demand for the product will be unprofitably low. The difficulty may be enhanced if retailers need to make substantial sunk investments in promoting the new product before it is known whether the product's launch will be profitable. If a retailer invests in promoting the product and demand is subsequently high, it can be difficult to stop other retailers, who did not contribute to the initial promotion costs, from selling the product and free-riding on the initial retailer's promotional efforts. This potential free-riding may reduce the willingness of the initial retailer to promote the new product. This could result in the new product either not entering the market, or failing due to inadequate promotional support to the detriment of inter-brand competition.

Minimum price RPM is one way to manage demand uncertainty by reducing the potential for free-riding on the initial retailer's promotions by other retailers if demand for the new product is high. Minimum price RPM also provides an assurance that prices will not fall even if demand is ultimately low. This might provide better incentives for retailers to hold more stock of a new product than they might otherwise do because if demand turns out to be low,

⁶⁶ The effect of the reputational system developed by eBay has been studied in the literature. See for example, Resnick P., Zeckhauser R. Swanson J. and K Lockwood, (2006) "The Value of Reputation on eBay: A Controlled Experiment", *Experimental Economics*, Vol. 9, No. 2, June, pp. 79-101, and Cabral L. and A. Hortacsu (2010). "The Dynamics of Seller Reputation: Evidence from eBay", *The Journal of Industrial Economics*, Vol. 58, No. 1, pp. 54-78.

⁶⁷ Buccirossi, P., 2013, Background Note, *Vertical Restraints for online sales*. OECD Policy Roundtable

discounters will not be able to capture sales by reducing prices. Providing better incentives for retailers to hold inventories of new products increases the likelihood that sufficient stock will be available if demand turns out to be high.⁶⁸

Similarly, exclusive territories can reduce the riskiness of entry by preventing competition from new distributors, and existing distributors in other territories, once the new product has been successfully promoted by the original distributor and demand increases. If the product has already been released in other markets, the manufacturer may wish to impose restrictions on online sales, or selling outside a home territory so as to protect a distributor's investments in the new market.

However, developments in online markets may reduce some of the problems associated with demand uncertainty and thus reduce the use of vertical restraints in response. For example, in online markets it is often the wholesaler (rather than the retailer who receives the order from the consumer) that ships the product direct to the consumer. This not only reduces the time taken to distribute the product to the online consumer but also substantially reduces the need for some online retailers to hold inventories. By reducing the need to hold inventories, the risk to an online seller of offering a new product with uncertain demand can be reduced.

Similarly, developments in online markets are changing the way in which new products are promoted to consumers. There is an increasing focus on so-called 'pull marketing strategies' which encourage consumers to actively seek out a brand, rather than traditional 'push marketing strategies' that focus on taking the product to the consumer. The new strategies build customer relationships through the use of social media and can be effective in creating brand awareness prior to entry into a new market, particularly if the product has already been successfully launched in another market and information about the product is readily available online. This can reduce not only uncertainty about demand for the product in a new market, but also the need for investments in costly 'push strategies', or promotional activities, by retailers.

Competition concerns

As in traditional markets, the use of vertical restraints in online markets can raise competition concerns. The immediate harm from vertical restraints is a reduction in competition between retailers selling the same product (intra-brand competition). This is likely to result in some consumers paying a higher retail price. Vertical restraints can also reduce inter-brand competition leading to higher prices, reduction in consumer choice of price-service combinations, and reduced innovation in distribution, to the ultimate detriment of efficiency and welfare.

As noted, developments in online markets have been, and are expected to continue to be, highly pro-competitive by reducing distribution costs, expanding the geographic boundaries for trade and enhancing market transparency. There are concerns, however, that

⁶⁸Deneckere, R., H. Marvel and J. Peck, 1997, "Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition", *American Economic Review*, Vol. 87, No. 4, pp.. 619 – 641.

incumbents may seek to use vertical restraints to protect their market position from this greater competition by, for example, placing restrictions on low cost online retailers' ability to price discount or sell to consumers beyond a particular geographic boundary. Traditional intermediaries might also seek to use vertical restraints to exclude competition from new entrants and deter the emergence of lower cost distribution methods, including direct online sales to consumers.

The main theories of economic harm arising from vertical restraints are:

- foreclosure of rivals, thus deterring entry and promoting exit
- softening of competition
- facilitation of collusion among suppliers or retailers.

Foreclosure of rivals

In some circumstances, vertical restraints may be used to foreclose market access and prevent the entry of more efficient rivals. Vertical restraints may also be used to raise the costs of existing competitors, thus reducing their competitiveness and potentially causing significant loss of market share and ultimately exit from the market.

Upstream foreclosure

Exclusive dealing arrangements are one of the main ways in which rivals may be foreclosed at various stages of the vertical supply chain. Rival manufacturers may be foreclosed (upstream foreclosure) if another manufacturer signs exclusive dealing arrangements with key distributors, thus requiring rivals to use less efficient distribution or set up their own distribution network. This may raise rivals' costs and reduce their access to customers if there are economies of scale and/or scope in distribution. On the other hand, developments in online markets may reduce concerns about upstream foreclosure in some instances. For instance, economies of scale and scope in distribution are falling in markets that are undergoing disintermediation. In those markets, manufacturers have less reliance on traditional distributors and are increasingly able to deal directly with consumers. In these markets, the competition concern is that vertical restraints may be used to protect incumbent intermediaries from direct competition from their traditional vertical supplier. This was the issue raised in the Flight Centre case study (see Box 7, page 78).

The use of minimum price RPM can also facilitate exclusion at the manufacturer level if, by protecting retail margins on a dominant manufacturer's products, it reduces retailers' incentives to sell smaller rivals' or new entrants' products.

Retail foreclosure

Rivals may be foreclosed at the retail level if a manufacturer engages in exclusive or selective distribution, including, for example, banning online sales. If the manufacturer's product is a 'must have' from the viewpoint of a substantial number of consumers, a retailer's

inability to stock this product may reduce its ability to attract customers thus reducing competition. This was one of the issues considered in the Peter McInnes (see Box 2 on page 38).

RPM imposed on suppliers by dominant retailers can also foreclose innovative new lower-cost retailers or distributors. This may be a particular issue in online markets if new entrants wish to adopt a low cost, price discounting model.

Platform foreclosure

In online markets, vertical restraints may also foreclose platform competition. For example, exclusive dealing arrangements and selective distribution can hinder the entry and development of innovative distribution platforms if they hinder a platform's ability to attract a wide range of sellers offering a wide range of products, including 'must have' products. Similarly, APPAs may impede or prevent entry of rival platforms by making it harder to attract buyers and sellers to the new platform. A new platform may, for example, seek to attract sellers by offering lower platform fees which may be passed onto buyers as lower prices. Other things being equal, lower prices would attract buyers to sellers on the new platform. However, an APPA restricts sellers' ability to offer lower prices on the new platform, thus making it harder to attract buyers to the platform. If a critical mass of buyers and sellers is needed to overcome strong network effects, difficulty in attracting buyers may prevent entry and reduce competition between different business models.⁶⁹ These types of concerns arose in the e-books (see Box 1, page 33), online travel agents (see Box 6, page 75) and Flight Centre (see Box 7, page 78) case studies.

Softening of competition

Vertical restraints are likely to affect strategic interactions between the vertical supply chain and rival supply chains in oligopoly markets. This is because vertical restrictions directly affect competition in downstream markets and therefore indirectly affect the behaviour of rival manufacturers upstream when contracting with retailers. Manufacturers may wish to 'soften' retail competition so as to achieve, through strategic interactions, higher prices and profits.

Vertical restraints, such as RPM, soften price competition between retailers that sell a particular product. This is the direct reduction in intra-brand competition. Vertical restraints can also be used to 'soften' inter-brand competition at the retail level and keep retail prices high if a manufacturer can commit to higher prices and rivals react by also keeping prices high.⁷⁰ This softer inter-brand competition results in higher prices and profits but lower consumer welfare.⁷¹

⁶⁹Boik A and Corts K. S. (2013) 'The Effects of Platform MFNs on Competition and Entry', Working Paper, University of Toronto.

⁷⁰ Rey, P., and Stiglitz, J. 1995. "The Role of Exclusive Territories in Producers' Competition." *RAND Journal of Economics*, Vol.26, pp. 431–51.

⁷¹ See Motta, M., 2004, *Competition Policy: Theory and practice*, Cambridge University Press, for a discussion of the strategic effects of vertical restraints.

As exclusive territories are highly visible, their commitment value and hence potential effectiveness as a means of softening competition is high. As noted elsewhere, developments in online markets are expanding the geographic scope for sales and undermining the effectiveness of exclusive territories as a way to segment geographic markets. There are concerns that suppliers will seek to use vertical restraints such as online sales bans or restrictions, to restrict the geographic reach of online sellers. Similarly, RPM may be used to soften the intensity of price competition, particularly from discounting online sellers.

APPAs can also soften competition between platforms leading to higher fees paid to platforms by suppliers and higher prices paid by consumers to suppliers. Absent APPAs, platforms are likely to compete for suppliers and consumers on the basis of fees charged to suppliers for accessing the platform. Other things being equal, suppliers will set lower prices on platforms that charge lower fees and thus attract more consumers to the lower cost platform. However, if a supplier has signed an APPA with the higher cost platform, it will not be able to charge lower retail prices on the lower-fee platform and attract consumers to that platform. An APPA may also restrict a supplier's ability to alter the distribution of sales volumes across platforms thus restricting its ability to increase sales on lower-fee platforms. In either case, the lower-fee platform will not benefit from increased overall transactions and commissions and will thus have less incentive to compete by decreasing commissions. This softening of competition between platforms can lead to higher fees paid by sellers and higher retail prices paid by consumers than would otherwise be the case. The Bundeskartellamt's Amazon investigation is an example of this type of potential competitive effect (see Box 4, page 67).

Facilitate collusion

In some instances, vertical restraints may facilitate collusion by making it easier for rivals to reach a collusive agreement and then reduce incentives to cheat and making it easier to detect and punish deviations from the collusive agreement.

Manufacturer cartels

It can be difficult to sustain collusion at the wholesale level if wholesale prices are not transparent. Certain vertical restraints, particularly RPM, can facilitate collusion at this level by increasing price transparency and stabilising prices. Similarly, the use of RPM can help manufacturers detect deviations from a collusive upstream agreement by reducing the sources of downstream price variation. This reduces the incentives to cheat. Members of a manufacturing cartel that wish to cheat might do so by reducing wholesale prices which would in turn lower retail prices and increase retail and wholesale sales. A manufacturer may have an incentive to cheat if the subsequent expansion in sales was likely to be profitable. Absent RPM, it could be difficult for upstream cartel members who observe a reduction in a rival's retail prices to know if the observed reduction is a result of deviation from the collusive upstream agreement or changes in demand conditions. With RPM, a reduction in a rival's retail prices would be easily detected as cheating. This reduces the incentive to cheat by making it less likely that an upstream price reduction would be profitable. This makes the

manufacturers' cartel more stable.⁷² This effect may be offset however if the 'cheating' manufacturer is able to stimulate demand for its product by reducing its wholesale price and then encouraging its retailers to engage in stronger non-price competition (which would be harder to detect). This strategy will be successful if stronger non-price competition increases sales sufficiently to recoup the wholesale price cut and is thus more likely in relation to products for which extra pre-sales service is valued by consumers.

Retail cartels

In retail markets, RPM may provide a focal point for retailers and therefore increase their ability to coordinate on higher, more profitable prices. In addition, RPM increases the ability to punish retailers that cheat by reducing prices. Furthermore, as it is the manufacturer rather than other colluding firms that will punish deviating retailers, the stability of collusive agreements is facilitated in markets where it might otherwise be difficult for punishment to occur.

The concept of a manufacturer-enforced retail cartel appears contrary to the interests of a manufacturer who ordinarily benefits from low, rather than high retail prices and would therefore appear to have little to gain from supporting artificially high retail prices. However, such an outcome may be possible if the retail cartel consists of a sufficiently powerful group of retailers. In these circumstances, minimum-price RPM agreements can achieve the same outcome as horizontal collusion between retailers.⁷³

An APPA may also affect competition between sellers because it reduces sellers' ability to price discriminate across platforms. The reduction in price variation across platforms may facilitate collusion at the retail level by making it easier to reach agreement as to a single price and to detect deviations from a collusive arrangement. In this regard, APPAs might also facilitate outcomes that are similar to traditional horizontal agreements.

If a supplier has a network of retail MFNs, the arrangement can have a similar effect to prices being set under an industry-wide RPM even if some retailers are free to set their own prices. This effect arises because the supplier must monitor and match all prices, which acts as a disincentive for a retailer that is able to set its own price to undercut its rivals.⁷⁴

Platform cartels

APPAs may facilitate collusion between platforms by reducing the incentives to cheat on a collusive arrangement and making it easier to monitor such an arrangement.

A platform may have an incentive to deviate from a collusive arrangement by offering lower fees/commissions to sellers if it expects that this would lead to lower prices, and hence more

⁷²Jullien, B., and P. Rey. 2007. "Resale Price Maintenance and Collusion." *The RAND Journal of Economics*, Vol. 38, No.4, pp. 983–1001.

⁷³OECD, Roundtable on Resale Price Maintenance, 2008, Background Note, p.31.

⁷⁴Boik, A. and K. S. Corts, 2013, "The Effects of Platform MFNs on Competition and Entry", University of Toronto, available at http://economics.yale.edu/sites/default/files/corts_17-oct-2013.pdf; Foros, O, Kind H. J. and G. Shaffer, 2013, "Turning the Page on Business Formats for Digital Platforms: Does Apple's Agency Model Soften Competition?", CESIFO Working Paper No. 4362

buyers and higher total fees/commissions, on the platform. However, if a seller has an APPA with rival platforms, then the seller is not able to charge different (lower) prices across platforms. Thus, the seller would need to share any benefit from lower fees/commissions offered by one platform, across all the other platforms on which it operates. Hence, it is less likely that a platform that wishes to deviate from a collusive arrangement by lowering fees/commissions would be able to capture sufficient market share to make deviation worthwhile. Furthermore, as sellers are not able to charge different prices across platforms, they may seek a fee/commission reduction from colluding platforms (thus alerting cartel members of deviation) in response to lower fees/commissions offered by the cheating platform.⁷⁵

Conclusions

The preceding discussion indicates that the reasons for and effects of vertical restraints in online markets will vary on a case by case basis. Just as in offline markets, a vertical restraint might improve competition, efficiency and welfare by helping to overcome a market failure. However, vertical restraints can also raise competition concerns. Sometimes a vertical restraint may have both effects.

The following chapters examine the four vertical restraints that are the focus of this project as well as geographic price discrimination. The chapters will consider, among other things, the legal frameworks that are applied to the various vertical restraints. It will be evident that there are a variety of legal approaches to vertical restraints. To some extent these reflect different views as to where the balance between the potential efficiencies and competitive harm from vertical restraints is likely to lie.

In jurisdictions where a particular vertical restraint is not per se illegal, an assessment of the competitive effects of vertical restraints often starts with the premise that such restraints are only likely to raise competition concerns if they are entered into by firms with significant market power. In some jurisdictions this premise is made explicit through the use of market share thresholds below which competition concerns are unlikely to arise. However, competition concerns may arise in markets where an individual vertical restraint does not breach competition laws but the cumulative effect of a number of such agreements may have such an effect. For example, if a supplier of a particular brand of sports shoes imposes a ban on online sales in order to protect its traditional bricks and mortar retailers, this action alone may not cause significant competition concerns if there is sufficient competition from rival suppliers of sports shoes. If, however, a large number of rival suppliers also independently entered into such vertical agreements, the competitive effect may be much more significant.⁷⁶ Cumulative competition effects are not unique to online markets. However, they might arise more frequently in online markets given the greater scope for expansion of geographic sales and disintermediation.

⁷⁵Buccirossi, P, 2013, "Background Note", in OECD Policy Roundtable, *Vertical Restraints for online sales*.

⁷⁶ This is not to say that wholly independent parallel conduct would violate competition laws.

Key vertical restraints in online markets

This section considers in more detail the four vertical restraints and online GPD that were the subject of the survey of ICN members for the ICN 2015 Online Vertical Restraints Project. For each type of vertical restraint and for GPD, this section sets out the results of the survey and seeks to provide a conclusion as to: the extent to which online vertical restraints of each type are being prioritised by ICN members; whether the existing legal frameworks, investigative and analytical tools are considered sufficient to deal with online conduct of this type, and what further work could be done by the ICN in relation to each online vertical restraint.

Resale price maintenance

RPM arises if a supplier controls or restricts the retail price of its products or services. RPM may involve a supplier specifying a minimum price or price floor on retail price. Alternatively, RPM may involve a supplier specifying a maximum or price ceiling on the retail price. If the supplier specifies the same minimum retail price for each of the retailers that are supplied and if all brands in a market engage in RPM it can facilitate price fixing across the market.

Suppliers sometimes make retail price recommendations to retailers. Such recommendations are not usually considered to be RPM as retailers retain the ability to set retail prices and are typically not penalised for non-compliance with the recommended price.

RPM can be pro-competitive if it is used to address a market failure. For example, a supplier might consider RPM as a way to address the potential for free-riding on investments in retail services, quality certification and to facilitate the entry of new products or manufacturers into new markets. Developments in online markets may create new avenues for market failure and thus new reasons for suppliers and retailers to seek to enter into RPM arrangements. These issues are discussed in more detail in Market Failures and Efficiency Rationales in Vertical Restraints, page 36.

However, RPM may also raise competition concerns, particularly in relation to minimum-price RPM which restricts price competition between competing sellers of the same product (intra-brand competition). RPM can also facilitate collusion and/or exclusion at the manufacturer or retail level. At the retail level, if retailers have sufficient power to induce a manufacturer to enter into minimum-price RPM agreements, then vertical RPM agreements can achieve the same outcome as horizontal collusive arrangements between retailers. These competition concerns are discussed in more detail at page 44.

Nevertheless, some consider that free-riding is unlikely to be of concern in most markets as few products require retail services for effective marketing and few retailers actually provide these services. In other markets, the services can be efficiently supplied by the manufacturer. Finally, retail services are likely to be of little value to consumers if the product

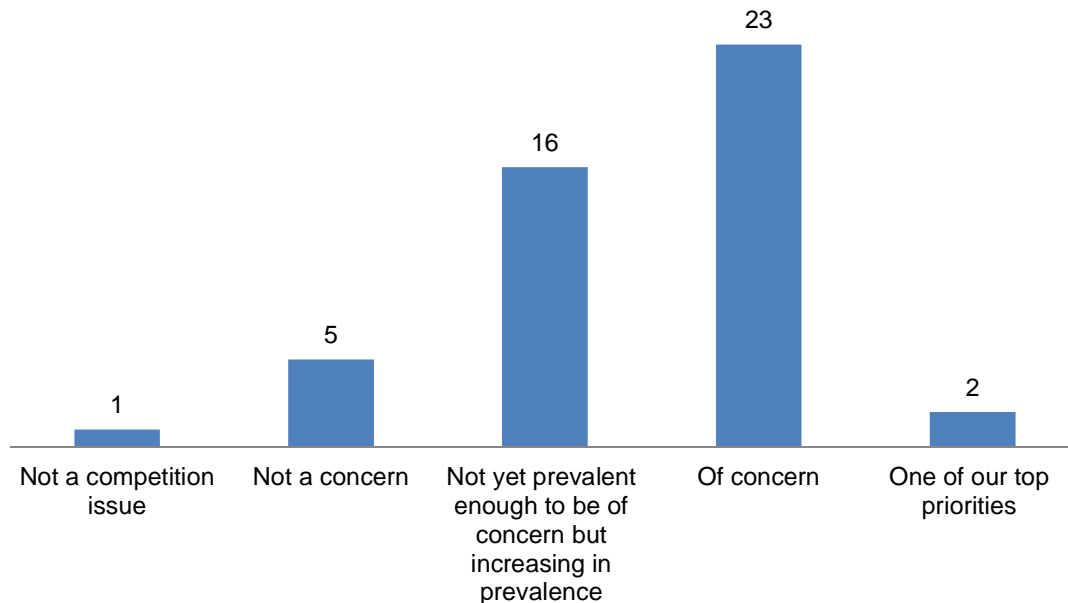
is relatively inexpensive and/or most consumers already know what they want and how to use the product.⁷⁷

Extent of ICN members concern about online RPM

Figure 4 below shows the level of concern that survey respondents have about RPM conduct in online markets in their jurisdiction.

RPM conduct in online markets is of greater concern to ICN members as a group than any of the other restraints that were included in the survey of ICN members. Almost half of all survey respondents submitted that online RPM conduct is of concern (23 responses or 49 per cent), closely followed by those that consider it is not yet prevalent enough to be of concern but is increasing in prevalence (16 responses or 34 per cent). Together, these accounted for the majority of respondents, with a smaller number indicating that RPM is a top priority (only two respondents – the Competition and Consumer Protection Commission of Ireland and the Swiss Competition Commission) or not a concern/competition issue (combined, 6 responses or 11 per cent).

Figure 4 – Extent of concern about RPM conduct in online markets (47 respondents)



Geographically, the survey results suggest that online RPM is of relatively greatest concern in Europe, North America and Asia. Drawing from the survey responses there appears to be less concern in Africa, South America and Oceania.

⁷⁷ Scherer FM and D Ross, 1990, *Industrial market structure and economic performance*, 3rded.

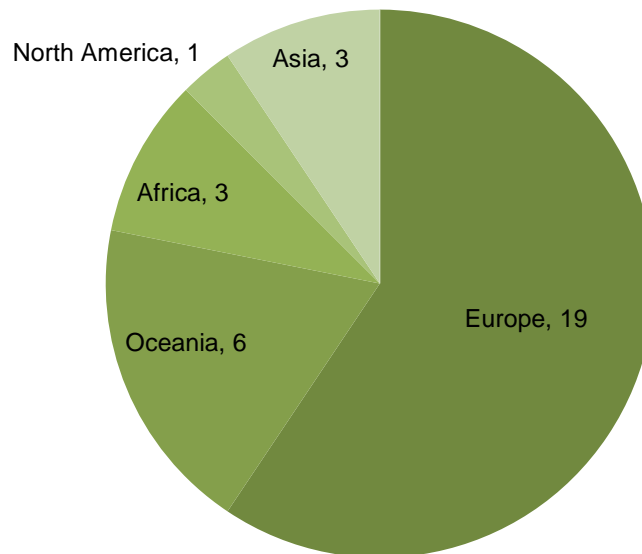
Prevalence of online RPM investigations in ICN member jurisdictions

Based on the survey responses, online RPM appears to be the most prevalent online vertical restraint issue investigated by ICN member agencies in 2013. As shown in **Figure 3** on page 26 of this report, of the jurisdictions that responded to the survey, more investigations were commenced in 2013 into online RPM-related conduct than any other type of online vertical restraint conduct. This accords with the views of ICN members above which show that almost half of all survey respondents submitted that online RPM conduct is of concern.

Figure 5 provides a regional breakdown of those online RPM investigations commenced in 2013.

The survey results indicate that European jurisdictions commenced approximately 60 per cent of the investigations into RPM in online markets in 2013. While more ICN members are located in Europe than any other continent, the concentration of online RPM investigations within Europe is not proportionate to its ICN membership—approximately 40 per cent of ICN members are from within Europe. However, the number of investigations commenced is consistent with the relative degree of concern about RPM in online markets in European jurisdictions. In particular, 13 of the 23 (56 per cent) European respondents to the survey indicated that RPM is of concern, with an additional two respondents indicating that RPM conduct is one of their top priorities. In contrast with other regions, none of the European (or North American) survey respondents indicated that RPM conduct in online markets is not of concern or not a competition issue. This also likely reflects the per se / hardcore status of RPM in Europe.

Figure 5 – Online RPM Investigations commenced in 2013 – by region (number of investigations)



Similarly, the proportion of investigations commenced within Oceania (19 per cent) exceeds its share of ICN membership (three per cent), with five of the six cases in Oceania being commenced in Australia. As discussed below, RPM conduct is a per se breach of Australia's competition laws, although it can be authorised. However authorisation of RPM is a rare occurrence with the ACCC authorising its first case in 2014 (see Box 2, page 38).

The lack of RPM cases in the US relative to the size of its economy may be indicative of the approach to RPM conduct over recent years following the *Leegin* case and the consequent shift from treating RPM as a per se offence to applying the rule of reason at the federal level, although several states continue to treat RPM as per se illegal.

In terms of responses from Asian members, nearly three quarters of these respondents indicated that online RPM is a concern, despite only three online RPM investigations being commenced in 2013.

Similarly, no investigations into online RPM were commenced in South American jurisdictions in 2013. Although none of the South American respondents to the survey indicated that RPM in online markets is currently of concern, half indicated that the conduct is increasing in prevalence. This may suggest that there is a need for better tools to identify, investigate and prosecute such conduct in Asia and South America.

Interestingly, three investigations into RPM in online markets were commenced in African jurisdictions in 2013 although there is a prevailing view from African respondents to the survey that such conduct is not currently of sufficient prevalence to be of concern, although its prevalence is increasing. This inconsistency may suggest that African jurisdictions are on the cusp of considering RPM conduct in online markets to be of concern.

Legal frameworks – online RPM

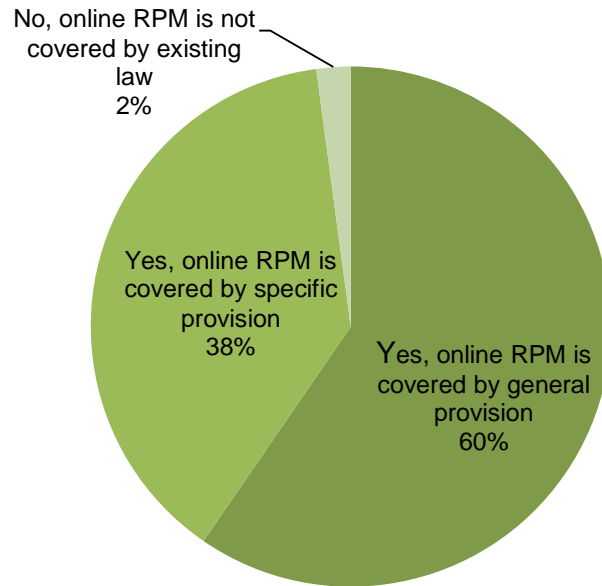
Is online RPM conduct covered by existing competition laws?

Figure 6 shows that existing competition laws cover online RPM conduct for most survey respondents. Only one survey respondent, El Salvador, indicated that its existing law does not cover RPM. In this case, the Salvadoran competition law is currently undergoing reform and while the law does not currently cover RPM, an RPM provision has been considered. It is proposed that in El Salvador a rule of reason test would be applied.⁷⁸

⁷⁸ It is proposed that two procedural requirements will be considered:

- (i) whether the party occupies the dominant position in the relevant market and
- (ii) the anticompetitive effect of the conduct, including on consumers. The proposed test would take into account competitive efficiencies gained from the conduct such as the promotion of innovation or allowing participants to integrate their productive capacities.

Figure 6 – Does the existing law cover online RPM?



In the majority of jurisdictions where the existing law covers online RPM (60 per cent of respondents) online RPM conduct is covered by a general provision dealing with vertical restraints. In the remaining cases (38 per cent of respondents), online RPM conduct is covered by a provision relating specifically to RPM conduct.⁷⁹

The appropriate legal treatment of RPM conduct has been debated for many years. Prior to 2007, the stance of competition law in most jurisdictions was that RPM constituted such a serious detriment to competition that it could never be justified. There are now several different approaches to RPM across ICN member jurisdictions. Some countries, most notably the US and Canada, have moved away from the per se prohibition. In the US, a 96 year per se prohibition on RPM was overturned by the US Supreme Court in *Leegin* (2007).⁸⁰ In *Leegin*, the Court recognised that while competition between resellers is likely to be reduced where RPM is practised, competition between manufacturers may increase. Now the rule of reason approach applies at the federal level, although several states continue to treat RPM as per se illegal.

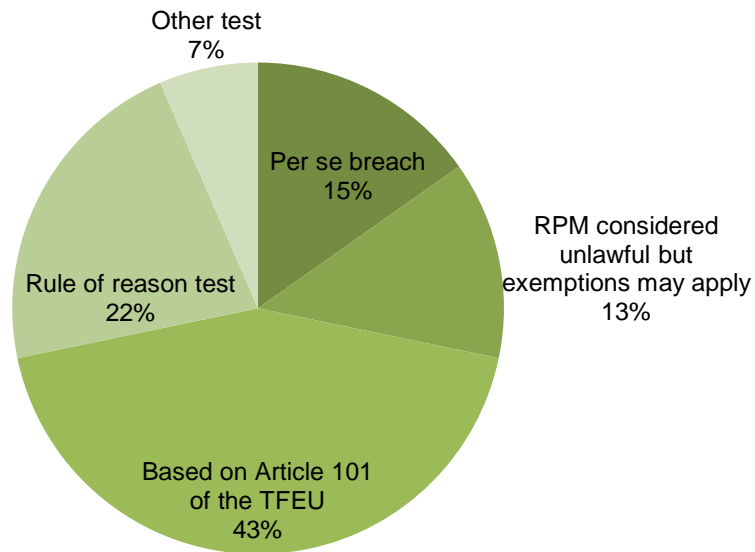
Figure 7 below provides a breakdown of the types of existing provisions that deal with RPM conduct, including those that cover RPM under a general provision and those whose law specifically addresses RPM conduct.⁸¹

⁷⁹ References to 'specific provision' throughout the document relate to provisions specifically aimed at that type of conduct.

⁸⁰ *Leegin Creative Leather Products, Inc v PSKS, Inc.*, No. 06-480, 28 June 2007.

⁸¹ For those respondents whose existing laws cover RPM.

Figure 7 – Type of existing provision dealing with online RPM



The largest group of respondents (43 per cent) have a provision based on Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements that may affect trade between Member States and have the object or effect of preventing, restricting or distorting competition, followed by those respondents whose law is based on a rule of reason test (22 per cent) and those jurisdictions in which RPM conduct is considered a per se breach of competition law (15 per cent). RPM conduct is considered unlawful but exemptions may apply in 13 per cent of jurisdictions while some other test applies in the remaining jurisdictions.

General provisions⁸² covering RPM conduct

Table 5 below shows a breakdown of the jurisdictions which apply a general provision to RPM conduct and the type of general provision that applies in each case.

In many jurisdictions, RPM conduct is covered by general provisions based on Article 101 of the TFEU or a rule of reason approach as provided for in the US (as discussed earlier).

Table 5 – General Provisions covering online RPM

Type of general provision	Countries
Online RPM is considered unlawful without conducting an analysis of competitive effects (per se breach or strict liability breach)	Ireland
Online RPM is considered unlawful without conducting analysis of competitive effects but exemptions can apply	Israel

⁸² By 'general provision' we mean a provision that is not specifically or exclusively designed to address RPM conduct but sufficiently broad in scope to be able to address the conduct.

Rule of reason applies to online RPM	Chile, Ecuador, Egypt, US
Rules apply to online RPM that are based on Article 101 of TFEU	Austria, Belgium, Bulgaria, Czech Republic, Denmark, EC , European Free Trade Association (EFTA) Surveillance Authority, Finland, France, Germany, Hungary, Italy, Lithuania, Luxemburg, Netherlands, Norway , Poland, Slovenia, Sweden, UK
Another test applies	Colombia, Hong Kong, Singapore

As shown in **Table 5**, most of the respondents whose jurisdictions apply a general provision to RPM type conduct are European member states whose laws are based on Article 101 of the TFEU. In the EU, there is a rebuttable presumption that RPM is anti-competitive and unjustifiable. This approach is more permissive than a per se prohibition but stricter than the rule of reason approach. Article 101 of the TFEU prohibits all agreements that may distort competition in the EU's internal market. There is an exception to the prohibition where RPM contributes to improving the production or distribution of goods or promotes technical or economic progress, while passing on a fair share of the benefits to consumers, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. These conditions create a relatively high threshold as the negative effects of hardcore clauses are such that they generally are not outweighed by positive effects, or the restriction is not indispensable to the achievement of the benefits sought.

The US, Chile, Egypt and Ecuador apply a general rule of reason test to vertical restraint conduct including online RPM, considering each case on its merits. In Ireland, RPM conduct is covered by a per se breach provision and in Israel, RPM is considered unlawful without conducting analysis of competitive effects but exemptions can apply. In Israel there is no formal difference between a horizontal restrictive agreement and a vertical restrictive agreement, such as RPM or APPAs. The two main exemptions which may apply are:

- block exemption for non-horizontal agreements that do not include minimum RPM (can include maximum RPM), naked restraints (general restraint on competition) or restraints that may substantially harm competition; and
- block exemption for franchise agreements.

Three jurisdictions indicated they apply a different kind of general provision to RPM conduct.

First, in the case of Colombia, it has recently been recognised that vertical restrictions under specific conditions can promote competition, improve the efficiency of a commercial operation and, ultimately, benefit consumers. Prior to 2014, any agreement (vertical or horizontal) related to price fixing was in-principle forbidden. Since 2014, the Superintendencia de Industria y Comercio, the Colombian competition authority, has established that in some cases and under specific conditions, vertical restraints might generate positive effects and efficiencies, which can lead to exemption of these

arrangements from the prohibition that would otherwise have applied. The exemptions do not apply automatically; efficiencies are considered on a case-by-case basis.

Second, in the case of Hong Kong, for RPM agreements that are not excluded as agreements of ‘lesser significance’⁸³, minimum/fixed price RPM may be treated as restriction by object but open to efficiency justifications. Maximum RPM will be treated as restriction by effect (see discussion below on maximum RPM).

Third, in Singapore, vertical agreements which prevent, restrict or distort competition within Singapore are prohibited under an abuse of dominance provision. When considering a vertical restraint, the Competition Commission of Singapore considers whether, by engaging in the vertical restraint conduct, the entity is abusing a dominant market position and whether such conduct can be objectively justified. There are a number of exceptions which mean that vertical agreements are generally exempt from competition law.⁸⁴ Where the Minister considers that the potential anti-competitive effects of conduct of concern outweigh the pro-competitive effects, the Minister can declare the Competition Act to be applicable to that conduct of concern.

Provisions specifically covering RPM conduct

Table 6 below shows a breakdown of the jurisdictions that apply a provision relating specifically to RPM conduct (including online RPM) and the type of specific provision that applies in each case.

Table 6 – Provisions specifically covering RPM

Type of RPM-specific provision	Countries
Online RPM is considered unlawful without conducting an analysis of competitive effects (per se breach or strict liability breach)	Botswana, Mauritius, Seychelles, South Africa
Online RPM is considered unlawful without conducting analysis of competitive effects but exemptions can apply	Australia (conduct can be authorised – see discussion below), Brazil, New Zealand (conduct can be authorised), PNG (conduct can be authorised), Russia
Rule of reason applies to RPM	Canada, Indonesia, Korea, Switzerland
Another test applies to RPM conduct	Japan, Taiwan

As shown in Table 6, five respondents submitted that in their jurisdictions, RPM conduct is considered unlawful without conducting an analysis of the competitive effects of the conduct: Botswana, Mauritius, Seychelles and South Africa all impose a per se prohibition or strict liability test on RPM conduct.

⁸³ Other than in the cases of certain conduct defined as Serious Anticompetitive Conduct (which includes price fixing, market allocation, limiting production or supply and bid rigging), arrangements between parties with a combined turnover of less than HK\$200 million are considered to be “agreements of lesser significance” and excluded from the scope of the “restriction by object” for minimum/fixed price RPM.

⁸⁴ Section 34 of the Singapore Competition Act prohibits cartel conduct; section 47 prohibits abuse of dominance. Exclusions under the third and fourth Schedule of the Competition Act prevent section 34 and 47 from applying to any goods or services to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter.

A further six respondents submitted that RPM conduct is considered unlawful without conducting an analysis of the competitive effects but exemptions can apply.

In Brazil, exemptions apply when neither the supplier nor its distributors (i) together have 20 per cent market share, and (ii) belong to a market in which the four major players have a combined market share of 75 per cent or more.

In Russia, exemptions apply where RPM is provided for by written vertical agreements of commercial concession, such as franchising agreements, if not between financial organizations and/or the market share of each participant in the RPM agreement does not exceed 20 per cent.

In Australia, New Zealand and Papua New Guinea, RPM is considered unlawful without conducting analysis of competitive effects although the conduct may be authorised (i.e. exemption granted).

In Australia, RPM conduct may not be authorised unless the ACCC is satisfied in all the circumstances that the conduct would result or be likely to result in such a benefit to the public that it should be allowed. In New Zealand, the conduct may be authorised if the New Zealand Commerce Commission is satisfied that the RPM will result, or be likely to result, in benefits to the public that will outweigh the harm. In Papua New Guinea, the authorisation process also involves an assessment of net public benefits.

In Australia, there is a current debate about whether RPM conduct should remain a per se prohibition of the *Competition and Consumer Act 2010* (CCA). The ACCC's view is that there are circumstances where RPM may be efficiency enhancing. This is reflected in its recent authorisation of RPM conduct (see Box 2, page 38). However, the ACCC also considers there is insufficient evidence that efficiency enhancing RPM occurs with such frequency that it should be assessed under a competition test. A contrary view, put by the Business Law Section of the Law Council of Australia is that RPM should not be per se illegal, as in markets where there is sufficient inter-brand competition, RPM will have a limited effect on competition and, in some instances, RPM may even be beneficial. The final report of the Competition Policy Review Committee broadly accepts the ACCC's view. The Committee's recommendation (number 34) is that RPM should continue to be per se illegal but that the notification process under the CCA should be extended to include RPM. The notification process is quicker and less expensive than the authorisation provisions through which business may currently seek exemption from the CCA for RPM conduct.⁸⁵

A rule of reason test applies to the specific regulation of RPM conduct in Canada, Indonesia, Korea and Switzerland such that the conduct is only prohibited when the conduct has had an adverse effect on competition in a market to the requisite level (of which the precise level differs among jurisdictions), including considerations of economic efficiency in some cases.

⁸⁵ *Competition Policy Review, Final Report*: Australia, 2015. Available at: <http://competitionpolicyreview.gov.au/final-report/>. The Review Panel also recommended that the prohibition on RPM should also be amended to include an exemption for RPM conduct between related bodies corporate.

For example, in Switzerland, an RPM agreement which significantly restricts competition may be afforded protection for a limited duration on the grounds that it involves an investment aimed at opening up new geographical or product markets.

Amendments to Canada's competition law in 2009 have seen RPM change from a criminal offence to a non-criminal reviewable practice. Under the new provision it is a reviewable practice to engage in price maintenance where the conduct has had, is having, or is likely to have an "adverse effect on competition in a market". This standard is deemed to be a lower threshold than a substantial lessening of competition. Conduct is assessed on a case-by-case basis.

The Canadian Competition Bureau released Enforcement Guidelines for Price Maintenance (section 76 of the *Competition Act*) in 2014. These describe the Bureau's general approach to the three types of price maintenance conduct that fall within section 76 of the Competition Act⁸⁶ if the conduct has had, is having or is likely to have an adverse effect on competition in a market.

The Enforcement Guidelines recognise that these price maintenance practices are common and can be pro-competitive in some circumstances, through enhancing non-price aspects of competition between resellers and enhancing competition between rival brands of products. However, price maintenance practices can sometimes have an adverse effect on competition in a market if they lead to exclusion at the supplier or retailer level, or inhibit competition between suppliers or retailers. A key factor in determining whether the price maintenance conduct has an 'adverse effect' on competition in a market is whether the price maintenance conduct is likely to create, preserve or enhance market power. If not, the conduct is unlikely to have an adverse effect on competition in a market.

The European Free Trade Association (EFTA) Surveillance Authority⁸⁷ submitted that agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price to be observed by the buyer, are treated as a hardcore restriction, pursuant to Article 53(1) of the Agreement on the European Economic Area (EEA Agreement).

Efficiency defences can be claimed under Article 53(3) of the EEA Agreement if the parties can show that the agreement will contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not (i) impose on parties restrictions which are not indispensable to the attainment of these objectives; or (ii) afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. This mirrors Article 101(3) of the TFEU.

⁸⁶ i) influencing upward or discouraging the reduction of selling or advertised prices of a product by means of a threat, promise, agreement or like means (s76(1)(a)(i)); ii) refusing to supply a person or class of persons due to the low pricing policy of that person or class of persons (s76(1)(a)(ii)); iii) inducing a supplier to refuse to supply a person or class of persons due to that person's or class of persons' low pricing policy (s76(8)).

⁸⁷ The EFTA Surveillance Authority ensures that Iceland, Liechtenstein and Norway respect their obligations under the European Economic Area Agreement in the same way that the EU Member States are supervised by the European Commission. It also ensures that enterprises in these countries abide by the rules relating to effective competition.

In Japan, the Antimonopoly Act stipulates that RPM without “justifiable grounds” is illegal as unfair trade practices since RPM reduces or eliminates price competition among distributors on the products and generally RPM will have a serious anti-competitive effect. The Japan Fair Trade Commission (JFTC) revised “the Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act,” which cover the JFTC’s approach on RPM, in March 2015. The revised guidelines now clarify that the JFTC considers both pro-competitive effects and anti-competitive effects of vertical restraints, including RPM. Moreover, the revised guidelines provide guidance on its interpretation of ‘justifiable grounds’ for clarification. The revised guidelines provide that RPM may have ‘justifiable grounds’ in the case where such RPM by a manufacturer will result in actual pro-competitive effects such as avoiding ‘free-riding’ and will promote inter-brand competition, will increase demand for the product thus benefiting consumers, and pro-competitive effects will not result from less restrictive alternatives than RPM.

In Taiwan, another test applies whereby RPM conduct is considered unlawful without conducting an analysis of competitive effects, but the enterprises involved are not barred from raising justifications for their conduct under Article 19 of the Fair Trade Act that came into force in February 2015.

Maximum-price RPM

The most common form of RPM is restricting the minimum price at which a product can be resold. However, RPM may also occur when a supplier stipulates a maximum price or price ceiling above which a reseller cannot on-sell a product. In some jurisdictions, maximum RPM is treated the same as minimum RPM; in others it is treated differently.

In the EU, whereas agreements or concerted practices which establish a fixed or minimum resale price or fixed or minimum price level to be observed by the buyer, are treated as hardcore restrictions, recommending a resale price to a reseller or requiring a reseller to respect a maximum resale price are not considered hardcore restrictions; provided that such maximum or recommended prices do not amount to a fixed or minimum price as a result of pressure from, or incentives offered by, any of the parties.

Similarly, other jurisdictions that treat maximum RPM differently to minimum RPM include:

- Russia (where the establishment of a maximum resale price is not prohibited as is the case with minimum RPM)
- Colombia (where suggested prices and maximum RPM are allowed in franchise agreements, regardless of the market share of the parties)
- Israel (where maximum RPM is covered by the block exemption for non-horizontal agreements)
- Hong Kong (where maximum RPM will be treated as a ‘restriction by effect’ as opposed to minimum RPM which may be treated as a ‘restriction by object’).

Case studies

Various case studies highlight the potential competition concerns associated with RPM in the online context. Fewer case studies highlight the potential efficiencies arising from RPM. This may reflect the legal treatment of RPM in some jurisdictions. The case studies presented are typically in branded goods markets which may suggest a desire to protect brand image. The majority of cases do not involve the types of complex products for which a free-riding on retail services argument is likely to be relevant (see Box 3 on page 62).

Case studies relating to RPM conduct were provided by 13 survey respondents. Of these, most case studies featured RPM at the distributor/retailer level of the supply chain, with minimum pricing requirements being set for a range of consumer goods including consumer electronics, outdoor equipment, pet food, vacuum cleaners, sports footwear, DVD movies, music equipment, photographic equipment and sports nutrition products. The case studies provided in the survey have also been supplemented by others independently researched by the ACCC.

In most cases, the investigations were prompted by voluntary complaints to the competition agency, demonstrating the importance of intelligence from consumers and other market participants in identifying such conduct. In one case, the investigation followed the identification of anti-competitive conduct among online retailers through an academic survey by the Vienna University of Economics and Business.

A range of investigative tools were used in the case studies submitted, including the use of dawn raids by agencies on several occasions.

The common theory of harm throughout the case studies was that the imposition of sanctions on retailers who refused to charge a fixed mark-up/price to end consumers, restricted those retailers' freedom to trade and impeded price competition between retailers, negatively impacting on consumers by artificially fixing prices above competitive levels and reducing the number of competitors in some instances. In particular, several of the case studies suggested that the competition concerns relating to RPM in online markets relate to concerns that online sellers will be restricted from competing effectively with offline sellers.

In many other cases the competitive effects of such conduct were deemed difficult to quantify and regulators described the effects more generally.

In terms of whether the competitive harm generated by the RPM conduct was manifested in online or offline markets or both, the case studies varied.

Box 3: recent examples of online RPM

CANDY

Pet food distributor CANDY was found to have breached the Act on the Protection of Competition by entering into minimum price agreements with its distributors and online sellers in the period of January 2010 – September 2012.

The Czech Office for the Protection of Competition assessed that the conduct of CANDY had a negative impact on competition and on end consumers as during the investigated period, the price level of pet food was increased (in several cases by more than 20 per cent) and the number of e-shops selling CANDY's products decreased.

Metzeler

In a recent decision in Germany, the Bundeskartellamt fined mattress manufacturer MetzelerSchaum €3.4 million for restricting the resale price of mattresses. It found that between 2007 and 2011, Metzeler repeatedly arranged minimum prices for their mattresses and other products with online and bricks-and-mortar retailers. Retailers were sent letters by the manufacturer informing them that the mattresses were "price-controlled goods".

The Bundeskartellamt found that the growing online retail market and resulting competition led to several of the retailers complaining that Metzeler's price demands meant they could not price their mattresses competitively.

Adidas Japan Kabushiki Kaisha

On 2 March 2012, the Japan Fair Trade Commission (JFTC) issued a cease and desist order against Adidas Japan Kabushiki Kaisha (Adidas Japan) for forcing retailers to sell toning shoes at prices designated by Adidas Japan. Under the conduct, Adidas Japan forced wholesalers to stop shipment of certain models of shoes to retailers which would not sell at a discount limit price or higher. The JFTC considered that Adidas Japan had restricted the ability of these retailers, who also sold online, to compete with their offline (and other online) competitors.

Do ICN members consider existing legal frameworks, investigative and analytical tools are sufficient to deal with online RPM effectively?

The survey responses were mixed as to whether ICN members have sufficient legal, investigative and analytical tools to allow them to deal effectively with online RPM conduct.

More than half of the survey respondents considered that the existing tools are sufficient to deal effectively with online RPM conduct. For the remainder of responses, there were some respondents who did not feel able to form a view on this as yet given that they had not yet dealt with an online RPM case; and a few respondents who indicated that while the existing tools were sufficient, more sophisticated tools will be required over the longer term as the nature of online RPM cases evolves.

Approximately one quarter of respondents submitted that they consider existing tools are not sufficient to deal effectively with online RPM conduct. Some of the reasons provided are:

- a lack of cooperation on cross border issues, particularly as the use of online commerce increases in future
- a need for a specific provision or specific guidelines dealing with online RPM conduct and related training for investigators would be helpful, particularly as this type of conduct increases in prevalence
- guidance on how to treat efficiencies and the extent to which these should be factored into investigations into RPM may be helpful. Currently, approaches vary and this may create future problems in cross-border investigations. Respondents recognised that there is ongoing debate about the appropriate legal treatment of RPM and this may impact on how any associated efficiencies are addressed. It was considered that a consensus may be difficult to achieve
- the need for more empirical work and data to better assess the impact of online RPM and to better distinguish between pro- and anti-competitive cases of online RPM
- the need for greater decision-making powers for the competition authority to be able to make binding decisions on administrative fines and to require compliance with the authority by parties subject to an investigation, including sanctions for the provision of incorrect or misleading information
- insufficient resources

Other matters arising from the survey responses

Is enforcement action warranted?

Notwithstanding the existence of an absolute prohibition on RPM conduct in some jurisdictions, enforcement action may not be deemed to be warranted on some occasions even where the conduct is deemed unlawful. In some instances, this discretion to take enforcement action may be a pragmatic way to deal with differences between the economic and legal approach to vertical restraints.

An example is the Swedish case study of RPM in the market for the manufacture and sale of sports nutrition products. The Swedish Competition Authority found in its preliminary assessment that although a manufacturer of sports nutrition products had engaged in RPM with its online retailers, the likelihood of the conduct leading to any significant harm to competition and consumers was not sufficient for the SCA to prioritise further investigation of the matter. In this case the manufacturer's low market share, combined with the fact that the relevant markets appeared to be highly fragmented, among other factors, meant that although RPM may be a 'restriction by object', it was not likely to lead to any significant harm

to competition or consumers. The Swedish Competition Authority did not adopt a position in its decision on whether the conduct contravened the Competition Act.

Further, competition authorities generally apply certain priorities in selecting those cases which warrant enforcement action and those which do not. In deciding whether enforcement action is taken, agencies might consider, among other things: whether the conduct results in significant consumer detriment, especially if participants are small and entry barriers are low; whether the conduct involves a significant new or emerging market issue; and whether the conduct gives rise to concerns under other provisions of the law.

Use of RPM to achieve social policy objectives

Even in cases where RPM may have a detrimental effect on competition, there may be circumstances in which governments consider its use is otherwise justified in achieving broader social objectives.

Norway highlighted the Norwegian book industry as one example where the industry is characterised by vertical restraints and RPM is used to achieve public policy objectives notwithstanding its anticompetitive effects.

Norwegian publishers and booksellers have traditionally enjoyed government subsidies and special arrangements including an exemption from competition law. The exemption, called the “fixed price policy”, involves pricing arrangements where retailers are obliged to sell books at the price set by the publisher. (This includes both e-books and paper books although the publisher may set different prices for each.)

The Norwegian Government has recently invited comments on a proposal for new legislation that makes the fixed price policy statutory. The purpose of the proposition is to contribute to a diversity of Norwegian literature and maintain a nationwide network of physical bookstores. It has not been concluded whether e-books will be part of the proposed legislation.

The Norwegian Competition Authority has highlighted that the fixed price agreement and the vertical integration between publishers and bookstores is perceived as an obstacle to competition and may hamper further development and digitisation of the book market.

The anti-competitive effects of this policy are twofold. First, high prices on e-books contribute to the protection of printed books where publishers and booksellers avoid cannibalisation, but at a significant disadvantage for the e-books market. Second, consumers are not able to benefit from the savings associated with not having to print, physically distribute and sell the e-books.

In contrast, in the case of Hamanaka against which the JFTC issued a cease and desist order, the Tokyo High Court dismissed the allegation by Hamanaka that its provision of wool to retailers on condition that retailers sell the product at the discount limit price or higher ‘maintained a fair and free competitive order’ by protecting small and medium-sized retailers and ‘promoted the democratic and wholesome development of the national economy’. The

Court found that the conduct did not have a justifiable cause and was in violation of Article 19 of the Antimonopoly Act.

Conclusions

Extent to which online RPM is (or should be) prioritised by ICN membership and what, if any, further work could be undertaken by the ICN?

Online RPM appears to be the most prevalent online vertical restraint issue investigated by ICN member agencies of late, with more than half (53 per cent) of all online competition investigations commenced in 2013 falling into this category. Of the jurisdictions which responded to the survey, more investigations were commenced in 2013 into online RPM-related conduct than any other type of online vertical restraint conduct. Consistent with this incidence of recent investigations, survey responses show that online RPM conduct is of concern or a top priority for more than half of all survey respondents (25 responses or 53 per cent), and an additional 16 respondents (34 per cent) consider that while it is not yet prevalent enough to be of concern, but it is increasing in prevalence. Relative to the other conduct types considered, online RPM (together with online sales bans/limitation) is of most concern to ICN members, supporting a conclusion that given the large number of investigations and the level of concern associated with it, further work in this area is justified.

RPM in online markets is increasingly raising agency issues and interactions between vertical restraints and horizontal effects, particular if the conduct involves APPA arrangements.

There is ongoing debate among academics and competition law commentators about the extent to which RPM yields anti-competitive outcomes and whether, having regard to its potential benefits—both in the online and offline context—it should necessarily be restricted. The survey results may suggest that where efficiency rationales for RPM have been finding increased acceptance among competition agencies in recent years, competition concerns have been brought back to the fore in the online space. Similarly, in terms of the question of to what extent efficiencies should be factored into decisions about RPM, approaches vary and this may pose issues in cross border investigations, which are increasingly likely as the use of online commerce increases further.

In terms of possibilities for future ICN work, survey responses suggest that further guidance as to the economic assessment of online RPM may be of value to a significant number of members. One possibility could be developing a workbook or guidelines for the assessment of online RPM. Further consideration could be given to why this type of vertical restraint conduct is raising more concern than others. With a large number of recent investigations focussing on this conduct, there is likely to be a significant information base for a review of recent cases and an analysis of their competitive effects in order to develop such guidance, recognising that approaches vary between jurisdictions and a consensus may be difficult to achieve.

Across platform parity agreements (APPAs) / online retail Most Favoured Nation (MFN) clauses

A new form of vertical restraint between suppliers and online platforms has emerged in online markets. For the purposes of the ICN 2015 Online Vertical Restraints project, the term APPA is used to describe a vertical agreement between a seller and a platform whereby the seller agrees to charge on that platform a retail price that is not higher than the retail price the seller charges on other platforms.⁸⁸ The restraint may also apply to the supplier's own online and/or offline platform(s). This type of APPA is also referred to as a retail MFN. Sometimes a parity agreement may also apply to quantity or volumes which can restrict a supplier's ability to allocate inventory across a range of distribution channels in response to competition between platforms.

An online platform is a two-sided market that serves two distinct user groups that provide network benefits to each other. On the one side of the market are final consumers. Suppliers that wish to sell goods to these consumers are on the other side. The value of the platform for each group of users increases with the number of users on the other side. Thus consumers are more likely to use a platform as the number of suppliers operating on the platform increases. Similarly, the value that suppliers derive from using an online platform increases with the number of customers that use the platform. Two-sided platforms typically maximise profits by setting different prices to users on different sides of the market.⁸⁹ In the case of online platforms that act as an intermediary between consumers and suppliers, the typical pricing structure is a zero price for consumers and the payment of a commission/fee (which may be fixed, variable or a combination depending on the particular circumstances) for suppliers who wish to use the platform to sell to consumers.

As discussed in more detail in the Economic Framework section, the use of an APPA may be a way for a platform to address the potential for free-riding on its investments, including in ancillary services that help to overcome some of the information asymmetries that affect online sellers' ability to compete effectively with offline stores and in IT systems that enable searching and sorting across a large number of products and suppliers. An APPA might also help to improve a platform's incentives to invest in quality and reputation that are valued by consumers. These issues are discussed in more detail in the section beginning at page 35.

However, APPAs that involve an agreement whereby a seller agrees to set a retail price on a platform that is no higher than the retail price set on other platforms can also raise competition concerns particularly where the retailer and platform operate under an 'agency' type business model where platforms may compete by offering lower commissions to a supplier. Agency issues are discussed further at page 31.

In particular, an APPA may deter the entry of rival platforms by making it harder for entrants to attract suppliers to the new platform by offering lower commissions/ platform fees. An

⁸⁸This definition is adopted by Lear, 2012, in "Can 'Fair' Prices be Unfair? A Review of Price Relationship Agreements", A report prepared for the OFT. In the context of an APPA, the platforms act as a trading or market-place that acts as an intermediary to facilitate the exchange between seller and buyer. The platforms allow consumers and retailers to meet and trade directly but do not buy the product from the seller and re-sell it to the buyer.

⁸⁹ OECD, 2009, "Two-sided markets", Policy Roundtable.

APPA may also help to protect an intermediary from competition from direct selling. Similarly, the use of APPAs in online markets can soften competition between platforms leading to higher fees paid to platforms by suppliers and higher prices paid by consumers to suppliers.

An APPA may also facilitate collusion between platforms by reducing the incentive to deviate from a collusive agreement on platform fees. Collusion between sellers may also be facilitated by an APPA because the reduction in price variation across platforms might make it easier to reach an agreement and to detect deviations from that agreement. In this regard, APPAs may facilitate outcomes that are similar to traditional horizontal agreements.

The Amazon Marketplace case study provides an example of the competition concerns that may arise with the use of APPAs.

Box 4: Amazon Marketplace

In November 2013, Germany's Bundeskartellamt (BKartA) and the then UK Office of Fair Trading (OFT) closed their respective investigations into Amazon's price parity policy on its Marketplace platform following Amazon's decision in August 2013 to end its Marketplace price parity policy across the European Union. The policy prohibited third party retailers from offering products through other online sales platforms cheaper than on Marketplace. The BKartA and OFT announced that they were considering closing their respective cases as a result but sought further clarification to ensure that their competition concerns were addressed. The BKartA was concerned that Amazon's policy was a horizontal, price-related agreement between competitors that reduced retail price competition. In any case, arguably, the price parity policy may soften competition between online marketplaces, curtail the entry of potential entrants, and directly affect the prices which sellers set on platforms (including their own websites), resulting in higher prices to consumers. In these proceedings the BKartA and OFT cooperated very closely with one another within the scope of the European Competition Network (ECN).

Narrow and broad MFNs

A distinction has recently been made in some jurisdictions between what is called 'broad retail MFNs' that restrict a supplier from offering lower retail prices to other platforms, including its own website, and 'narrow retail MFNs' that restrict a supplier from offering a lower retail price on its own website, but not through other platforms. The suggestion is that, generally, the competitive effects of 'narrow MFN's are less than 'broad MFNs' as the former only restrict intra-brand competition between the supplier and the particular platform. Rival platforms may still compete for lower retail prices by offering the supplier lower commissions. Thus the potential for intra-brand competition between these other platforms is maintained.

The distinction between 'narrow' and 'broad' retail MFNs may be helpful in ensuring that the extent of any vertical price restraint is no broader than is necessary to realise any likely efficiencies. In this regard, a narrow retail MFN may be an effective way for a platform to protect itself from free-riding by the supplier on investments made by the platform to promote the suppliers' product. For example, a platform may incur costs in promoting a supplier's

product and providing valuable information to consumers which increases the competitiveness of the product. However, absent a narrow retail MFN, the supplier may have an incentive to 'free-ride' on the platform's investments by setting a lower retail price for sales made direct to consumers through its own platform. If this occurs, the investing platform is not able to fully benefit from its investments and thus may have inadequate incentives to make such investments.

On the other hand, narrow retail MFNs may reduce the incentive for consumers to switch to lower cost 'disintermediated' distribution models. This was the concern in the Australian Flight Centre case (see Box 7, page 78), where an offline retailer was trying to thwart an online competitor from dealing directly with consumers.

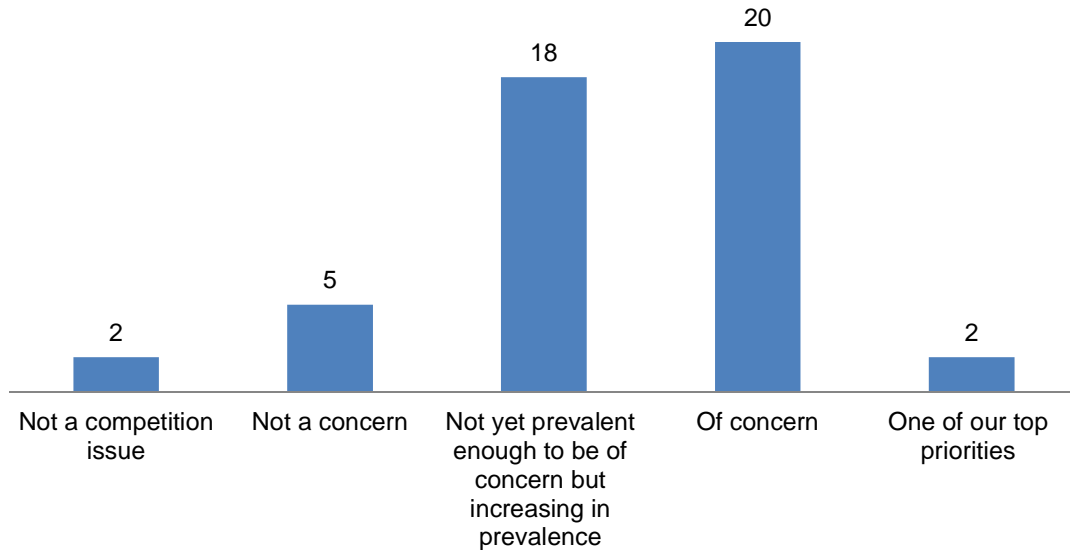
Extent of ICN members concern about APPAs and online MFN clauses

Figure 8 below shows a breakdown of survey responses indicating the level of concern among member agencies about the use of APPAs in online markets in their jurisdiction.

APPAs/MFNs are of concern to nearly half (47 per cent) of survey respondents. Forty three per cent of survey respondents indicated that APPAs/MFN are a concern in their jurisdiction with a further 4 per cent identifying APPAs/MFN as one of their top priorities. Just over a third of respondents indicated that APPAs/MFN are not yet prevalent enough to be of concern but it is increasing in prevalence. The remaining 15 percent of respondents indicated that APPAs/MFN are not a concern (11 per cent) or not considered to be a competition issue in their jurisdiction (four per cent).

Geographically, the survey results suggest that APPAs/MFN are of relatively greatest concern in Europe, North America and Asia. Concern is increasing in Africa and Oceania while jurisdictions in South America generally consider APPAs/MFN to not be of concern or not a competition problem.

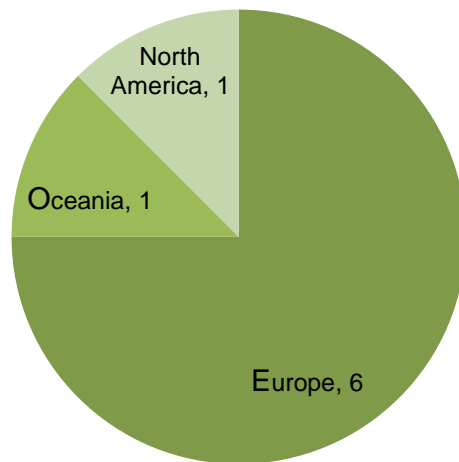
Figure 8 – Are ICN members concerned about APPAs/ online MFN clauses? (47 respondents)



Prevalence of APPA investigations in ICN member jurisdictions

Eight investigations into APPAs were commenced by survey respondents in 2013.

Figure 9 – APPA investigations commenced in 2013 – by region (number of investigations)



The survey results indicate that European jurisdictions commenced 75 per cent of the investigations into APPAs in online markets in 2013. While more ICN members are located in Europe than any other continent, the concentration of online APPA investigations within Europe is not proportionate to its ICN membership—only approximately 40 per cent of ICN

members are from within Europe. However, the number of investigations commenced is consistent with the relative degree of concern about APPAs in online markets in European jurisdictions. In particular, 11 of the 23 (48 per cent) European respondents to the survey indicated that APPAs are of concern, with an additional two respondents indicating that APPA conduct is one of their top priorities. Only one European and no North American survey respondents indicated that APPA conduct in online markets is not of concern or not a competition issue.

There was a large contingent of respondents (38 per cent) that indicated that APPAs were not yet a concern but that the conduct was increasing in prevalence. This may indicate that as e-commerce continues to grow APPAs will be an increasing area of work for ICN members.

Asian respondents were evenly split with 33 per cent concerned about APPAs, 33 per cent noting it is increasing in prevalence and 33 per cent indicating it is not a concern.

The majority view of both African and South American respondents to the survey was that APPA conduct is not currently of sufficient prevalence to be of concern, although its prevalence is increasing or is not a competition issue.

Legal frameworks – APPAs / online retail MFN clauses

Are APPAs covered by existing competition laws?

Figure 10 below shows that for most survey respondents, their existing competition law covers APPAs. APPA conduct is primarily addressed by general competition law provisions (77 per cent of respondents). A significant proportion of jurisdictions do not have a legal framework that addresses APPAs (23 per cent), while no jurisdictions have a specific provision.

Figure 10 – Does the existing law cover APPA?

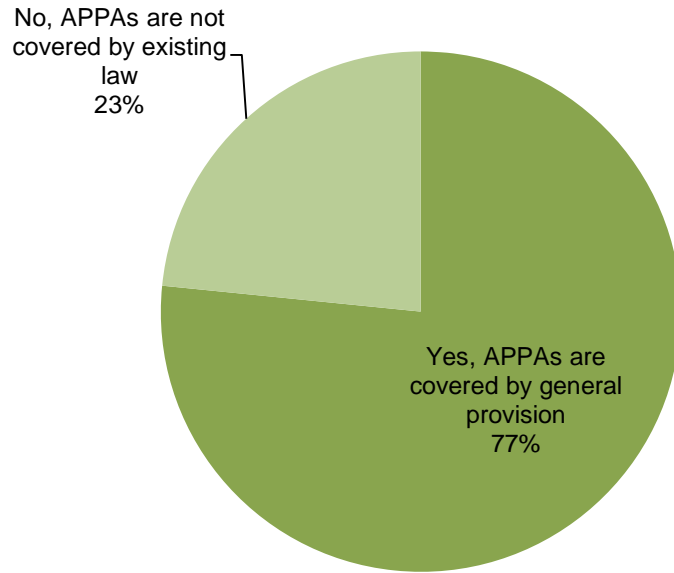
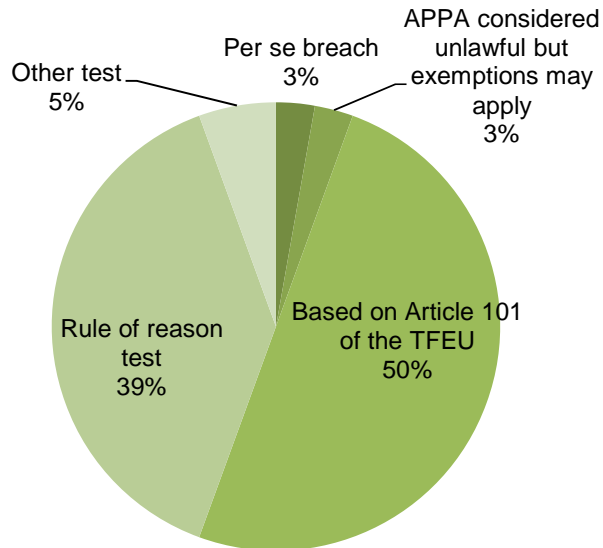


Figure 11 below shows that most types of existing provisions dealing with APPAs are either those based on Article 101 of the TFEU (50 per cent) or those based on a rule of reason test (39 per cent). Overviews of Article 101 TFEU and the rule of reason approach as provided for in the US are provided at page 27.

Figure 11 – Type of existing provision dealing with APPA



General provisions covering APPAs

Table 7 below shows a breakdown of the jurisdictions which apply a general provision to APPAs and which type of general provisions apply in each case.

Table 7 – General Provisions covering APPA

Type of general provision	Countries
APPA conduct is considered unlawful without conducting an analysis of competitive effects (per se breach or strict liability breach)	Botswana
APPA conduct is considered unlawful without conducting analysis of competitive effects but exemptions can apply	Israel
Rule of reason applies to APPA conduct	Australia, Canada, Chile, Hong Kong, Indonesia, Ireland, Japan, New Zealand, South Africa, Switzerland, Taiwan, US, Egypt
Rules apply to APPA conduct that are based on Article 101 of TFEU	Austria, Belgium, Bulgaria, Czech Republic, Denmark, EFTA Surveillance Authority, EU, Finland, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Norway, Sweden, UK
Another test applies	Mauritius, Singapore

In Israel, APPAs are considered a restrictive arrangement and are forbidden under the Israeli Restrictive Trade Practices Law. There is no formal difference between a horizontal restrictive arrangement and a vertical restrictive arrangement, such as RPM or an APPA. The Israel Antitrust Authority has established Block Exemption Rules that can apply to an RPM or APPA restrictive arrangement. Parties may also seek approval of a restrictive arrangement from the Antitrust Tribunal. When considering the public interest the Tribunal shall take into consideration, inter alia, whether the benefit to the public from the agreement is substantially greater than the damage that may be caused to the public or to any part thereof, or to anyone not party to the arrangement.

The Canadian Competition Bureau can review APPAs, as defined in this survey, under the following provisions of Canada’s Competition Act: section 76, dealing with price maintenance; sections 78-79, which permit remedies in respect of an abuse of dominant market position; or section 90.1, concerning agreements or arrangements that substantially lessen competition, as occurred in relation to e-books (see Box 1 page 33). The particular provision under which an APPA is reviewed will depend on the circumstances.

In South Africa, Section 5(1) of the Competition Act states that –

“An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.”

In Mauritius, APPAs could fall within either the abuse of monopoly or RPM. However, with regards to a monopoly situation, the one imposing the APPA must be in a dominant position and the agreement must have the object or effect of preventing, restricting or distorting competition; or in any other way constitutes exploitation of the monopoly situation. The following factors need to be considered:

1. whether the market share threshold as set by the Act is met
2. the extent to which the enterprise is a dominant player
3. whether the conduct has the object or effect of preventing, restricting or distorting competition; or in any other way constitutes exploitation of the monopoly situation
4. if the conduct is likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers
5. whether there are offsetting public benefits and to what extent the benefits, if they are present, should be taken into account in determining the remedial action to be taken.

In certain cases such agreements may constitute a collusive agreement, depending on the nature of the clause. It may act either as a facilitating conduct and result indirectly in price fixing. There may be a need to show the effect in fixing the price.

Case studies

The UK Competition and Markets Authority's (CMA) Private Motor Insurance market investigation illustrates the distinction between 'narrow' and 'broad' MFNs. The CMA identified a number of competition concerns associated with 'wide MFNs' (see Box 5 on page 74) where an insurer and a price comparison website (PCW) agreed that the private motor vehicle insurance policy offered by the insurer through the PCW will not be sold at a lower price on other PCWs. However, the CMA did not identify the same competition concerns with 'narrow MFNs' where an insurer and PCW agreed that the insurer would not offer the same policy at a lower price on its own website as it offered through the PCW. Instead, the CMA considered that PCWs enhance competition between suppliers. Furthermore, narrow MFNs may be necessary to ensure the viability of PCWs by preventing suppliers free-riding on a PCW's retail services and protecting the PCW's reputation as a low-cost supplier. The reputational effect was considered important as greater use of PCWs is likely to enhance competition between suppliers. The use of PCWs may also lower consumers' search costs and provide access to a 'one stop shop' and a broader range of suppliers. The CMA considered that the benefits of narrow MFNs may offset the reduction in intra-brand competition between the insurer and the PCW. Thus PCWs and providers of private motor insurance may continue to enter into narrow MFN arrangements. However, the CMA also considered that wide MFNs are unlikely to provide any significant beneficial effects over and above those provided by narrow MFNs. Thus the CMA prohibited wide MFNs and behaviour by large PCWs that seeks to replicate the effects of wide MFNs across platforms.

Box 5: Private Motor Insurance Market Investigation

The CMA has, in its recently concluded Private Motor Insurance (PMI) market investigation, identified a number of competition concerns associated with the use in that market of so-called 'wide retail most favoured nation clauses' (wide MFNs), where a supplier (the insurer) and an online retail platform (a price comparison website) agree that the product that the supplier sells through that platform will not be sold at a lower price elsewhere. The competition concerns included softened competition on the level of the commission charged by online retail platforms and potential barriers to entry. However, no infringement of competition law was found as this was an investigation conducted under the CMA's market investigation powers set out in the Enterprise Act 2002 and did not involve competition law enforcement. However, the CMA decided to remedy the anti-competitive concerns by (a) prohibiting wider MFNs and (b) prohibiting behaviours by large PCWs which seek to replicate the anti-competitive effects of wide MFNs.

The CMA did not identify the same competition concerns in the market in question with so-called narrow most-favoured nation clauses (narrow MFNs) where a supplier and an online retail platform agree that the product that the supplier sells through that platform will not be sold at a lower price on the supplier's own website (but is free to sell at lower prices on other sales channels, including other platforms). Instead, the CMA considered that the existence of PCWs enhanced competition between PMI providers and that narrow MFNs may be necessary to ensure the viability of current PCW models. A narrow MFN may protect the reputation of a PCW as a low cost supplier and thus encourage usage by consumers, leading to more competition between PMI suppliers. Usage of PCWs may also lower consumers' search costs and give them access to a broader range of PMIs than may be available in their local area. These beneficial effects of narrow MFNs may offset the reduction in intra-brand competition between the PCW and the PMI provider. However, wide MFNs are unlikely to provide any significant beneficial effects over and above those provided by narrow MFNs.

The distinction between 'narrow' and 'broad' MFNs also underlies commitments offered to the Italian, French and Swedish competition authorities by Booking.com to remedy concerns about the competitive effects of APPAs entered into between Booking.com and hotels. If accepted, these commitments would apply to the entire European area. The commitments would remove APPAs that require price parity with rival platforms (wide MFNs). However, an APPA that prevents a hotel offering a lower room rate on its own platform than it offers to Booking.com would still be permitted (see Box 6, page 75).

In contrast, the Bundeskartellamt (BKartA) did not draw a distinction between narrow and broad MFNs in its investigation into APPAs entered into by Hotel Reservations Service (HRS) (a hotel booking portal) and hotels (see below). Instead, the BKartA ordered HRS to remove the MFN clauses from its contracts with hotels. In so doing, it rejected HRS' arguments that the clauses were necessary to prevent free-riding on HRS's investments (See Box 6 below).

Box 6: Online travel agents – Various European Investigations

A number of European competition authorities have investigated, or are continuing to investigate, vertical restraints in online hotel bookings, in particular the use and effects of APPAs/MFNs. The competition concerns identified by the various agencies are similar. However, the approaches to remedying the competition concerns may vary.

(i) The UK

The UK Office of Fair Trading (OFT) started an investigation in 2010 of the online hotel booking sector following a complaint from a small online travel agent (OTA) that was prevented from offering discounted prices by some hotel chains.

In 2012, the OFT issued statements of objection against online booking agents, Booking.com and Expedia, and International Hotels Group (IHG) (which owns a number of hotel brands including Crown Plaza, Holiday Inn and Intercontinental). The online booking agents had allegedly entered into vertical agreements with IHG that were intended to limit the ability of the agents to discount hotel accommodation. The OFT was concerned the agreements restricted price competition between online booking agents and would increase barriers to entry and expansion for online travel agents that seek to gain market share by offering price discounts. The OFT's investigation was closely followed as it offered the potential to resolve a number of key legal issues concerning the commercial practices that are prevalent in online markets. These include the extent to which online platforms act as agents or distributors, whether pricing restrictions in this context amount to RPM, which could be regarded as restrictions by object in some jurisdictions, the extent to which price parity or MFN clauses amount to restrictions of competition in and of themselves.⁹⁰

In January 2014, the OFT closed its investigation after commitments were agreed to by all parties. The commitments required that OTAs and hotels would be free to offer discounts off headline room rates. However, discounts would only be viewable to members of 'closed groups' of consumers (club members) and only applied when a customer had made a previous non-refundable booking with that OTA. Club membership was contingent on opting in and entering personal details. OTAs would be able to publicise to non-club members the availability, but not the level, of discounts for IHG hotel rooms. Price reductions offered by OTAs were to be funded from their commission revenue or margin. There was no limitation on discounts offered by hotels. The commitments were to remain in place until 2016 and were designed address concerns with RPM. To address the RPM concerns effectively, the commitments required the parties to alter their MFN clauses, on the basis that the application of the MFN clauses could adversely affect the visibility of online discount rates. The commitments addressed the OFT's competition concerns by allowing OTAs and hotels to offer discounts that were not publicly displayed, but still relatively easy for consumers to access, which would, in the OFT's view, allow for greater price competition.

In early 2014, the OFT's decision was appealed to the Competition Appeal Tribunal by Skyscanner, a price-comparison/metasearch website (PCW) that allows customers to search

⁹⁰ Bar-Isaac, R and S Gindill, 2014, 'A Fresh Accommodation', Competition Law Insight, 9 December, pp. 8-11.

and compare the price of hotels (among other things). Skyscanner argued that the commitments would affect inter-brand competition by removing price transparency and limiting the ability of consumers to compare the offers of different hotel groups effectively. This is because PCWs would not be able to show the precise discounts for each hotel, but merely advertise that such discounts were available to club members. Club members would then have to check the available discount with the OTA or hotel. Skyscanner submitted that this would undermine the benefits of the price-comparison services provided by PCWs. The Tribunal upheld Skyscanner's appeal in September 2014 and ordered the OFT's successor, the Consumer Market Authority (CMA) to reconsider the case. The CMA reopened the investigation following the judgment.

(ii) Germany

In January 2010, the Bundeskartellamt (BKartA) began an investigation into vertical restraints between Hotel Reservation Service Robert Ragge GmbH (HRS), an online hotel booking portal, and its hotel partners after receiving a complaint from a hotel. BKartA issued a Statement of Objections in February 2012, which challenged MFN clauses that required hotels to always offer HRS their lowest room price, maximum room capacity, and most favourable booking and cancellation conditions available online, and after 2012, also those rates and conditions available from a hotel's front desk. BKartA argued that the clauses threaten competition by removing incentives for participants to behave competitively and increasing barriers to entry. A second Statement of Objections was issued in July 2013. In December 2013, BKartA ordered HRS to remove the MFN clauses from its contracts with hotels. It also launched investigations into similar agreements of Expedia and Booking.com. In making this order, the BKartA rejected HRS' arguments that the clauses were necessary to prevent free-riding on HRS investments by lower quality portals and sales channels, and enhanced quality-based competition.

HRS appealed the BKartA's decision to the Düsseldorf Higher Regional Court on the grounds that the market for its services was defined too narrowly. The BKartA considered the relevant market was a market for hotel portals in Germany. HRS claimed that the market should also include hotel-owned and other specialised portals, online travel agents and metasearch engines. HRS also submitted that it should benefit from the block exemption for vertical agreements under EU law as its market share is less than the threshold 30 per cent. The Court rejected HRS' appeal in January 2015. The Court found that the clauses were a serious restriction on competition and did not qualify for any exemption under EU law.⁹¹

In April 2015, the BKartA issued a statement of objections to Booking.com regarding the website's practice of including potentially anti-competitive 'best price' clauses in its contracts with hotels. Following the Court's confirmation of BKartA's decision against HRS with respect to the same issue, Booking.com and Expedia did not eliminate the 'best price' clauses from their contracts. For this reason the Bundeskartellamt has prohibited the continued use of 'best price' clauses by Booking.com which has become the largest hotel booking portal in Germany. The Bundeskartellamt's statement of objections gives Booking.com the opportunity to review its position on the issue, noting that the use of best

⁹¹Note that HRS has market share of more than 30 per cent and is not exempt from Vertical Restraints Block Exemptions

'price clauses' by HRS has been prohibited in a final and non-appealable judgment. The proceedings against Expedia continue.

(iii) Other European investigations

Competition authorities in several other European countries have also launched investigations into MFN clauses in the online hotel booking sector.

In February 2012, the Austrian Competition Authority (Bundeswettbewerbsbehörde) received a complaint from the Austrian hotels association Österreichische Hotelierversammlung about MFN clause between HRS and Austrian hotels.

The Swiss Competition Commission (Wettbewerbskommission) began an *ex-officio* investigation into the MFN clauses in hotel contracts by Booking.com, Expedia and HRS in December 2012. The Commission is also investigating whether the booking portals abused their dominant positions by forcing hotels to accept these contractual clauses.

In July 2013 the Hungarian Competition Authority (Gazdasági Versenyhivatal (GVH)), launched an *ex-officio* investigation into the MFN clauses in the online hotel booking sector after conducting a survey which found that 24 online booking agencies offering the same room were charging almost identical rates.

In the same month, France's Autorité de la concurrence began an investigation of Booking.com, Expedia and HRS after receiving a complaint from a French hotels association regarding parity clauses, which compel hotels to offer booking websites with at least as many available rooms and services as it offers through other distribution channels and prevents hotels offering lower prices to non-internet customers.

Autorità Garantedella Concorrenza e del Mercato, Italy's competition authority, began investigating Booking.com and Expedia in February 2014, in regard to MFN clauses in their contracts with hotels.

Given the number of cases opened in EU Member States, the European Competition Network decided to establish enhanced cooperation between the French, Italian and Swedish authorities to investigate the case as a priority. The European Commission is coordinating this investigation.

On 11 December 2014, Booking.com offered to these three competition authorities a first set of commitments to competition authorities which, if accepted, would apply to the entire European Economic Area. The commitments would remove the MFN clauses from its contracts with hotels that concern parity with third party booking services, while keeping those that require parity with hotel's direct sales. Booking.com would not be able to offer lower commissions to hotels conditional on hotels setting the same or higher prices on other platforms but could offer lower commissions that are based on a number of objective commercial criteria. A market test was jointly launched on 15 December 2014 which led to further negotiations between the competition authorities involved and Booking.com in order to design a new set of commitments which would adequately address competition concerns.

Joint decisions are expected to be adopted in this case in due course. The French, Italian and Swedish competition authorities are continuing their investigations into the parity clauses of other OTAs.

The CMA's views on the competitive effects of 'narrow' MFNs are also in contrast to the Australian court's findings in *Flight Centre* (see Box 7, below). The case involved alleged attempts by Flight Centre to enter into arrangements with several international airlines whereby those airlines would not offer airfares direct to consumers at prices lower than Flight Centre offered, effectively a 'narrow' retail MFN. Flight Centre is Australia's largest travel agent. It is predominantly an offline travel agency but also sells online. A key competition concern was that Flight Centre was attempting to restrict the benefits of disintermediation and competition from a lower cost distribution channel (direct sales to consumers). The Federal Court found that Flight Centre was in a horizontal relationship with the international airlines as it competed with airlines in the market for booking and distribution services. The Court found that on six occasions, Flight Centre had attempted to enter into arrangements that sought to eliminate differences in airfares so as to fix, control or maintain Flight Centre's retail or distribution margin. As a predominantly offline travel agent, Flight Centre sought to prevent disintermediation and the use of lower cost online distribution systems. A critical aspect of the case was Flight Centre's 'Price Beat Guarantee', which was similar to a retail MFN.

Box 7: Australian Competition and Consumer Commission v Flight Centre Ltd

Flight Centre is Australia's largest travel agent. Flight Centre obtains its revenue from commission from airlines for its travel arrangement services in a vertical relationship. However, airlines are increasingly recognising the benefits and opportunities of direct online sales to consumers which potentially bring an airline into competition with its traditional distributors. Flight Centre had a 'price beat' policy under which it would beat cheaper airfares (for the same flight, date and class of travel) offered by its competitors. As a result of Flight Centre's 'price beat' policy, Flight Centre was obliged to match cheaper web fares offered by airlines which caused Flight Centre to forego commission in some cases.

The Flight Centre case involved alleged attempts by Flight Centre to enter into arrangements with Malaysia Airlines, Singapore Airlines, Etihad Airways and Emirates whereby those airlines would not offer their airfares direct to consumers at prices lower than Flight Centre offered. In some cases, Flight Centre accompanied this attempt with the threat of no longer offering flights operated by the airline if it refused to enter the agreements.

In December 2013 the Federal Court found that Flight Centre competed with international airlines for the retail or distribution margin on the sale of international air fares. Flight Centre was thus in a horizontal relationship with airlines as well as operating in a vertical relationship through its agency arrangements. The Court also found that on six occasions between 2005 and 2009, Flight Centre had attempted to enter into arrangements with airlines which sought to eliminate differences in airfares so as to fix control or maintain Flight Centre's retail or distribution margin. A crucial fact was Flight Centre's promotion of its corporate pricing policy which operated throughout the period, known as its 'Price Beat Guarantee'. Despite these representations, Flight Centre had engaged in concerted efforts

to remove other cheaper airfares from being made available to consumers in the first place. Flight Centre was fined \$AUD 11 million in relation to five of the six established contraventions. Flight Centre has appealed both the finding and the subsequent penalty. The ACCC has cross appealed on the quantum of penalty. The ACCC's cross appeal contended that four of the penalties imposed do not provide adequate deterrence given the nature of the court's findings about the nature of the conduct and the size and financial strength of Flight Centre. Both appeals are still before the court.

The distinction between narrow and wide APPAs/retail MFNs may be appropriate in some instances. However, it will likely still be necessary to examine the rationale for these types of restraints on a case by case basis. The competitive effects of APPAs/retail MFNs will depend on a number of factors including the type and scope of the vertical restraint, the extent to which similar arrangements are in place between other suppliers and platforms, the structure of payments/commissions between platforms and suppliers and the market position of the various parties.

Do ICN members consider existing legal frameworks, investigative and analytical tools are sufficient to deal with APPAs effectively?

In terms of whether ICN members have sufficient legal, investigative and analytical tools at their disposal to allow them to deal effectively with APPA conduct, the survey responses were mixed.

Largely, responses reflected those given in relation to the sufficiency of existing tools for online RPM (discussed above). The issues raised in relation to APPAs were:

- Several respondents said that while they did consider their existing tools were sufficient to deal with APPAs, they were yet to deal with cases of this kind.
- Empirical work and data to better assess the impact of online vertical restraints was identified as an area of need. Also guidance on how to treat efficiencies and the extent to which these should be factored into investigations. These were identified particularly in relation to APPAs where the competitive effects are less well understood relative to other types of online vertical restraints.

Conclusions

Extent to which APPAs are (or should be) prioritised by ICN membership and what, if any, further work could be undertaken by the ICN?

APPAs/retail MFNs are new forms of vertical restraints that do not generally arise in offline markets. The internet facilitates greater consumer choice and reduces the search costs borne by consumers. Notwithstanding this, access to greater volumes of information creates new challenges for consumers. Online platforms can help consumers navigate this abundance of information by acting as an intermediary between consumers and suppliers.

Vertical restraints such as APPAs may in some cases be deemed necessary to protect the investment in such platforms.

However, these restraints may also raise significant competition concerns, as has been demonstrated in a range of recent high profile cases, noticeably in Europe, discussed in this paper. Competition concerns may also stem from attempts to prevent disintermediation or from attempts to protect offline sellers from online retailers. Given the relatively recent advent of this type of vertical restraint, the potential efficiencies associated with them and their competitive implications are generally less well understood than for other types of online vertical restraints which have offline equivalents, meaning that of the vertical restraint conducts considered, APPAs could be a priority area for the ICN going forward.

Suggestions for further work relating to APPAs/retail MFNs could include:

- monitoring market outcomes where commitments are reached to address competition concerns with APPAs
- considering whether a consistent approach to assessment is possible and/or desirable
- an ICN (or OECD) ex-post review of relevant cases
- undertaking further work on the possible efficiencies and competitive detriments of APPAs in various scenarios including the effects of 'narrow' and 'wide' APPAs / retail most favoured nation clauses (MFNs).

The online hotel bookings case studies raise a number of interesting issues in relation to both APPAs and, more generally, online vertical restraints that arise in multiple jurisdictions:

- Each of the national competition authorities has identified similar competition concerns but has taken different approaches to resolving the competition concerns.
 - What are the benefits of each jurisdiction undertaking its own investigation and reaching its own resolution? What are the risks?
 - What are the benefits of a coordinated approach to online vertical restraints that affect more than one jurisdiction? What are the risks?
 - Is it possible to identify when an individual rather than coordinated investigative approach is appropriate?
- In some jurisdictions, exemptions from competition laws may apply. Where these exemptions are based on market shares, the definition of the relevant market may be crucial. How should markets be defined and market shares calculated?

RPM Facilitating Conduct, including MAPs

As noted in the discussion of RPM, vertical restraints that directly fix retail prices are often prohibited under competition laws. However, in some instances, vertical restraints may be used as an indirect means of achieving RPM. In many jurisdictions, this 'RPM facilitating conduct' would be treated differently under competition laws. In particular, it may not be prohibited outright.

There are a number of ways in which vertical restraints may be used to facilitate RPM conduct. For example, the EC's Guidelines on Vertical Restraints list the following ways of achieving RPM by indirect means: fixing the retail margin, fixing the maximum discount a retailer can offer from a prescribed price level, making the grant of rebates or reimbursement of promotional costs conditional on the maintenance of a particular price level, and linking the prescribed resale price to competitors' resale prices (APPAs/MFNs). In addition, threats, intimidation, warning, penalties, delays or suspension of deliveries if a given price level is not observed can also induce a retailer to maintain a particular resale price. Such measures can be more effective in facilitating RPM if there are also monitoring mechanisms in place that help to identify price-cutting distributors. Measures that reduce a retailer's incentives to discount prices, such as the supplier printing a recommended resale price on a product can also enhance the effectiveness of indirect uses of vertical restraints as a way of facilitating RPM.

The (then) UK Office of Fair Trading (OFT) has also identified the use of 'internet minimum advertised prices' (iMAP) and dual pricing restrictions as vertical restraints that may be used to indirectly facilitate RPM. Under a MAP agreement, a retailer is prevented from advertising a supplier's product below a minimum agreed resale price. A MAP does not directly place any restraints on the actual selling price. However, if consumers do not usually negotiate further price discounts with retailers, a MAP may effectively set the retail price.

The potential pro-competitive rationales for vertical restraints that facilitate RPM are the same as for RPM; that is, to address the potential for free-riding on retail services and quality certification services, to facilitate the entry of products or suppliers into new markets and to protect brand image. There is a detailed discussion of these potential market failures, in the Economic Framework section (see p 36).

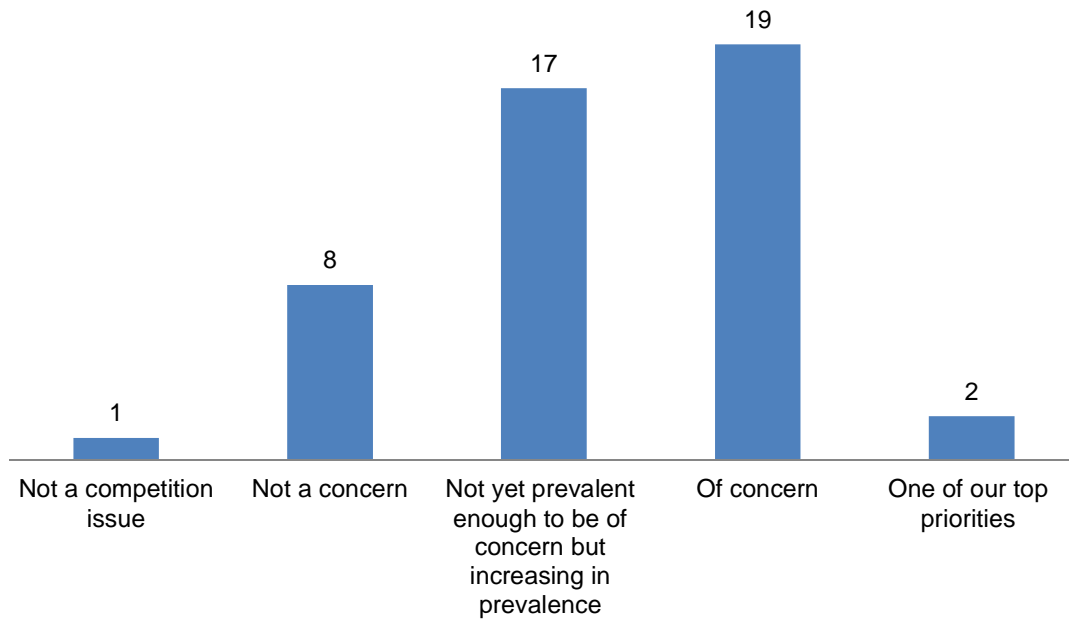
Competition concerns associated with RPM facilitating conduct include concerns that indirect restraints on a retailer's ability to set retail prices may reduce the intensity of price competition (reduce intra-brand competition), facilitate collusion, or exclude rivals at the supplier or retail level. For example, a MAP may reduce intra-brand competition between online and offline sellers in circumstances where an online retailer cannot engage in customer negotiations as readily as offline retailers. Exclusion at the supplier level may arise if the conduct guarantees a retail margin that makes a retailer less willing to stock a rival supplier's product. Foreclosure of downstream distribution channels in this manner would reduce competition between suppliers. Exclusion at the retail level may also occur if a supplier is induced to adopt an indirect price maintenance scheme that reduces discounting retailers ability to compete. This type of exclusion may be a particular issue in online

markets. In particular, offline retailers may have an incentive to try to induce suppliers to implement MAP policies, refuse to supply or otherwise discriminate against discounting online retailers.

Extent of ICN members concern about online RPM facilitating conduct

Figure 12 below shows a breakdown of survey responses indicating the level of concern among member agencies about the use of RPM facilitating conduct in online markets in their jurisdiction.

Figure 12 – Is online RPM facilitating conduct a significant concern? (47 respondents)



RPM facilitating conduct is of concern to 45 per cent of survey respondents (41 per cent of survey respondents indicated that RPM facilitating conduct is a concern in their jurisdiction with a further four per cent identifying this conduct as one of their top priorities). Over a third of respondents (36 per cent) indicated that RPM facilitating conduct is not yet prevalent enough to be of concern but it is increasing in prevalence. The remaining 19 per cent of respondents indicated that RPM facilitating conduct is not a concern (17 per cent) or not considered to be a competition issue in their jurisdiction (two per cent).

Geographically, the survey results suggest that RPM facilitating conduct is of relatively greatest concern in Europe, North America and Asia. Concern is increasing in Africa, South America and Oceania. However, in all jurisdictions other than North America there are ICN members who are not concerned about RPM facilitating conduct or do not consider it to be a competition issue.

Prevalence of online RPM facilitating conduct in ICN member jurisdictions

Despite the high level of concern expressed, very few of the investigations commenced in 2013 related to online RPM facilitating conduct. Only two investigations, one in North America and one in Europe, related to RPM facilitating conduct were commenced in 2013.

Legal frameworks – online RPM facilitating conduct

Is online RPM facilitating conduct covered by existing competition laws?

Figure 13 below shows that for most survey respondents, their existing competition law covers RPM facilitating conduct.

RPM facilitating conduct is primarily addressed by respondents' general competition law provisions (85 per cent). More jurisdictions' legal frameworks do not address RPM facilitating conduct (11 per cent) than have a specific provision (4 per cent).

Figure 13 – Does the existing law cover RPM facilitating conduct?

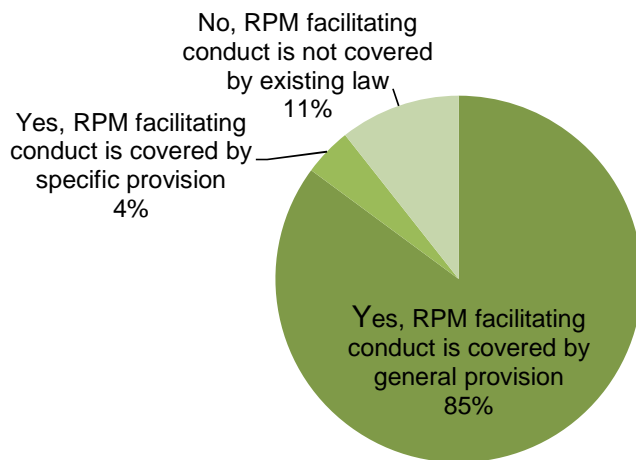
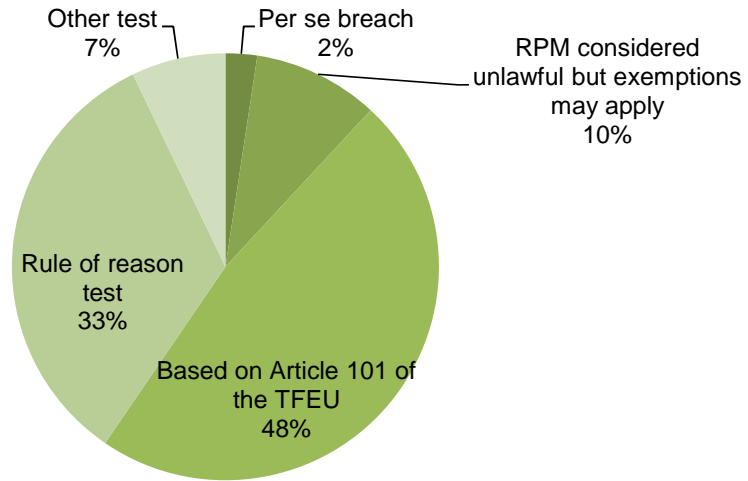


Figure 14 shows that the most common types of provisions dealing with RPM facilitating conduct are those based on Article 101 TFEU (48 per cent) and those based on a rule of reason test (33 per cent). The figure reflects the responses for both general and specific provisions.

Figure 14 – Type of existing provision dealing with RPM facilitating conduct



General provisions covering RPM facilitating conduct

In many jurisdictions, RPM facilitating conduct may be covered by general RPM provisions based on Article 101 of the TFEU or the rule of reason approach as provided for in the US (discussed at page 29).

Table 9 below shows a breakdown of the jurisdictions which apply a general provision to RPM conduct and which type of general provisions apply in each case.

Table 9 – General Provisions covering RPM facilitating conduct

Type of general provision	Countries
RPM facilitating conduct is considered unlawful without conducting an analysis of competitive effects (per se breach or strict liability breach)	South Africa
RPM facilitating conduct is considered unlawful without conducting analysis of competitive effects but exemptions can apply	Brazil, Ireland, PNG, Russia
Rule of reason applies to RPM facilitating conduct	Australia, Chile, Ecuador, Egypt, Hong Kong, Indonesia, Israel, Korea, New Zealand, Switzerland, US
Rules apply to RPM facilitating conduct that are based on Article 101 of TFEU	Austria, Belgium, Bulgaria, Czech Republic, Denmark, EC, EFTA Surveillance Authority, Finland, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Norway, Poland, Slovenia, Sweden, UK

In Ireland, RPM facilitating conduct is per se unlawful, however, section 4(5) of the Competition Act 2002 provides that exemptions may apply where agreements, decisions or concerted practice or a category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not—

- a. impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,
- b. afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.⁹²

In Russia, section 2 of Article 11 of the FL 135 “On protection of competition” prohibits RPM, and RPM facilitating conduct. There is an exception where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm. Article 12 exempts RPM from prohibition contained in Article 11 where:

- a. RPM is provided for by a written agreement of concession; or/and
- b. the market share of each participant of the RPM agreement does not exceed 20 per cent (this provision does not apply to financial institutions).

In New Zealand, RPM facilitating conduct falls under section 27 of the Commerce Act. Under section 27 it is illegal to "enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market." Section 27 also prohibits giving effect to such a contract, arrangement or understanding. In other words, both entering into and giving effect to such an agreement is illegal.

The purpose is the intention or aim of the party of the agreement alleged to be anti-competitive. The purpose does not need to be the only or main purpose – it need only be a substantial purpose. In its survey response the New Zealand Commerce Commission has noted that purpose is assessed by looking at what happened, or was likely to happen, in the market as a result of the agreement. What each party intended when entering the agreement can also be relevant. The effect is the actual result of the agreement while the likely effect is the likely future effect of the agreement. An effect is "likely" if there is a real and substantial risk that it will occur.

⁹² We note that this is a reproduction of TFEU Article 101(3).

Provisions specifically covering RPM facilitating conduct

Table 10 - Provisions specifically covering RPM facilitating conduct

Type of RPM-specific provision	Countries
Rule of reason applies to RPM facilitating conduct	Canada
Another test applies	Taiwan

In Canada, RPM facilitating conduct may be subject to section 76 of the Competition Act (the resale price maintenance provision) if a supplier by agreement, threat, promise or any other means influences upward or discourages the reduction of a resale or advertised price of a product within Canada. In some instances, a MAP agreement may be caught by this section. In addition, a refusal to supply a product to a retailer that has a low pricing policy may also be reviewed under section 76.

In Taiwan, RPM facilitating conduct which produces the same effect as RPM is considered unlawful without conducting an analysis of competitive effects, but the enterprises involved are not barred from raising justifications for their conduct under Article 19 of the Fair Trade Act that came into force in February 2015.

Case studies

In one of its investigations of mobility scooters, the OFT found that a manufacturer and several retailers of Roma-branded mobility scooters had infringed the Competition Act 1998 (UK) by entering into vertical agreements that prohibited some retailers from advertising prices online for certain mobility scooters and also prohibited online selling (see Box 8, below). In another investigation in the same sector, the OFT found that a manufacturer and several retailers of certain Pride-branded mobility scooters had infringed the Competition Act 1998 (UK) by entering into vertical agreements that prohibited the advertising of prices below RRP. The OFT considered that the use of iMAPs can soften intra-brand competition, reduce discounting and raise prices to consumers. In addition, the use of iMAPs reduced price transparency and significantly increased consumers' search costs. This was of particular concern as consumers of mobility scooters typically incur high search costs due to their particular circumstances. Thus the internet may be an especially valuable way to reduce search costs for less mobile consumers. The OFT considered that these prohibitions restrictions prevented, restricted or distorted price competition.

Box 8: Mobility Scooters

The OFT issued an infringement decision on 5 August 2013 finding that a manufacturer (Roma) and seven retailers of Roma-branded mobility scooters had infringed the prohibition imposed by section 2 of the Competition Act 1998 (UK) by entering into agreements and/or participating in concerted practices which had as their object the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK. The prohibitions that were found to have infringed section 2 of the Competition Act 1998 (UK)

were prohibitions on retailers (i) selling online and (ii) advertising prices online in respect of certain mobility scooters supplied by the manufacturer.

The OFT also issued an infringement decision on 27 March 2014 finding that a manufacturer (Pride) had entered into agreements and/or participated in concerted practise with eight of its UK-wide online retailers which prevented them from advertising online prices below Pride's Recommended Retail Price (RRP) for certain models of mobility scooter and had as their object the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK contrary to the prohibition imposed by section 2 of the Competition Act 1998 (UK).

The OFT's infringement decisions required the parties to terminate the infringements and to refrain from entering into agreements or concerted practices that were the same or similar in nature. The parties were also required to write to the retailers in question informing them that there was no longer a ban on online sales or online price advertising in relation to mobility scooters. The OFT did not fine the parties on the basis that the combined turnover for each manufacturer-retailer combination did not exceed £20 million and therefore benefitted from the statutory immunity from penalties.

The OFT concluded that as a result of the infringements, retailers were restricted in accessing a wider consumer base with the help of the internet and that consumers were significantly restricted from (i) identifying and better obtaining discounted prices by shopping around and/or (ii) buying products that are not available from offline retailers in their local area. The OFT concluded that this prevented, restricted or distorted price competition between retailers. The OFT noted that the agreements and/or concerted practices undermined the benefits of the transparency and enhanced search functions brought about by the internet and the possibilities offered by e-commerce.

The OFT was particularly concerned that a prohibition on price advertising and a prohibition on online sales, in the context of a selective distribution system (where intra-brand competition was already weak) undermined the benefits brought about by the internet. The OFT was particularly concerned that the prohibitions were liable to disproportionately impact on potentially more vulnerable consumers and place them at a particular disadvantage.

The representations made to the OFT did not expressly cover the issue of individual exemption (which includes consideration of any efficiencies arising from the prohibition). They were, however, submissions of a more general nature that the prohibitions benefit consumers as they can lead to the provision of pre and post-sales services (for example by stopping internet retailers from free-riding on the pre-sales services provided by offline retailers and by discouraging significant exit from offline stores due to 'lower end' prices). The OFT noted that the prohibitions did not impose requirements on retailers to provide pre and post-sales services. In addition, the OFT did not receive any evidence that the prohibitions directly mitigated or eliminated any free-riding by internet retailers on pre-sales services provided by offline retailers, nor regarding the magnitude of any benefits arising from the prohibitions. The OFT did not consider that the conditions required for exemption under section 9 Competition Act 1998 (UK) were satisfied.

The ACCC's consideration of an application for authorisation of a MAP arrangement between retailers of electrical products illustrates the competition issues that may arise if retailers seek to induce RPM facilitating conduct (Box 9, below). In particular it highlights that MAP conduct may be a way for offline retailers to be shielded from competition from discounting online sellers. The ACCC rejected the claim that a MAP was necessary on a range of electronic goods to enable members of the Narta buying group's ability to compete more effectively with other retailers. Instead, the ACCC was concerned that the MAP conduct would be likely to result in higher prices for the products subject to the MAP and would particularly impact on online retailers of the electronic goods for whom the advertised price is often the same as the selling price.

Box 9: Narta International Pty Ltd

In 2013, the ACCC denied authorisation to Narta International Pty Ltd for proposed arrangements that would enable Narta to set a minimum advertising price (MAP) on a wide range of electronic goods. Narta is a buying group of around 30 electrical goods retailers, including offline and online suppliers. The proposed conduct would have ensured that all of its members advertised the same price for particular new release, premium or BEKO branded products. Narta submitted that the application of a MAP is necessary for it to be able to obtain exclusive access to these types of products and thus enable its members to compete more effectively with members of other chains and franchises.

However, the ACCC was concerned that the imposition of a MAP on a broad range of electrical goods could reduce competition between retailers and result in higher prices. This would have a particular impact on online retailers of electrical goods which generally do not negotiate their selling price below advertised prices like offline retailers often do.

Dual pricing, whereby a supplier sets a higher wholesale or retail price for online sales, has also been raised as an issue in online markets and may be a way to indirectly achieve RPM. On the one hand, dual pricing may be an appropriate way to prevent online sellers free-riding on service investments by exclusive or accredited distributors. However, such practices also further reduce intra-brand competition and thus may lead to higher retail prices than is necessary to address the potential free-riding.

A variant of dual pricing was one aspect of the ACCC's consideration of a notification by Games Workshop OZ Pty Ltd (GWOP) of various forms of exclusive dealing (Box 10, page 89). This case study illustrates the use of dual pricing to address potential free-riding on retail services. GWOP proposed a 'value added service pricing model' (VASP) in its agreement with independent retailers. Under the VASP, each outlet would be scored against certain criteria. The score would determine the wholesale pricing tier relevant to the outlet. The ACCC accepted that GWOP products are complex and some consumers may value pre- and post-sales retail services which relied, in part, on a network of independent retailers to provide. The VASP is designed to reduce the risk of low-service retailers free-riding on the investment in retail services made by high-service retailers (including online). In this case

study, the criteria used to determine an outlet's wholesale pricing tier applied equally to online and offline retailers thus was considered unlikely to exclude online sellers.⁹³

Box 10: Games Workshop Oz Pty Ltd

Games Workshop OZ Pty Ltd (GWOP) is part of the Games Workshop group of companies which manufactures and sells various hobby kits and games including miniatures, board games, paints and glues, associated hobby products, related books and literature and other related products. In May 2014, GWOP lodged a notification in relation to exclusive dealing other than third line forcing with the ACCC.⁹⁴

The exclusive dealing conduct notified to the ACCC included a number of aspects. Of most relevance are requirements for independent retailers to: (i) have at least one offline outlet, GWOP would not supply online-only retailers; (ii) not supply GWOP products to third parties who will sell the products through a market stall or third party online platforms such as eBay; (iii) not supply GWOP products to customers outside Australia and New Zealand. In addition, a value added service pricing model (VASP) was proposed, under which each outlet would be scored against certain criteria. The score would determine the wholesale pricing tier relevant to the outlet. The VASP would apply to online and offline outlets.

The ACCC considered that the notified conduct was unlikely to have the purpose, effect or likely effect of substantially lessening competition in a market. The ACCC defined the relevant market as the national market for tabletop war games, it was noted that some customers may have more or less close substitutes available to them. GWOP is the clear market leader and has some degree of market power associated with its brand loyalty and installed customer base. However, the ACCC did not consider that the notified conduct was likely to protect or enhance GWOP's market position. In particular, there were no restrictions on retailers' ability to sell rival tabletop war games products.

The ACCC recognised that the notified conduct is likely to result in higher retail prices for GWOP products to the detriment of some consumers. However, the ACCC accepted that GWOP products are complex and some consumers are likely to value pre- and post-sales retail services so as to enhance their overall gaming experience. GWOP provides some of these services itself but also relies on a network of independent retailers. The notified conduct, and in particular the VASP, is designed to reduce the risk of low-service retailers free-riding on the investment in retail services made by high-service retailers (including online retailers). The ACCC noted that if retail services are not actually valued by many of GWOP's customers, the conduct was unlikely to be profitable to GWOP as suppliers and retailers of other table top war games would be well placed to attract disaffected customers.

In contrast, the Bundeskartellamt's investigation into Bosch Siemens Hausgeräte GmbH (Bosch) rebate system illustrates the potential anti-competitive effects of dual pricing (see

⁹³ Another aspect of the conduct was a ban on online-only retailers. See the discussion in selective distribution for further information about this aspect of the conduct.

⁹⁴ Section 47 of the Competition and Consumer Act prohibits exclusive dealing conduct that substantially lessens competition. Businesses may obtain protection from legal action to engage in exclusive dealing conduct by lodging a notification with the ACCC. If the ACCC forms the view that the conduct will, or is likely to, substantially lessen competition, the ACCC then assesses whether there are any net public benefits under s.93(3) of the Act.

Box 11 below). The concern was the dual pricing conduct may alter incentives for retailers to engage in online sales. Thus competition from online sales may be reduced.

Box 11: Bosch Siemens Hausgeräte GmbH

On 23 December 2013, the Bundeskartellamt discontinued its investigations against Bosch following the announcement that Bosch would stop applying its anti-competitive rebate system. In February 2013, the BKartA initiated proceedings against Bosch after receiving complaints from Bosch's product dealers. The dealers alleged that Bosch applied a rebate system which put dealers who sold household appliances in both physical and online stores (so called 'hybrid' dealers) at a disadvantage. Due to this rebate system, an increase in turnover generated online led to a decrease in total rebates received. The rebate system therefore created incentives for dealers to limit their online sales. As a result, competition through online sales was reduced. The BKartA considered the rebate system to be anti-competitive dual pricing, constituting a restriction of competition by object according to Sect. 1 ARC and Article 101 TFEU. Bosch only operated its rebate system in Germany. However, the system was also found to have an effect on intra-EU trade.

In November 2013, Bosch informed the BKartA that it would stop using the rebate system as of January 2014. The new rebate system does not raise competition concerns according to a preliminary, non-binding evaluation by BKartA. Since January 2014, similar rebates can be obtained for sales in offline shops and for online sales.

Do ICN members consider existing legal frameworks, investigative and analytical tools are sufficient to deal with online RPM facilitating conduct?

Most (although not all) respondents agree that specific rules for *online* RPM facilitating conduct are not necessary. The primary reasons provided by those that considered that they do not have appropriate legal, investigative and analytical tools were lack of resources and relevant experience.

Some respondents consider that there is a lack of cooperation on cross border issues, that specific guidelines dealing with RPM and RPM facilitating conduct and that associated training for investigators would assist, particularly as the prevalence of this conduct increases.

Conclusions

Extent to which online RPM facilitating conduct is (or should be) prioritised by ICN membership and what, if any, further work could be undertaken by the ICN?

Only a small proportion (three per cent) of online commerce-related investigations commenced by survey respondents in 2013 related to online RPM facilitating conduct. While RPM facilitating conduct raises many of the same issues as RPM itself, certain types of RPM

facilitating conduct are of particular relevance in the online context. e.g. iMAPs and dual pricing, as demonstrated by the above case studies.

While the prevalence of online RPM facilitating conduct may increase internationally as the volume of e-commerce increases and the number of investigations may also increase accordingly, the survey responses suggest that the existing frameworks and tools are applicable to online RPM facilitating conduct. This is not an area in which members have articulated a need or likely benefit in further ICN work and the level of concern expressed, together with the number of investigations conducted recently, supports this conclusion.

The prevailing debate among academics and competition law commentators about the extent to which RPM yields anti-competitive outcomes and whether, having regard to its potential benefits, it should be restricted applies equally to conduct designed to facilitate RPM conduct. It is noted that any further ICN work undertaken relating to RPM may also be applicable to RPM facilitating conduct.

Online sales bans or limitations – a form of selective distribution

Selective distribution arises if a manufacturer agrees to supply its products to a retailer on the basis of the retailer meeting certain criteria specified by the manufacturer. The selection criteria typically require distributors to convey a particular image or to undertake pre- and/or post-sales retail services. Selective distribution channels are often seen in relation to complex products that require a high level of retail services to enable consumers to make well informed decisions (or just to convince them that they need it) about whether to purchase the product. In addition, suppliers of luxury products often use selective distribution channels to create and protect the product's brand image.

The ICN 2015 Special Project survey examined one particular form of selective distribution – online sales bans or limitations, in which a manufacturer agrees to supply its products to a retailer on the basis of the retailer banning or limiting the use of online sales.

Online sales bans/limitations, and selective distribution more generally, is a common feature of luxury, experience and credence goods markets. By engaging in selective distribution, a supplier restricts the availability of a product to retailers who meet certain criteria. Selective distribution can be a way for a supplier to build and protect its brand image, or to limit free-riding on pre-sales service and the provision of information that might help to reduce information asymmetries in online markets. Information asymmetries are a particular issue in relation to experience and credence goods.

Sometimes, exclusive distribution arrangements, whereby restrictions are placed on selling other competing goods, might also be used in conjunction with a selective distribution system. Exclusive distribution might be pro-competitive if it creates better incentives for retailers to adequately promote a product and provide pre-sales service. Historically, the physical distance between exclusive distributors prevented competition from other exclusive distributors. However, the exclusive distribution may be undermined by competition from online sellers who are able to reduce consumers' search and travel costs and thus enhance the likelihood of consumers making purchases outside their traditional territory. Thus suppliers might seek to protect exclusive distributors by placing additional vertical restrictions on competing suppliers' ability to sell online, or sell outside their home territory.

A key competition concern with online sales bans and restrictions is the potential foreclosure of efficient online competitors, particularly if there is an outright ban on online sales or the selection criteria go beyond what is required to deal with a particular market failure. Foreclosure concerns may be strengthened if the suppliers' products are 'must have' items for retailers to be able to compete effectively. If efficient retailers are foreclosed by selective distribution arrangements then prices are likely to be higher and consumer choice restricted.

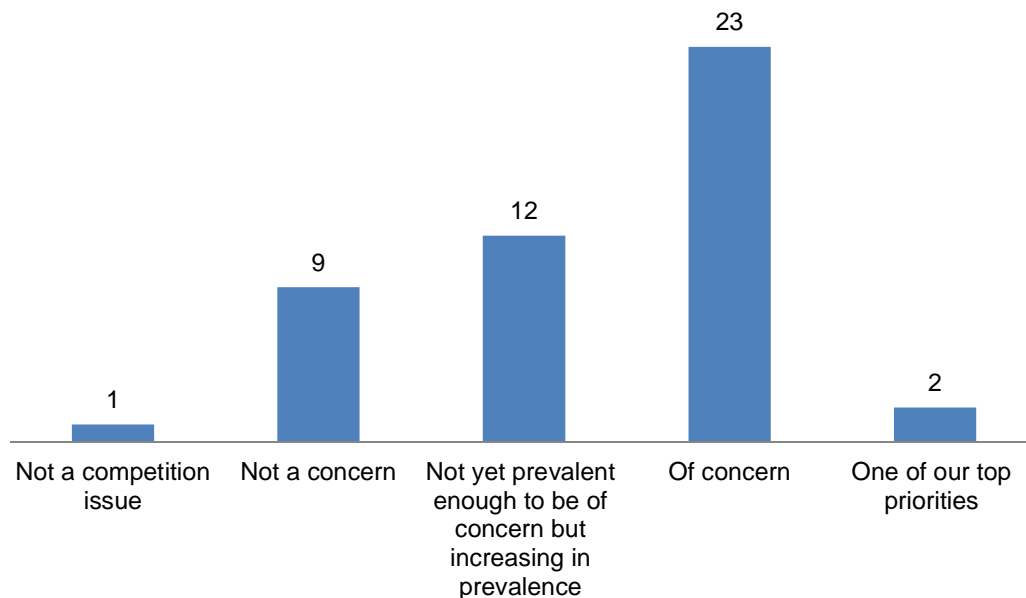
Exclusive/selective distribution arrangements may also restrict rival manufacturers' access to retail/distribution outlets and thus customers. This may reduce competition between manufacturers and choice for consumers at the retail level. However, concerns about the potential foreclosure of manufacturers' access to customers may lessen as developments in

online markets make it easier for manufacturers to sell direct to customers, thus bypassing traditional distribution models.

Extent of ICN members concern about online sales bans or limitations

Figure 15 below shows a breakdown of survey responses indicating the level of concern among member agencies about the use of online sales bans/limitations in their jurisdiction.

Figure 15: Are online sales limits or bans a significant concern? (47 respondents)



More than half of all survey respondents submitted that they are concerned about online sales bans/limitations, with 49 per cent (23) of respondents indicating that online bans/limitations are a concern in their jurisdiction and a further four per cent (two respondents - Ecuador and Ireland) identifying this conduct as one of their top priorities. A quarter of respondents (12) submitted that online bans/limitations are not yet prevalent enough to be of concern but it are increasing in prevalence. The remaining 21 per cent (10) of respondents indicated that selective distribution is either not a concern (nine respondents) or not considered to be a competition issue in their jurisdiction (one respondent).

While there were no online sales limits or bans cases commenced in South America in 2013, and three of the six respondents from South America responded that online sales bans/limitations are not a concern, one identified this as a top priority area and two noted that it is not yet prevalent enough to be of concern but is increasing in prevalence. In terms of responses from Asian members, most respondents indicated this is an area of concern, while respondents from Africa were divided with two respondents considering this an issue of concern, two considering it is not a concern and one submitting that it is not yet prevalent enough to be of concern but increasing in prevalence.

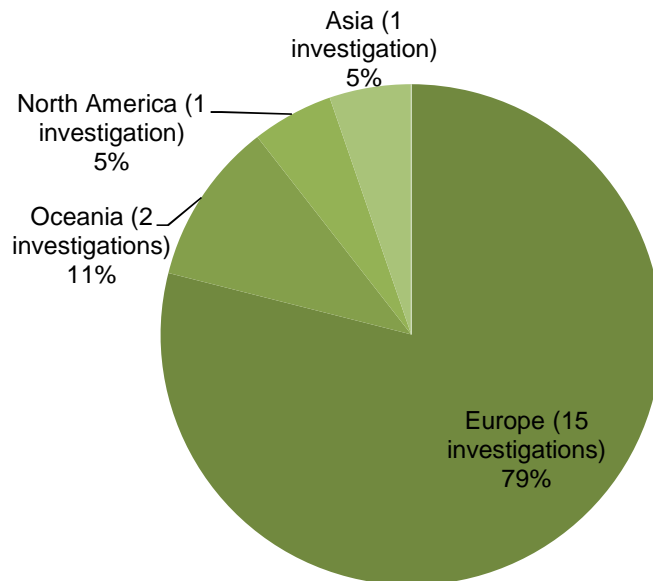
Prevalence of online sales bans or limitations investigations in ICN member jurisdictions

Online sales bans/limitations are the second most prevalent online vertical restraint issue currently being investigated by ICN member agencies with 31 per cent of all online competition investigations commenced in 2013 falling into this category (see Figure 1 on page 11). A total of 19 online sales bans/limitations investigations were commenced by survey respondents in 2013.

Figure 16 provides a regional breakdown of those investigations relating to online sales bans/limitations commenced in 2013, with 79 per cent of investigations into this type of conduct occurring within Europe.

While more ICN members are located in Europe than any other continent, the concentration of online sales bans/limitations investigations within Europe is not proportionate to its ICN membership—approximately 40 per cent of ICN members are from within Europe.

Figure 16: Online sales bans/limitations investigations commenced in 2013



Legal frameworks – online sales bans or limitations

Are sales bans or limitations covered by existing competition laws?

Figure 17 shows that for most survey respondents (83 per cent) their existing competition law covers online sales bans/limitations. Of those respondents whose existing law covers online sales bans/limitations, in all cases the conduct is covered by a general provision dealing with vertical restraints.

Figure 17: Does the existing law cover online sales bans/limitations?

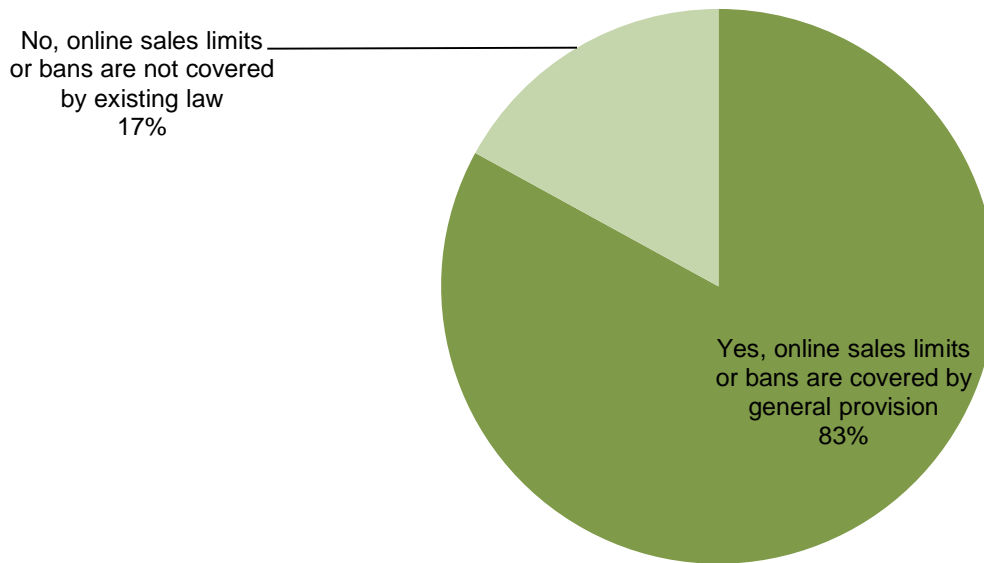
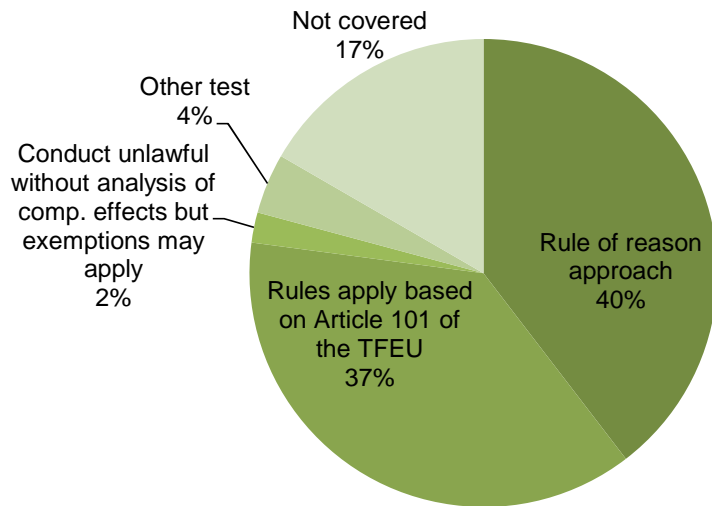


Figure 18 below provides a breakdown of the types of existing provisions that deal with online sales bans/limitations, for those respondents whose existing laws cover online sales bans/limitations under a general provision and those whose law specifically addresses online sales bans/limitations conduct.

A large proportion of respondents (40 per cent) have a provision based on the rule of reason approach, and 37 per cent apply rules based on Article 101 of the TFEU. Most respondents who answered this question fell within these two categories.

Figure 18: Type of existing provision dealing with online sales bans/limitations



General provisions covering sales bans or limitations

Table 11 below shows a breakdown of the jurisdictions which apply a general provision to online sales bans/limitations and which type of general provisions apply in each case.

Table 11 – General Provisions covering online sales bans/limitations

Type of general provision	Countries
Online sales ban/limitations is considered unlawful without conducting analysis of competitive effects but exemptions can apply	Ireland, Israel
Rule of reason applies to online sales ban/limitations	Australia, Brazil, Canada, Chile, Egypt, Hong Kong, Indonesia, Japan, Korea, Mauritius, New Zealand, Russia, South Africa, Switzerland, Taiwan, US
Rules apply to online sales ban/limitations that are based on Article 101 of Treaty of Functioning of Euro Union	Austria, Belgium, Czech Republic, Denmark, EFTA Surveillance Authority, EC, Finland, France, Germany, Hungary, Italy, Lithuania, Luxemburg, Netherlands, Norway, Poland, Sweden, UK
Another test applies	Colombia, Singapore

Examples of some of the jurisdictions which use the rule of reason approach are:

- In **Canada**, various defences or exceptions may be available under Canada's competition law in respect of online sales bans / limitations, which may be reviewed under the civil provisions of Part VIII of Canada's Competition Act, to the extent that the conduct is likely to have an adverse effect on, or substantially lessen or prevent, competition in a market.

Regardless of the availability of a specific exception or defence, the Competition Bureau will generally consider the existence of a business explanation or credible pro-competitive rationale for online sales bans / limitations in determining the competitive effect of the conduct.

- In **Hong Kong**, the test applied to online sales bans/limitations is whether the online sales ban/limitation has the effect of preventing, restricting or distorting competition in Hong Kong. General exclusions for (i) agreements of lesser significance⁹⁵ and (ii) agreements enhancing overall economic efficiency may apply.
- In **Japan**, restrictions on a retailers sales methods (excluding those on sales prices, sales territory and customers) except for being used as a means to restrict sales price etc. do not contravene the Antimonopoly Act where they are recognised to have plausibly rational reasons for the purpose of ensuring proper sales of the product, such as related to assuring safety of the product, preservation of its qualities, maintenance or credit of its trademark, etc. and if the same restrictions are applied to other retailers/customers on equal terms.
- In **Russia**, online sales bans/limitations may be recognised as unlawful in cases where it leads to restraints to competition. If such a case occurs, the defence would be to show that the practice in question does not harm competition in the relevant market or leads to efficiencies outweighing the competitive harm.
- In **South Africa**, an agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless the a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.
- In the **US**, online sales bans/limitations are evaluated under the rule of reason. There are no specific defences or limitations for this conduct, however general antitrust defences may apply. Under the rule of reason, a party may put forward various justifications and defences for its conduct.

The rule of reason approach is also adopted by Taiwan, among others. In a recent case study provided by the Taiwan FTC (TFTC), Merida Co.—the second largest brand of bicycle in Taiwan—sent a letter to its retailers stating that its sale of products on the internet violated

⁹⁵ reference back to online RPM section

the company's regulations and threatened to terminate its relationship with the retailer if the this conduct continued.

In **Europe**, a total ban on online sales would normally fall within Article 101(1) TFEU and would be considered as a restriction of the territory into which, or other customers to whom, a buyer party to the agreement may sell the goods or services and/or as a restriction of sales to end users by members of a selective distribution system. It would therefore fall within the category of hardcore clauses listed in Article 4 of the Vertical Block Exemption Regulation (that limits the application of the VBER). However, the above mentioned hardcore restrictions do not imply that a seller necessarily will have to supply online only distributors, nor that online sales cannot be made subject to conditions or restrictions which could be considered to be exempted under the VBER if the parties market share is below 30 per cent or otherwise exempted under application of Article 101(3) TFEU.

A ban on online sales may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU. The EC's response to the survey indicated that these conditions are unlikely to be fulfilled as the negative effects of hardcore clauses are such that they generally are not outweighed by positive effects, or the restriction is not indispensable to the achievement of the benefits sought.

Online sales are generally considered to be 'passive' sales, which are distinguished from 'active sales' in the European Commission's guidelines on Vertical Restraints. A total ban on online sales is among the examples of hardcore restrictions of passive sales specified in the Guidelines, given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers.

The **EFTA Surveillance Authority**, which monitors compliance with European Economic Area rules in Iceland, Liechtenstein and Norway, responded that in principle, every distributor must be allowed to use the internet to sell products. The EFTA Surveillance Authority considers any obligations which dissuade appointed dealers from using the Internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from offline shops as a hardcore restriction. The EFTA Surveillance Authority regards a number of restrictions on passive selling as hardcore restrictions. (For example a hardcore restriction may be necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected.) Some restrictions on active selling may be justified.

In **the Netherlands**, rules apply based on Article 101 of the TFEU. In its response to the survey, the Netherlands submitted that given a market with sufficient (upstream) inter-brand competition, the Netherlands Authority for Consumers and Markets is unlikely to prioritise cases of restrictions on online sales. According to the Netherlands Authority for Consumers and Markets, in those circumstances, consumer harm from these restrictions is not very likely and reasons for restrictions are more likely to be pro-competitive, e.g. to protect a brand image or avoid free-riding on investments in offline retail. The Authority submitted that it would be harder to imagine why an absolute ban on online sales might be pro-competitive under these circumstances though, so that could warrant further investigation.

In **Ireland**, online sales bans/limitations are considered unlawful without conducting an analysis of the competitive effects. However, a concerted practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, may be allowed.

In **Israel**, restrictive arrangements including those relating to the price to be demanded, offered or paid, are forbidden under Israeli Restrictive Trade Practices Law without an analysis of the competitive effects. The two main exemptions which may apply are:

- block exemption for non-horizontal agreements that do not include: minimum RPM (can include maximum RPM), naked restraints (general restraint on competition) or restraints that may substantially harm competition and
- block exemption for franchise agreements.

In **Colombia**, this conduct is analysed according to the general provision of Article 1 of Law 155 of 1959, which states: “agreements and covenants that either directly or indirectly have the purpose of limiting the production, supply, distribution or consumption of raw materials, products, goods, or national or foreign services, and in general, all type of practices, procedures or systems that tend to limit free competition in order to determine or maintain inequitable prices to the detriment of consumers and raw materials’ producers shall be prohibited”.

Case studies

In the following case study, restrictions placed by Adidas on its resellers amounted to a ban on the use of third party platforms and was considered by the BKartA to restrict competition by limiting the ability of resellers to reach customers online.

Box 12: Adidas – Restrictions on use of third party platforms

Adidas operates a selective distribution system for Adidas-branded sports and leisure equipment in Germany. Since April 2012, Adidas has restricted its authorised resellers from using third party platforms such as eBay, Amazon Marketplace and Rakuten.de. The sellers were allowed to sell through ‘closed’ internet platforms and their own online stores. Adidas also required that its authorised resellers’ customers should not be able to access the authorised online stores through a site carrying a third party platform’s logo.

The BKartA started proceedings against Adidas in 2013. It considered that Adidas’ policy was a general ban on the use of third party platforms that restricts competition by limiting authorised resellers’ ability to reach more and different customers online. The BKartA also considered that the policy could not benefit from either the Vertical Agreements Block Exemption Regulation (VBER) or individual exemption under Article 101(3) TFEU. This was despite the fact that Adidas’ share in some markets was below the 30 per cent threshold applied by the VBER. The BKartA’s view was that the ban was such a serious restriction on competition that it could never be exempted by the VBER. In addition, the ban was not equivalent to conditions imposed on offline stores and other online sales. In markets where

Adidas' market share exceeded 30 per cent, the BKartA considered whether the ban was necessary to protect authorised resellers from intense price competition and/or free-riding. It also considered whether the ban was necessary to protect Adidas' brand image. The BKartA found that protection against intense competition did not lead to any efficiencies. In addition, the risk of free-riding was not third-party platform specific and that any free-riding could be solved by other less restrictive means. The BKartA acknowledged that the need to protect the image of a trademark may be a legitimate consideration. However, it did not justify a ban on the use of third party platforms because it could not be assumed that all such platforms would harm the trademark's image.

The BKartA closed its proceedings after Adidas removed its ban on sales through third party platforms and clarified that authorised resellers are able to use Adidas brand related terms as search words for search engine advertising.

In Pierre-Fabre Dermo-Cosmétique case (France), the Court of Justice of the European Union ruled that a contractual clause, prohibiting *de facto* the internet as a method of marketing was a restriction by object within the meaning of Article 101 TFEU. It also ruled that such a clause is a hardcore restriction under Article 4c of the Vertical Block exemption regulation applicable at the time (essentially maintained as Article 4c of the current Vertical Block Exemption Regulation).

Box 13: Pierre Fabre

Pierre Fabre is a manufacturer of cosmetics and personal care products. The products are distributed through pharmacies but are not medicines. Pierre Fabre sought to market these products through a selective distribution network with distributors chosen on the basis of the quality of the point of sale services and the requirement to have a qualified pharmacist available to assist with the purchase. The effect of these requirements was a *de facto* ban on online sales. Pierre Fabre argued that the conduct was necessary to protect consumers from the risk of using the product without appropriate pharmacist advice, the need to prevent counterfeits and the prevention of free-riding.

In 2008, the French Competition Authority (the Autorité de la Concurrence) held that Pierre Fabre's selective distribution agreements breached both French and EU competition law and did not fall within the scope of the Block Exemption or qualify for individual exemption. The Autorité rejected Pierre Fabre's justifications for the ban on online sales because its products were not medicines and appointing specialist distributors was sufficient to guarantee product quality. Instead the Autorité considered that the ban on online sales was a hardcore restriction on active and passive sales within the meaning of the 1999 Vertical Agreements Block Exemption (which applied at the time) and could not benefit from an individual exemption under Article 101(3) TFEU. Pierre Fabre was thus ordered to amend the contracts to enable the products to be sold by online retailers and fined €17,000.

Pierre Fabre appealed the decision to the Paris Court of Appeal (the Cour d'appel de Paris) which in turn made a reference to the European Court of Justice (ECJ). The question to be determined was whether (i) a ban on online sales imposed on authorised distributors in the context of a selective distribution network was a hardcore restriction on competition which

could not be exempted under the Vertical Block Exemption regulation and, (ii) if this was the case, whether the provision could be exempted on an individual basis.

The ECJ ruled in 2011. It confirmed that a de facto ban on online sales could restrict competition but there are legitimate reasons that may justify such a ban and therefore conform with Article 101 TFEU. However, the ECJ noted that in EU case law the need to provide customers with individual advice on the use of non-prescription medicines and contact lenses at the point of sale were not considered valid reasons for a ban on online sales. The desire to maintain a prestigious image was also not a legitimate reason for banning online sales. The ECJ also considered whether the Vertical Block exemption regulation could apply to the ban. It found that the object of the ban, at the very least, was a restriction of passive sales to online end users outside the distributor's area. Thus the block exemption could not apply. However, it was for the French court to decide whether the ban could be individually exempt under Article 101(3) TFEU.

In January 2013 the Paris Court of Appeal rejected Pierre Fabre's appeal, confirming that a de facto prohibition on online sales of cosmetics is an infringement by object of Article 101(1) that could not be objectively justified.

In making its assessment the Court considered that a need to provide advice and protect consumers from incorrect use of the product was insufficient to justify a ban on online sales as personalised advice and information could be offered online via an interactive video link or an online discussion with a pharmacist.

The Court also rejected a request for individual exemption under Article 101(3) as Pierre Fabre had failed to meet the standards required to prove the existence of the claimed efficiencies. Furthermore, a ban on online sales was not indispensable to achieving any such efficiencies.

In the following case study, despite claims that a selective distribution system was necessary for health and safety reasons and to prevent investments from free-riding, the Bundeskartellamt deemed the selective distribution system implemented by CIBA Vision anti-competitive and imposed a fine against the contact lens supplier.

Box 14: CIBA Vision Vertriebs GmbH (CIBA Vision)

In 2009, the Bundeskartellamt imposed a fine of €11.5 million on CIBA Vision, the market leader in contact lenses in Germany. CIBA Vision was accused of having illegally restricted the internet trade in contact lenses of its own brand, in particular via eBay, and of having influenced the resale prices of internet traders in an anti-competitive manner. CIBA Vision disputed the allegation from a factual and legal point of view but did not lodge a legal appeal against the decision.

CIBA Vision claimed that a selective distribution system was necessary for health and safety reasons and to protect necessary investments from free-riding. The Bundeskartellamt found the argument regarding health and safety was not convincing as contact lenses are prescription free in Germany, measurement and control services offered by non-medical

optical stores are available at the customer's discretion and are often not required, particularly for repeat purchases of daily or monthly lenses. In addition, soft lenses are sold in a variety of drugstores and supermarkets. In relation to free-riding on necessary investments, the Bundeskartellamt was of the opinion that the claimed benefits arising from a ban on internet sales could also be achieved in less restrictive ways. In addition, CIBA Vision employed so-called 'price management' measures, operating a surveillance and intervention system with several persons in charge of monitoring and controlling the traders' sales prices on the internet. If the resale prices of individual traders were at a certain level below the non-binding RRP, CIBA Vision staff would contact the internet traders and try, in many cases successfully, to induce them to increase their sales prices.

In a recent case study provided by the Taiwan FTC Merida Co.—the second largest brand of bicycle in Taiwan—sent a letter to its retailers stating that its sale of products on the internet violated the company's regulations and threatened to terminate its relationship with the retailer if the this conduct continued.

Merida Co.'s ban on online sales was found to have breached Taiwan's competition law, which provides that no enterprise shall impose restrictions on its trading counterparts' business activity improperly by means of the requirements of business engagement, which is likely to lessen competition or to impede fair competition. The factors are identified as relevant for examining particular restrictions include: the intent, purposes, market position of the parties concerned, the structure of the market to which they belong, the characteristics of the goods and their impact on market competition.

Further examples of online sales bans and the response of competition authorities to such conduct can be seen in the UK OFT Mobility Scooters matter (see Box 8 page 86) and the Bundeskartellamt in Bosch Siemens Hausgeräte GmbH (see Box 11, page 90).

Do ICN members consider existing legal frameworks, investigative and analytical tools are sufficient to deal with online sales bans or limitations?

An unintentional failure to include this question in this section of the survey questionnaire means that, unlike with other conduct, respondents were not asked about the sufficiency of existing legal frameworks, investigative and analytical tools with respect to online sales bans or limitations. However, survey responses to other questions suggest that while this is one of the more prevalent and concerning categories of online vertical restraint conduct, the application of general provisions to this conduct enables competition authorities to deal with such conduct where it raises concerns and for efficiency gains to be realised in those jurisdictions whose legal framework permits the consideration of these.

Other matters arising from survey responses

Differences between treatment of online and offline sales bans or limitations

Whereas most responses (almost 80 per cent) indicated that sales bans or limitations that involve online commerce are not addressed differently than offline sales bans or limitations, Switzerland provides an interesting comparison.

In Switzerland, online sales are explicitly qualified as 'passive sales,' whereas offline sales can be either 'active' or 'passive' sales. Limitations on active sales in open and exclusive distribution agreements are not qualified as qualitatively severe restraints by the Notice of the Swiss Competition Commission on the competition law treatment of vertical agreements as opposed to limitations on passive sales. Whereas only few quantitative effects must be present in order to conclude that a qualitatively severe restraint significantly restricts competition, more quantitative effects are necessary for the same conclusion if an agreement is not a qualitatively severe restraint.

Conclusions

Extent to which online sales bans or limitations are (or should be) prioritised by ICN membership and what, if any, further work could be undertaken by the ICN?

Online sales bans/limitations are the second most common type of online investigations recently conducted by ICN members and more than half of all survey respondents submitted that they are concerned about online sales bans/limitations.

In terms of the extent to which online sales bans/limitations are/should be prioritised by ICN membership, despite a prevalence of concern about the conduct itself, this was not identified as an area of priority for further ICN work. One reason for this may be that sales bans or limitations that involve online commerce are not addressed differently than those in the offline context. The application of general provisions to this conduct appears to enable competition authorities to deal with such conduct where it raises concerns and for efficiency gains to be realised in those jurisdictions whose legal framework permits the consideration of these.

As the incidence of such conduct increases over time (as is expected by members), consideration could be given to whether members continue to feel adequately equipped to address such conduct. Based on the information available from the survey, further ICN work and guidance in the immediate future appears to be better directed towards other types of vertical restraint conduct.

Geographic price discrimination

Price discrimination is the sale of the same goods or services at different prices to different customers, or groups of customers where the price differences are not due to differences in the cost of supplying those customers or group. Price discrimination is a feature of many markets, including workably competitive markets, and does not necessarily raise competition concerns. For instance, transport and theatre tickets are often lower for students and low income earners than for the general public.

Geographic price discrimination (GPD) occurs when a supplier charges different prices for the same product to customers located in two or more different locations based upon differences in those customers' willingness to pay for the product. When considering GPD, it should be kept in mind that prices sometimes differ across regions because of differences in the supplier's costs of serving the different markets (such as transport costs), size of markets, and competition at the retail level. Thus price differences across regions do not necessarily mean that a supplier is engaging in GPD.

International price discrimination is when geographic price discrimination occurs across country borders. International price discrimination is a form of 'third degree' or imperfect price discrimination. A supplier that practices 'third degree' international price discrimination maximises its total profit by maximising its profits from sales in each country separately. As a result, prices will be higher in countries where consumers as a group have a higher willingness to pay than in countries whose consumers are willing to pay less.

Geographic price discrimination is a profit maximising strategy that any firm would engage in if possible. However, three broad conditions must be satisfied in order for a firm to successfully implement a GPD strategy; a supplier must (i) have some degree of market power in each of the regions, (ii) be able to identify differences in customers' willingness to pay between regions and (iii) be able to stop customers in a higher priced geographic location from accessing sales in lower priced regions (prevent arbitrage).

The overall effect of geographic price discrimination on consumer welfare is ambiguous. It is evident that consumers who pay a higher price than they would if prices were the same across regions are worse off. On the other hand, consumers who pay a lower price than they otherwise would are better off. The overall effect on consumer welfare will thus depend on a case by case assessment of consumer welfare effects in each region. These overall effects will depend on competitive conditions in each market, and thus a supplier's market power, and the extent of differences in consumers' willingness to pay across regions.

Developments in online markets and the ready access to information about prices offered by overseas sellers have increased consumers' awareness of discriminatory pricing strategies that cross national boundaries. This greater awareness has raised concerns in some higher-priced countries that consumers are being exploited by large firms with market power that are able to increase profits at local consumers' expense. Sometimes this creates political pressure to take steps to address any perceived exploitation. However, there are differing

views about whether these higher prices are actually a problem that competition laws should seek to address or simply reflect differences in the competitive environment across regions.

In some instances, trade restrictions and control of intellectual property rights may support suppliers' ability to segment geographic markets and thus to practice international price discrimination. For example, incentives for parallel importing are likely to arise in the higher-price region when a supplier seeks to segment geographic regions and practice price discrimination.⁹⁶ However, legislative restrictions on parallel importing, particularly in intellectual property laws, can prevent this circumvention of GPD. Where legislative restrictions have been removed, suppliers may use 'geo-blocking' to prevent price arbitrage between countries and force consumers to use location-specific distribution channels. Consumers who wish to purchase goods from cheaper international retailers are 'locked out' by businesses that use various tools including internet addresses, credit card numbers or other means of electronic identification to identify a consumer's geographic location and block sales and prevent downloads or refuse delivery from lower-price to higher price regions.⁹⁷ Consumers may to some extent be able to circumvent geo-blocking measures which support GPD. However, these measures are not available to all consumers and might themselves cause inefficiencies.

Vertical restraints such as exclusive dealing, selective distribution and restrictions on selling outside a geographic territory may also enable a supplier to segment countries and thus facilitate a price discrimination strategy. These types of restraints increase consumers search and travel costs thus reducing the likelihood of arbitrage. Developments in online markets may, however, reduce the effectiveness of these vertical restraints in segmenting markets and facilitating geographic price discrimination. This is because the internet generally reduces consumers search and travel costs thus making it more likely that consumers located in a particular higher-priced region will purchase from lower-priced suppliers in another territory. Of course, this only holds true where suppliers do not engage in geo-blocking to prevent price arbitrage between countries and force consumers to use location-specific distribution channels.

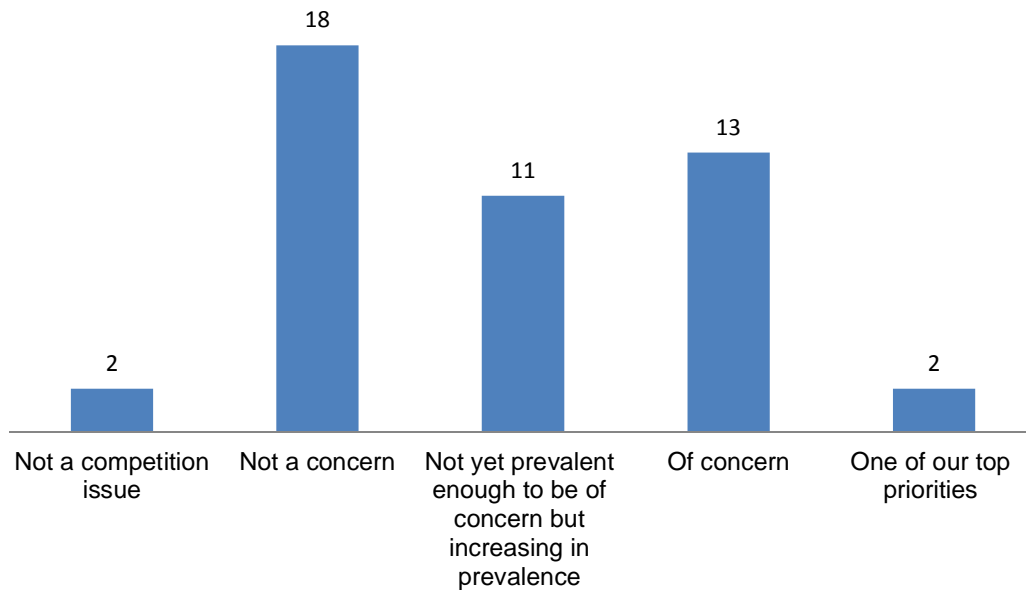
Extent of ICN member concern about online geographic price discrimination

Figure 19 below shows a breakdown of survey responses indicating the level of concern among member agencies about the use of GPD conduct in online markets in their jurisdiction. Clearly there is significant diversity in views amongst ICN members about the level of concern associated with online GPD.

⁹⁶ Parallel imports are products that have been legally supplied in one country but are imported into another country without the permission of the owner of the intellectual property rights in the importing country.

⁹⁷ These issues were explored by the Australian Standing Committee on Infrastructure and Communications in its 2013 inquiry *At what cost? IT pricing and the Australia Tax*, available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

Figure 19 - Is online geographic price discrimination a significant concern?



A significant proportion of survey respondents submitted that online GPD conduct is either not a concern (18 responses or approximately 40 per cent) or not a competition issue (two responses or four per cent), however 24 per cent (or 11 responses) consider that online GPD is not yet prevalent enough to be of concern but it is increasing in prevalence, 28 per cent consider that it is of concern (13 responses) and 4 per cent consider it to be a top priority (two responses).

Geographically, the survey results suggest that online GPD is of relatively greatest concern in Europe. Concern is increasing in South America, Oceania and Africa. However, the survey results also suggest that in all regions a high proportion of ICN members are not concerned about geographic price discrimination or do not consider it to be a competition issue. This is particularly the case in Asia, North America and South America.

The proportion of members who responded that geographic price discrimination is either 'not a concern' or 'not a competition issue' was higher than any of the other issues covered by the survey.

Prevalence of online GPD investigations in ICN member jurisdictions

Survey responses did not identify any investigations into online GPD that were commenced during the relevant period. Nonetheless, there were a number of ongoing investigations that continued or were concluded during the 2013 calendar year (See Box 15 on page 112).

While not reporting any investigations into online GPD during the relevant period some respondents noted that exchange rate trends in recent years have resulted in online GPD becoming the subject of increasing scrutiny.

Legal framework - online GPD

Is online GPD covered by existing competition laws?

As has been noted, a range of tools may be used by a supplier seeking to segment geographic markets, including vertical restraints in online markets (for example restrictive distribution agreements that prevent passive sales).

The survey asked respondents whether their existing laws address online GPD. **Figure 20** provides a pie chart of responses received. However, it is possible that some respondents that have answered 'no' to this question may be able to address online GPD if such conduct arose from an anti-competitive vertical restraint.⁹⁸ The majority of respondents indicated that their existing competition law covers online GPD conduct.

Of those respondents who indicated that their existing law covers GPD, in the vast majority of cases (74 per cent of respondents) the conduct is covered by a general provision dealing with vertical restraints. In the remaining cases of those where existing laws cover GPD (15 per cent of respondents), GPD conduct is covered by a specific provision.

⁹⁸A number of survey responders—Hong Kong, Israel, New Zealand, Seychelles, and Slovenia—indicated that their existing law does not cover GPD.

Figure 20 - Does the existing law cover online GPD?

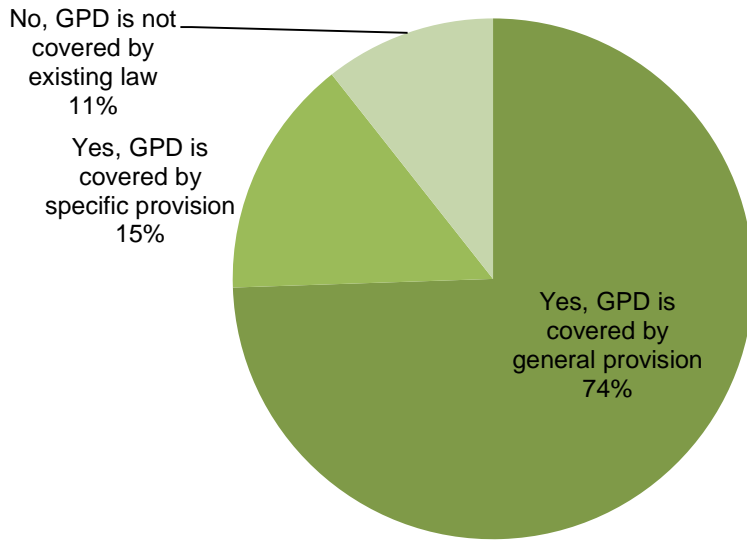
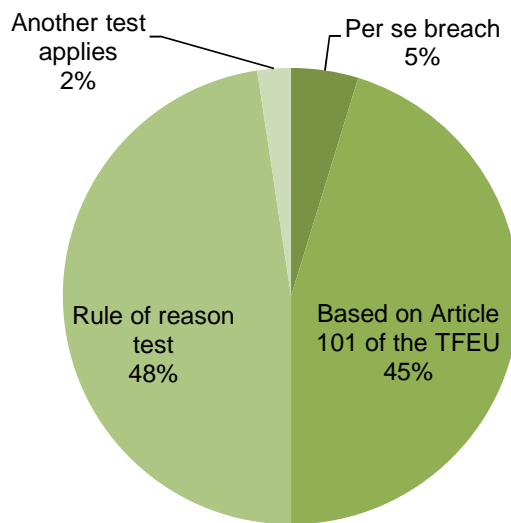


Figure 21 below provides a breakdown of the types of existing provisions that deal with GPD conduct (including those that cover GPD under a general provision and those whose law specifically addresses GPD) for those respondents who indicated that their existing laws cover GPD.

The largest group of respondents (48 per cent) have a provision based on a rule of reason test, while slightly fewer respondents apply Article 101 of the TFEU (45 per cent). Two jurisdictions consider GPD to be a per se breach of competition law.

Figure 21 – Type of existing provision dealing with GPD



General provisions covering online GPD conduct

Table 12 below shows a breakdown of the jurisdictions which apply a general provision to GPD conduct and which type of general provisions apply in each case.

Table 12 – General Provisions covering online GPD

Type of general provision	Countries
Rule of reason applies to GPD	Australia, Brazil, Canada, Chile, Egypt, Indonesia, Mauritius, Papua New Guinea, Russia, South Africa, Taiwan, US
Rules apply to GPD that are based on Article 101 of TFEU	Austria, Belgium, Bulgaria, Czech Republic, Denmark, European Free Trade Association, EC, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxemburg, Netherlands, Norway, Poland, Sweden, UK
Another test applies	Singapore

Article 101(1) TFEU does not directly address geographic price discrimination although some of the vertical arrangements that facilitate geographic price discrimination may be hardcore restrictions under the Vertical Block Exemption Regulation. For example, restrictions on a distributor's ability to sell nationally or cross-border to other authorised distributors within a selective distribution system or to end users. This may include requiring a distributor to prevent customers located in another territory from viewing its website, or automatically rerouting customers to the manufacturer's or another distributor's website; requiring a distributor to terminate a transaction once the customer's credit card information reveals that the customer is not within the distributor's territory, requiring the distributor to limit the proportion of sales made over the internet and requiring the distributor to pay a higher price for products intended to be sold online than the price paid for products intended to be sold offline. However, Article 101(1) does not apply to unilateral practices nor to agreements between a supplier and its 'genuine' agents or subsidiaries of the supplier.

The EC recently announced a Digital Single Market strategy, an element of which is to tackle geo-blocking.⁹⁹ This review will also include a review of copyright laws. The main areas the Commission will focus its work on in creating a Digital Single Market are: (i) better access for consumers and businesses to digital goods and services; (ii) shaping the environment for digital networks and services to flourish; and (iii) creating a European Digital Economy and Society with long-term growth potential.

As outlined previously in this paper, a rule of reason test broadly provides that the conduct is only prohibited when it has had an adverse effect on competition in a market to the requisite

⁹⁹ *Digital Single Market Strategy: European Commission agrees areas for action*, European Commission - Press release, 25 March 2015.

level (of which the precise level differs among jurisdictions). This assessment can include consideration of economic efficiency in some cases.

In 2009 amendments to Canada's competition law saw price discrimination change from a criminal to a non-criminal offence. Under the new provision it is an offence to engage in price discrimination where the conduct is an abuse of a dominant market position. This general provision (section 79 of the Competition Act) can apply to any conduct, including GPD, engaged in by a dominant firm or group of firms for the purpose of having an intended negative effect on a competitor that is predatory, exclusionary, or disciplinary.

In December 2014 the Canadian Government introduced an amendment to the Canadian Competition Act seeking to address international GPD between Canada and the United States.

Proposed section 10 (1.1)

If the Commission has reason to believe that the proposed selling price of a product or class of products is or was higher in Canada than the selling price of that product or class of products – or similar product or class of similar products – in the United States, the Commissioner may make an inquiry into the matter with a view to determining the facts, including the extent of the difference between the selling prices, and the reasons for that difference.

GPD is also of significant interest to consumers in Australia. Prior to 1995 certain forms of price discrimination were prohibited, however this provision was repealed as it was found to be likely to result in price inflexibility, which would negatively affect consumer welfare.

Following concerns about international GPD for books, CDs and computer software and a series of inquiries by the then Prices Surveillance Authority, restrictions on parallel imports in the Copyright Act were partially removed in the 1990s. However, geo-blocking has provided another means to prevent arbitrage and support international GPD. Two recent inquiries have considered whether further legislative measures are required.¹⁰⁰ The most recent inquiry has not recommended the reinstatement of a price discrimination prohibition into Australia's competition law. Instead, market solutions should be promoted, including through the removal of restrictions on parallel imports and ensuring that consumers are able to take lawful steps to circumvent geo-blocking mechanisms that seek to restrict their access to cheaper legitimate products.

Provisions specifically covering GPD conduct

Table 13 below shows a breakdown of the jurisdictions which apply a provision specific to online GPD conduct and which type of specific provision applies in each case.

¹⁰⁰ *At what cost? IT pricing and the Australia Tax*, Australian Standing Committee on Infrastructure and Communications, 2013. Available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm
Competition Policy Review, Final Report: Recommendation 26, Australia, 2015. Available at: <http://competitionpolicyreview.gov.au/final-report/>

Table 13 – specific provisions covering GPD conduct

Type of GPD-specific provision	Countries
GPD is considered unlawful without conducting an analysis of competitive effects (per se breach or strict liability breach)	Ecuador, Botswana
Rule of reason applies to GPD	Columbia, El Salvador, Japan, Korea, Switzerland

Price discrimination is prohibited per se in Botswana as such conduct applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The application of ‘dissimilar conditions’ refers to the practice of providing goods or services at different prices or terms to different buyers, even though the sales costs are the same for all transactions. GPD can also be considered under Botswana’s prohibition against an abuse of dominant position in the market:

Any conduct on the part of one or more enterprises is subject to prohibition by the Authority if, following an investigation by the Authority, such conduct is determined to amount to an abuse of a dominant position in any market.

Under Salvadorian law, a rule of reason test applies such that a firm may abuse a dominant position through sales or the rendering of services in a given part of the territory at a price that differs from the price charged in another part of the country where the intention or effect is to reduce, eliminate or displace competition from that area of the country. In evaluating such conduct, consideration will be given to whether it is commercially unjustified to set different prices or sales conditions where consumers are under the same conditions.

In Switzerland, GPD may infringe Swiss competition law if passive sales are banned - online sales are explicitly qualified as ‘passive sales,’ whereas offline sales can be either ‘active’ or ‘passive’ sales. Limitations on active sales in open and exclusive distribution agreements are not qualified as qualitatively severe restraints by the Notice of the Swiss Competition Commission on the competition law treatment of vertical agreements as opposed to limitations on passive sales (absolute territorial protection; Art. 5 para. 4 Swiss Cartel Act) or if it is an unlawful conduct by a dominant undertaking (Art. 7 Swiss Cartel Act). We note that in January 2015, the Swiss Council of States accepted a parliamentary initiative aimed at lowering prices of imported products in Switzerland.

Case studies

No case studies were provided in the survey responses specifically addressing online geographic price discrimination. An examination of recent decisions has identified two investigations involving online price discrimination strategies which were supported by anti-competitive conduct. We note that Switzerland’s ComCo have also been active in seeking to

address Geographic Price Discrimination by addressing restrictions on parallel importation¹⁰¹.

Box 15: examples of online GPD

Witt Hvidevarer

In July 2014, the Danish Public Prosecutor for Serious Economic and International Crime entered into a settlement with Witt Hvidevarer (Witt) for infringing section 6 of the Danish Competition Act and article 101 of the Treaty of the Functioning of the European Union. Witt is a Danish distributor of white goods and had been appointed as an exclusive distributor for the resale of iRobot products in Denmark, Norway, Sweden, and Finland. The distribution agreement prohibited Witt from selling to customers outside its territory. In 2009 Witt sought to prevent the parallel import and passive sale of certain robot vacuums in Denmark as part of a broader RPM strategy it was seeking to implement. This strategy affected both online and offline retailers.

In implementing a selective distribution model Witt sought to prevent low-priced parallel imports being sold in Denmark. It did this by purchasing sample products, tracking down serial numbers in order to identify the source of supply. It then contacted the parallel trader and their supplier to pressure them to stop the parallel trade of iRobots in Denmark.

In settling this matter Witt agreed to pay a fine of DKK 1.1 million (€ 147.500).

Swiss Bookshops

In May 2013 ten wholesalers of French-language books were sanctioned under the Swiss cartel Act in relation to unlawful territorial agreements. It was alleged that for the period 2005 to 2011 ten wholesalers of books prevented Swiss bookshops from purchasing books from abroad – in particular in France – at lower prices. To achieve this, the wholesalers developed distribution systems designed to restrict competition in the procurement market for French-language books. The exclusive arrangements between wholesalers and publishers made it impossible for the Swiss bookshops to purchase books from abroad. It was alleged that this foreclosed the market and allowed wholesalers to maintain and exploit inflated prices for books in Switzerland. An appeal is currently pending before the Swiss Federal Administrative Court.

GABA International AG

In December 2013 the Swiss Federal Administrative Court upheld a decision by the Swiss Competition Commission that the toothpaste Elmex manufacturer GABA International AG (Gaba) and its Austrian licensee Gebro Pharma GmbH had entered into an unlawful vertical territorial agreement under the Swiss Cartel Act in implementing a prohibition on passive sales from Austria and thus parallel imports into Switzerland (an export ban). It was noted

¹⁰¹ For example, in May 2012, ComCo fined BMW 156 million Swiss francs for restricting parallel imports and before that fined Nikon 12.5 million francs and IFPI 4 million francs for similar offences.

that the arrangements were not justified on economic efficiency grounds. An appeal is currently pending before the Swiss Federal Supreme Court.

Conclusions

Do ICN members consider existing legal frameworks, investigative and analytical tools are sufficient to deal with online geographic price discrimination?

The majority of respondents consider that they have the legal, investigative and analytical tools necessary to deal effectively with online GPD.

Extent to which online geographic price discrimination is (or should be) prioritised by ICN membership and what, if any, further work could be undertaken by the ICN?

The proportion of members who responded that online GPD is either not a concern or not a priority was higher than any other issue covered by the survey (44 per cent in total). GPD is of greatest concern in Europe where consistent legal frameworks should support cross border investigations by competition authorities.

Three broad conditions must be satisfied in order for a supplier to successfully implement a GPD strategy:

- they must have some market power in each of the regions
- they must be able to identify differences in customers' willingness to pay across regions
- they must be able to stop customers in a higher priced geographic location from accessing sales in lower priced regions.

Online GPD can be an outcome of an online vertical restraint, but it is not of itself a vertical restraint, nor do such pricing strategies necessitate the imposition of a vertical restraint. Online GPD can also be as a result of trade restrictions, intellectual property rights and/or geo-blocking.

In considering whether online GPD is (or should be) prioritised by ICN members, it appears that the application of general provisions enables competition authorities to deal with such conduct where it raises concerns and for efficiency gains to be realised in those jurisdictions whose legal framework permits the consideration of these. Given that GPD is of concern (or a top priority) to a much smaller proportion of ICN members than the other conduct types, future ICN work may be best directed towards area of wider interest or benefit.

Annexure A

Responses by regulator type

Table 14 below shows that the vast majority of respondents are economy-wide competition regulators, about one third of respondents have also have consumer protection responsibility, some also have product safety responsibilities and a monopoly infrastructure regulatory role.

Table 14: Respondents by regulator type (by number of respondents)

	Whole of economy competition regulator	Sectoral competition regulator	Whole of economy consumer protection regulator	Sectoral consumer protection regulator	Whole of economy product safety regulator	Sectoral product safety regulator	Monopoly infrastructure regulatory role
Yes	45	1	14	0	4	3	8
No	1	26	17	26	24	25	21
Not Answered	1	20	16	21	19	19	18
	47	47	47	47	47	47	47

Respondents' resources

Figure 22 below shows 64 per cent of respondents had a 2013 annual budget of less than \$USD 20 million and 20 per cent of respondents had a 2013 annual budget of more than \$USD 50 million.

Figure 22 – 2013 Annual Budget (number of respondents)

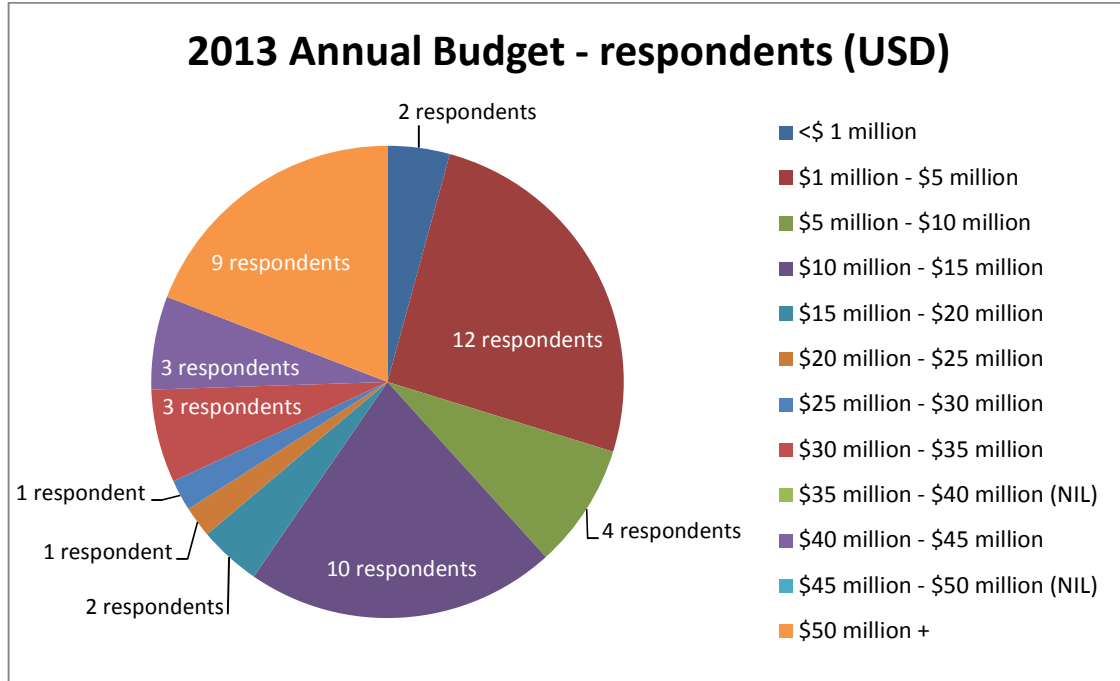
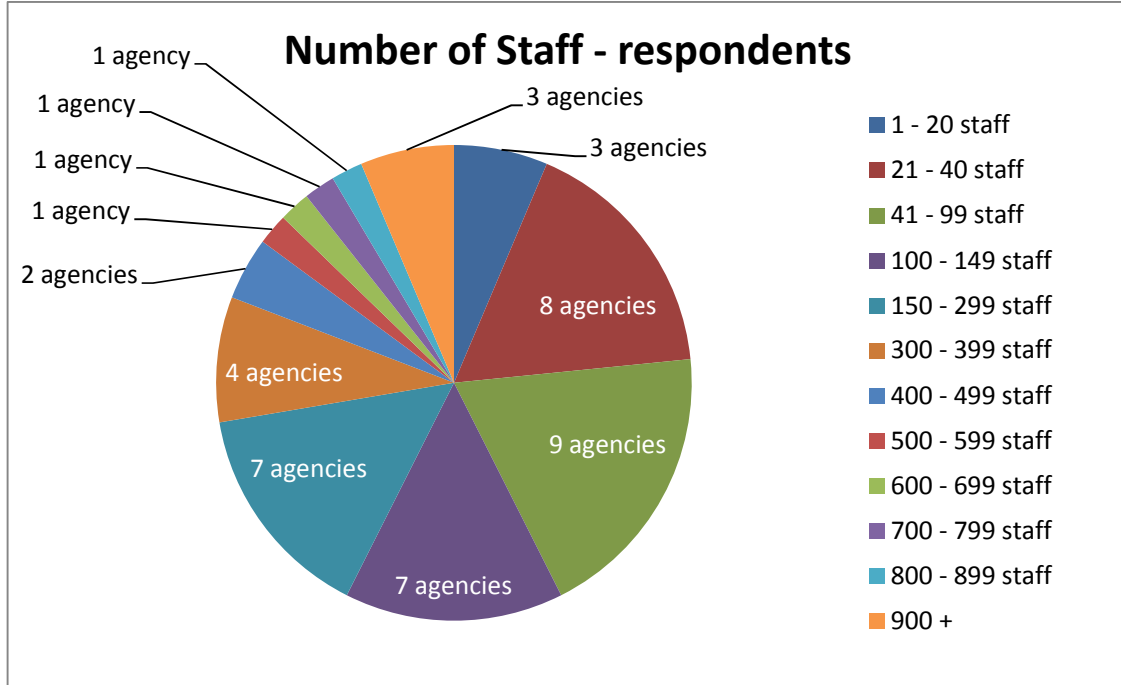


Figure 23 below shows 43 per cent of respondents had less than 100 staff. Forty three per cent of respondents had between 100 – 499 staff and 15 per cent had more than 500 staff.

Figure 23 – Number of Agency Staff (number of respondents)



Annexure B



ICN 2015 - online vertical restraints - member survey

Overview

As you may be aware, as part of hosting the 2015 ICN Annual Meeting, the Australian Competition and Consumer Commission (**ACCC**), with the assistance of a number of ICN member volunteers, is undertaking a special project on online vertical restraints.

In order to ensure that i) the project has access to sufficient data and ii) the views of the diverse ICN membership are reflected in the project, the special project team has prepared a survey for ICN members to complete.

Please submit your response to the survey by 31 October 2014

Please do not submit an offline version of this survey. If you have difficulties submitting an online response please contact the ACCC at international@acc.gov.au.

Information privacy/security

The information collected will be kept as agency internal information. When drafting the report, data will be aggregated so as not identify the any single agency. The **exception** to this will be any **case studies** that are provided. Therefore please ensure that the case studies you provide only contain public information.

More detailed information about the project and survey is set out below. If you have questions about the survey or the project generally, please email the ACCC at international@acc.gov.au

Purpose

The purpose of the project is to prepare a report to the Steering Group discussing:

- The differences and similarities of the various legal frameworks in ICN member jurisdictions as they relate to online vertical restraint conduct;

- Whether, and to what extent, existing legal frameworks, investigative tools, and analytical tools in ICN member jurisdictions allow members to deal with online vertical restraints effectively;
- The amount of online vertical restraint conduct occurring in ICN member jurisdictions;
- The extent to which online vertical restraints are a priority for the ICN members; and
- Relevant case studies.

Conduct of interest

Following consultation with ICN member volunteers assisting the ACCC on the special project, the survey has been limited to the following five categories of online vertical restraint conduct:

Resale Price Maintenance (**RPM**):

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

RPM facilitating conduct:

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

Across Platform Parity Agreements (**APPAs**) – also known as Most Favoured Nation clauses (**MFNs**):

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is

required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

Geographic Price Discrimination:

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

Online sales bans / limitations:

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

Introduction

Please enter appropriate details in case we need to contact you about your response

Name

What is your email address?

This is optional, but if you enter your email address then you will be able to return to edit your consultation at any time until you submit it. You will also receive an acknowledgement email when you complete the consultation.

Email

Please enter the full name (not acronym) of your organisation

Organisation

In what region are you located?

(Required)

Please select only one item

- Africa Asia Europe North America South America
 Oceania

What was your agency's total budget for last year (in US dollars)?

Please use either calendar year or 2013/14 financial year, whichever is more convenient. Please state which is used.

free text (Required)

Please state the total number of staff in your organisation as at 1 January 2014?

free text (Required)

What is your agency's jurisdiction? (please check all that apply)

	Yes	No
Whole of economy competition regulator <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>
Sectoral competition regulator <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>
Whole of economy consumer protection regulator <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>
Sectoral consumer protection regulator <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>
Whole of economy product safety regulator <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>
Sectoral product safety regulator <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>
Monopoly infrastructure regulatory role <i>Please select only one item</i>	<input type="radio"/>	<input type="radio"/>

Other areas of jurisdiction

RPM: coverage

Does your competition law address Resale Price Maintenance (RPM)?

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

(Required)

Please select only one item

- Yes, we have a specific RPM provision
- Yes, we have a general provision that covers RPM conduct
- No, RPM is not covered by a specific or general provision

RPM: specific provision

How does your specific RPM provision[s] treat this conduct?

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

(Required)

Please select only one item

RPM conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

RPM conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to RPM conduct

Rules apply to RPM that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to RPM conduct

RPM: general provision

How do your general provisions treat RPM?

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

(Required)

Please select only one item

RPM conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

RPM conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to RPM

Rules apply to RPM that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to RPM

RPM: per se exemption processes

Please describe your exemption processes in relation to RPM including the factors that are considered before granting an exemption and any presumptions or exclusions that may operate

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

[free text] (Required)

RPM: test

Please describe your test in relation to RPM including the factors that are considered when examining particular conduct and any presumptions or exclusions that may operate

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

[free text] (Required)

RPM: defenses

Are there defenses or other limitations that can apply to RPM conduct in your jurisdiction?

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

(Required)

Please select only one item

Yes No

RPM: defense description

Please describe any defenses and/or other limitations that may apply

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

[free text] (Required)

RPM: online and offline treatment difference

Is RPM that involves online commerce addressed differently in your jurisdiction than offline RPM?

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

(Required)

Please select only one item

Yes No

RPM: treatment difference description

Please describe the differences in treatment of online RPM conduct as compared to offline RPM conduct

For the purposes of this survey **Resale Price Maintenance (RPM)** refers to the following conduct: where an upstream firm requires a downstream firm to charge a price that is not lower than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge a price that is not higher than the price mandated by the upstream firm; **OR** where an upstream firm requires a downstream firm to charge the price mandated by the upstream firm.

[free text] (Required)

Do you have any other comments to make about the treatment of online RPM in your jurisdiction?

Other comments in relation online RPM

RPM facilitating conduct: coverage

Does your competition law address conduct that seeks to facilitate RPM conduct?

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

(Required)

Please select only one item

- Yes, we have a specific RPM facilitating conduct provision
- Yes, RPM facilitating conduct is covered by a general provision
- No, RPM facilitating conduct is not covered by a specific or a general provision

RPM facilitating conduct: specific provision

How does your specific RPM facilitating conduct provision[s] treat this conduct?

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

(Required)

Please select only one item

RPM facilitating conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

RPM facilitating conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to RPM facilitating conduct

Rules apply to RPM facilitating conduct that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to RPM facilitating conduct

RPM facilitating conduct: general provision

How do your general provisions treat RPM facilitating conduct?

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

(Required)

Please select only one item

RPM facilitating conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

RPM facilitating conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to RPM facilitating conduct

Rules apply to RPM facilitating conduct that is based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to RPM facilitating conduct

RPM facilitating conduct: per se exemption processes

Please describe your exemption processes in relation to RPM facilitating conduct including the factors that are considered before granting exemption and any presumptions or exclusions that may operate

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

free text (Required)

RPM facilitating conduct: test

Please describe your test in relation to RPM facilitating conduct including the factors that are considered when examining particular conduct and any presumptions or exclusions that may operate.

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

free text

RPM facilitating conduct: defense

Are there defenses or exemptions that can apply to RPM facilitating conduct in your jurisdiction?

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

(Required)

Please select only one item

Yes No

RPM facilitating conduct: defense description

Please describe any defenses and/or exemptions that may apply in relation to RPM facilitating conduct.

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

free text (Required)

RPM facilitating conduct: online and offline treatment difference

Are RPM facilitating conduct that involves online commerce addressed differently in your jurisdiction than offline RPM facilitating conduct?

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

(Required)

Please select only one item

Yes No

RPM facilitating conduct: treatment difference description

Please describe the differences in treatment of online RPM facilitating conduct as compared to offline RPM facilitating conduct

For the purposes of this survey **RPM facilitating conduct** refers to: where a downstream firm agrees to limitations on conduct and / or positive obligations that may facilitate RPM conduct (for example, but not limited to, where a downstream firm agrees not to advertise an upstream firm's product for less than an agreed minimum price).

[free text] (Required)

Do you have any other comments to make about the treatment of online RPM facilitating conduct in your jurisdiction?

Do you have any other comments to make about the treatment of online RPM facilitating conduct in your jurisdiction?

APPA: coverage

Does your competition law address APPAs?

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

(Required)

Please select only one item

- Yes, we have a specific APPA provision
- Yes, APPAs are covered by a general provision
- No, APPAs are not covered by a specific or a general provision

APPA: specific provision

How does your specific APPA provision[s] treat this conduct?

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

(Required)

Please select only one item

APPAs conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

APPAs conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to APPAs conduct

Rules apply to APPAs that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to APPAs conduct

APPAs: general provision

How do your general provisions treat APPAs?

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

(Required)

Please select only one item

APPAs conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

APPAs conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to APPAs conduct

Rules apply to APPAs that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to APPAs conduct

APPA: per se exemption processes

Please describe your exemption processes for APPAs including the factors that are considered before granting exemption and any presumptions or exclusions that may operate.

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

free text (Required)

APPA: test

Please describe your test in relation to APPAs including the factors that are considered when examining particular conduct and any presumptions or exclusions that may operate.

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

free text

APPA: defense

Are there defences or exemptions that can apply to APPAs conduct in your jurisdiction?

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

(Required)

Please select only one item

Yes No

APPA: defense description

Please describe any defences and/or exemptions that may apply to APPAs.

For the purpose of this survey, **Across Platform Parity Agreements (APPAs)** [also known as Most Favoured Nation clauses] refers to the following conduct: arrangements between a seller and an online trading platform whereby the seller undertakes to charge a price on the platform that is no higher than the price charged on other platforms **OR** arrangements between a seller and an online trading platform whereby the seller is required to ensure that the price charged on the trading platform is the lowest (or equal lowest) price available.

free text (Required)

Do you have any other comments about APPA conduct?

free text

Geographic Price Discrimination: coverage

Does your competition law address Geographic Price Discrimination?

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

(Required)

Please select only one item

- Yes, we have a specific Geographic Price Discrimination provision
- Yes, Geographic Price Discrimination is covered by a general provision
- No, Geographic Price Discrimination is not covered by a specific or a general provision

Geographic Price Discrimination: specific provision

How does your specific Geographic Price Discrimination provision [s] treat this conduct?

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

(Required)

Please select only one item

Geographic Price Discrimination conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

Geographic Price Discrimination conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to Geographic Price Discrimination conduct

Rules apply to Geographic Price Discrimination that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to Geographic Price Discrimination conduct

Geographic Price Discrimination: general provision

How do your general provisions treat Geographic Price Discrimination?

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

(Required)

Please select only one item

Geographic Price Discrimination conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

Geographic Price Discrimination conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to Geographic Price Discrimination conduct

Rules apply to Geographic Price Discrimination that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to Geographic Price Discrimination conduct

Geographic Price Discrimination: per se exemption processes

Please describe your exemption processes for Geographic Price Discrimination including the factors that are considered before granting exemption and any presumptions or exclusions that may operate.

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

free text

Geographic Price Discrimination: test

Please describe your test in relation to Geographic Price Discrimination including the factors that are considered when examining particular conduct and any presumptions or exclusions that may operate.

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

free text (Required)

Geographic Price Discrimination: defense

Are there defences or exemptions that can apply to Geographic Price Discrimination conduct in your jurisdiction?

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

(Required)

Please select only one item

Yes No

Geographic Price Discrimination: defense description

Please describe any defences and/or exemptions that may apply to Geographic Price Discrimination.

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

free text (Required)

Geographic Price Discrimination: online and offline treatment difference

Is Geographic Price Discrimination that involves online commerce addressed differently in your jurisdiction than offline Geographic Price Discrimination?

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

(Required)

Please select only one item

Yes No

Geographic Price Discrimination: treatment difference description

Please describe the differences in treatment of online Geographic Price Discrimination conduct as compared to offline Geographic Price Discrimination conduct

For the purpose of this survey **Geographic Price Discrimination** refers to the following conduct: where an upstream firm charges different prices to downstream entities or consumers in different geographic locations.

[free text] (Required)

Do you have any other comments to make about online Geographic Price Discrimination?

free text

Online sales limitations: coverage

Does your competition law address agreements that seek to ban online sales entirely and / or agreements that limit online sales [for example, prohibition of sales via select online platforms]?

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

(Required)

Please select only one item

- Yes, we have a specific online sales ban / limitations provision
- Yes, online sales ban / limitations are covered by a general provision
- No, online sales bans / limitations are not covered by a specific or a general provision

Online sales limitations: specific provision

How does your specific online sales ban / limitations provision[s] treat this conduct?

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

(Required)

Please select only one item

Online sales bans / limitations conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

Online sales bans / limitations conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to online sales bans / limitations conduct

Rules apply to online sales bans / limitations that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to online sales bans / limitations conduct

Online sales bans / limitations: general provision

How do your general provisions treat online sales bans / limitations?

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

(Required)

Please select only one item

Online sales ban / limitations conduct is considered unlawful without conducting an analysis of competitive effects [known in some jurisdictions as a per se breach or strict liability breach]

Online sales ban / limitations conduct is considered unlawful without conducting an analysis of competitive effects but exemptions can apply

A rule of reason test applies to online sales ban / limitations conduct

Rules apply to online sales ban / limitations that are based upon Article 101 of the Treaty on the Functioning of the European Union

Another test applies to online sales ban / limitations conduct

Online sales ban / limitations: per se exemption processes

Please describe your exemption processes for online sales ban / limitations including the factors that are considered before granting exemption and any presumptions or exclusions that may operate.

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

free text (Required)

Online sales ban / limitations: test

Please describe your test for online sales ban / limitations including the factors that are considered when examining particular conduct and any presumptions or exclusions that may operate.

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

free text (Required)

Online sales ban / limitations: defenses

Are there defenses or exemptions that can apply to online sales ban / limitations conduct in your jurisdiction?

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

(Required)

Please select only one item

Yes No

Online sales ban / limitations: defense description

Please describe any defenses and/or exemptions that may apply to online sales ban / limitations.

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

free text (Required)

Online sales ban / limitations: online and offline treatment difference

Are sales ban / limitations that involve online commerce addressed differently in your jurisdiction than offline sales ban / limitations?

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

(Required)

Please select only one item

Yes No

Online sales ban / limitations: treatment difference description

Please describe the differences in treatment of online sales ban / limitations conduct as compared to offline sales ban / limitations conduct

For the purpose of this survey **online sale limits or bans** refers to the following conduct: where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online at all **OR** where an upstream firm seeks to prohibit or limit a downstream firm from selling goods or services online via certain online platforms

[free text] (Required)

Do you have any other comments to make about online sales ban / limitations conduct?

free text

Prevalence of online vertical restraints

Approximately how much online commerce occurs in your jurisdiction?

Please provide the most recent data you have available in whatever measurement, for example, \$X pa, X% of GDP and so on. Please state the time period and measurement used.

free text (Required)

What is the approximate rate of growth of online commerce in your jurisdiction?

Please provide the most recent data you have available in whatever measurement, for example, \$X pa, X% of GDP and so on. Please state the time period and the measurement used.

free text (Required)

Last year how many competition investigations did you commence?

Enter the number of investigations commenced in the calendar year 2013 or financial year 2012/13. (Required)

Last year how many investigations relating to competition issues in online commerce did you commence?

Enter the total number of investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to traders that engage in both on and offline trade. (Required)

Enter the number of investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to traders that engage in online trade only. (Required)

Last year, in relation to online RPM conduct, how many investigations did you commence?

Enter the total number investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to online RPM. (Required)

Last year, in relation to online RPM facilitating conduct, how many investigations did you commence?

Enter the total number of investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to online RPM facilitating conduct. (Required)

Last year, in relation to online APPAs/MFNs, how many investigations did you commence?

Enter the total number of investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to online APPAs/MFNs. (Required)

Last year, in relation to online Geographic Price Discrimination, how many investigations did you commence?

Enter the total number of investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to online Geographic Price Discrimination. (Required)

Last year, in relation to online sales bans / limitations, how many investigations did you commence?

Enter the total number of investigations commenced in the calendar year 2013 or the financial year 2012/13 relating to online sales bans / limitations. (Required)

Issues of concern

Please briefly describe the methodology used by your agency and the factors considered by your agency when selecting and prioritising investigations.

When responding to this question, please consider at least the following:

- the prioritisation of RPM, RPM facilitating conduct, APPAs/MFNs, geographic price discrimination and online sales bans / limitations; and
- whether cases are selected purely on the strength of the evidence; or
- whether you conduct any economic assessment of impacts; or
- whether you consider other impacts

free text

How significant a concern is the use of RPM in relation to online markets in your jurisdiction?

When considering this question, please consider the interdependent relationship between the online and offline space. For example, RPM may be used to protect traditional distribution channels, such as bricks and mortar retailers, from competition from online distribution channels.

(Required)

Please select only one item

- it is one of our top priorities it is of concern
 it is not yet prevalent enough to be of concern but is increasing in prevalence
 it is not a concern it is not a competition issue

Do you feel that the legal, investigative and analytical tools at your agency's disposal are sufficient to allow you to deal effectively with online RPM conduct? Why/Why not?

free text (Required)

How significant a concern is online RPM facilitating conduct in your jurisdiction?

(Required)

Please select only one item

- it is one of our top priorities it is of concern
 it is not yet prevalent enough to be of concern but is increasing in prevalence
 it is not a concern it is not a competition issue

Do you feel that the legal, investigative and analytical tools at your agency's disposal are sufficient to allow you to deal effectively with online RPM facilitating conduct? Why/Why not?

free text (Required)

How significant a concern are online APPAs / MFNs in your jurisdiction?

(Required)

Please select only one item

- it is one of our top priorities it is of concern
 it is not yet prevalent enough to be of concern but is increasing in prevalence
 it is not a concern it is not a competition issue

Do you feel that the legal, investigative and analytical tools at your agency's disposal are sufficient to allow you to deal effectively with online APPA/MFN conduct? Why/Why not?

free text

How significant a concern is online geographic price discrimination in your jurisdiction?

When considering this question, please consider the extent to which vertical restraints (such as restrictions on selling outside a particular territory, restrictions on online sales) are used to implement or support geographic price discrimination.

Please select only one item

- it is one of our top priorities it is of concern
 it is not yet prevalent enough to be of concern but is increasing in prevalence
 it is not a concern it is not a competition issue

Do you feel that the legal, investigative and analytical tools at your agency's disposal are sufficient to allow you to deal effectively with online geographic price discrimination conduct? Why/Why not?

free text (Required)

How significant a concern are online sales bans / limitations in your jurisdiction? When considering this question, please consider the interdependent relationship between the online and offline space. For example, online sales bans / limitations may be used to protect bricks and mortar stores from competition from online sellers.

(Required)

Please select only one item

- it is one of our top priorities it is of concern
- it is not yet prevalent enough to be of concern but is increasing in prevalence
- it is not a concern it is not a competition issue

If you are able to do so, please state what are your agency's top three competition priorities in relation to conduct that affects competition in online markets?

Priority 1

Priority 2

Priority 3

Are there online vertical restraints of concern in your jurisdiction that have not been considered by this survey?

free text (Required)

Any other comments relevant to online vertical restraints?

free text (Required)

Case Study (total 500 word maximum)

When preparing the final report to the Steering Group for this phase of the online vertical restraints project and/or when presenting the project at ICN 2015 the ACCC would like to present a number of case studies. Do you have a relevant case study (ies)? If so, please complete the below template (alternatively, if your agency has previously prepared a case summary for other purposes please provide a copy or a link thereto)

Please describe the conduct of concern and industry/trader/individual involved?

free text (Required)

Please describe how your agency became aware of the conduct of concern?

free text (Required)

Please describe the investigation?

free text (Required)

Please describe the outcomes of the investigation?

free text (Required)

Please discuss the online vertical restraint(s) that were relevant to the conduct. When considering this question please include a discussion of at least the following: any efficiency rationales that were put forward, the key theories of harm identified

free text (Required)

Do you feel that your agency was able to adequately address the conduct within the constraints of your legal, investigative and analytical framework? Why/Why not?

free text (Required)

Please describe any lessons learned or recommendations you would make to other competition agencies in addressing conduct of this kind or confronted with this case.

free text (Required)

Any other relevant issues?

free text (Required)

Do you have another case study?

(Required)

Please select only one item

Yes No

Case Study 2

Please describe the conduct of concern and industry/trader/individual involved?

free text (Required)

Please describe how your agency became aware of the conduct of concern?

free text (Required)

Please describe the investigation?

free text (Required)

Please describe the outcomes of the investigation?

free text (Required)

Please discuss the online vertical restraint(s) that were relevant to the conduct. When considering this question please include a discussion of at least the following: any efficiency rationales that were put forward, the key theories of harm identified

free text (Required)

Do you feel that your agency was able to adequately address the conduct within the constraints of your legal, investigative and analytical framework? Why/Why not?

free text (Required)

Please describe any lessons learned or recommendations you would make to other competition agencies in addressing conduct of this kind or confronted with this case.

free text (Required)

Any other relevant issues?

free text (Required)

Do you have another case study?

(Required)

Please select only one item

Yes No

Case Study 3

Please describe the conduct of concern and industry/trader/individual involved?

free text (Required)

Please describe how your agency became aware of the conduct of concern?

free text (Required)

Please describe the investigation?

free text (Required)

Please describe the outcomes of the investigation?

free text (Required)

Please discuss the online vertical restraint(s) that were relevant to the conduct. When considering this question please include a discussion of at least the following: any efficiency rationales that were put forward, the key theories of harm identified.

free text (Required)

Do you feel that your agency was able to adequately address the conduct within the constraints of your legal, investigative and analytical framework? Why/Why not?

free text (Required)

Please describe any lessons learned or recommendations you would make to other competition agencies in addressing conduct of this kind or confronted with this case.

free text (Required)

Any other relevant issues?

free text (Required)

Do you have another case study?

Please email any additional information to international@acc.gov.au

Annexure C

Following is a list of survey respondents:

- The Australian Competition and Consumer Commission
- The Austrian Federal Competition Authority
- The Belgian Competition Authority
- The Botswana Competition Authority
- The Brazilian Administrative Council of Economic Defence
- The Commission for Protection of Competition of Bulgaria
- The Competition Bureau of Canada
- The Tribunal de Defensa de la Libre Competencia (Chile)
- The Fiscalía Nacional Económica (Chile)
- The Superintendencia de Industria y Comercio of Colombia
- The Office for the Protection of Competition (Czech Republic)
- The Danish Competition and Consumer Authority
- The Superintendencia de Control de Poder de Mercado (Ecuador)
- The Egyptian Competition Authority
- The Superintendencia de Competencia (El Salvador)
- The European Free Trade Association (EFTA) Surveillance Authority
- The Directorate-General for Competition of the European Commission
- The Finnish Competition and Consumer Authority
- Autorité de la Concurrence (France)
- Bundeskartellamt (Germany)
- The Competition Commission of Hong Kong
- The Hungarian Competition Authority
- The Commission for the Supervision of Business Competition
- The Competition and Consumer Protection Commission
- Israel Antitrust Authority
- Italian Competition Authority
- The Japan Fair Trade Commission
- The Korean Fair Trade Commission
- The Competition Council of Lithuania
- Conseil de la Concurrence (Luxembourg)
- The Competition Commission of Mauritius
- The Netherlands Authority for Consumers and Markets
- The Commerce Commission of New Zealand
- The Norwegian Competition Authority
- The Independent Consumer and Competition Commission
- The Office of Competition and Consumer Protection
- The Federal Antimonopoly Service
- The Fair Trading Commission Seychelles
- The Competition Commission of Singapore
- The Slovenian Competition Protection Agency
- The Competition Commission of South Africa
- The Swedish Competition Authority

- The Swiss Competition Commission
- The Taiwan Fair Trade Commission
- The Competition and Markets Authority (UK)
- The US Department of Justice
- The US Federal Trade Commission