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***15th EU-China Competition Week:  
Assessing vertical restraints; internet  
platforms and copyright licensing***

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**Key issues related to Vertical Restraints**



General approach and elements impacting the antitrust assessment of vertical restraints

Typical vertical restraints

Impact of e-commerce on legal analysis of traditional vertical restraints

Anticompetitive attempts to reduce e-commerce

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## General approach of vertical restraints analysis: *From economic flexibility to legal certainty (including for on-line agreements)*

### Legal analysis

- Safe harbour
- Intra-brand restrictions less problematic than inter-brand competition



### Economics framework

#### Analysis

(efficiency gains v. competitive risks)

### EU Commission Guidelines

(analysis for each type of restraint)

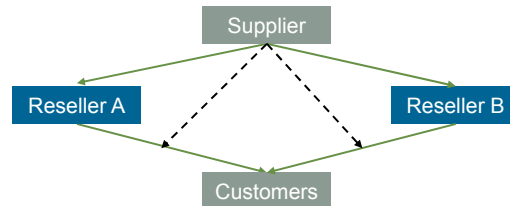
## Elements impacting the antitrust assessment of each vertical restraint: effect-based approach



- **Principle:** safe harbour and guidelines outside of safe harbour
- Supplier market shares (safe harbour in the EU: 30%)
- Distributor market shares (safe harbour in the EU: 30%)
- Presence of hard-core restrictions
- Period of time (e.g., RPM for a short launching period; non-compete clause: ≥5 years, automatically renewable)
- Degree of maturity of the market
- Network effect (all suppliers apply the same restraints; “market practice”)
- Entry barriers
- Resellers’ bargaining power
- Level of trade: wholesaler (lower risk of foreclosure) v. final retailer (higher risk of foreclosure)

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## Resale Price Maintenance



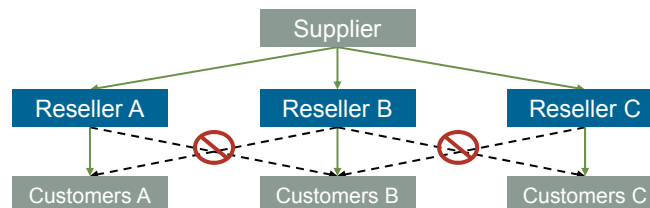
Definition	Efficiency Motives
Supplier imposing, directly or indirectly, fixed or minimum resale prices to its resellers (with or without monitoring)	<ul style="list-style-type: none"> <li>- Reducing free-riding, esp. during launching/promotional period</li> <li>- Maximum or recommended price ensures consistency for consumers</li> </ul>
Theories of Harm	
<ul style="list-style-type: none"> <li>- Reduction of intra-brand competition</li> <li>- Reduction of inter-brand competition (if all suppliers behave similarly)</li> </ul>	

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## Exclusive Distribution System



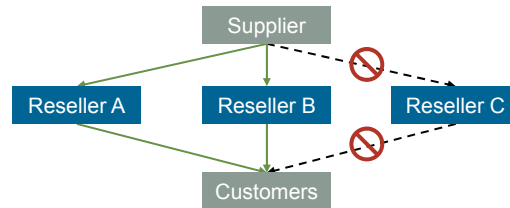
Definition	Efficiency Motives
One distributor per geographic zone per types of clients	<ul style="list-style-type: none"> <li>- Ensure investment by resellers</li> <li>- Reduction of free-riding</li> </ul>
Theories of Harm	
<ul style="list-style-type: none"> <li>- Reduction of intra-brand competition (risk of price discrimination)</li> <li>- Reduction of inter-brand competition (if all suppliers behave similarly)</li> <li>- Restriction of "passive" (unsolicited) sales to customers – hard-core restriction</li> </ul>	

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## Selective Distribution System



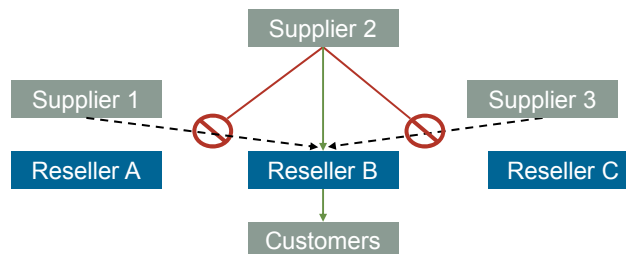
Definition	Efficiency Motives
Resellers selected by the supplier; their number is limited	<ul style="list-style-type: none"> <li>- Ensure investment, a service of excellence by resellers</li> <li>- Brand protection</li> <li>- Reduction of free-riding</li> </ul>
Theories of Harm	
<ul style="list-style-type: none"> <li>- Reduction of intra-brand competition</li> <li>- Usage of selection unjustified</li> <li>- Absence, discriminatory use, or subjectivity of selective distribution criteria</li> <li>- Reduction of inter-brand competition (if all suppliers behave similarly)</li> </ul>	

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## Single Branding



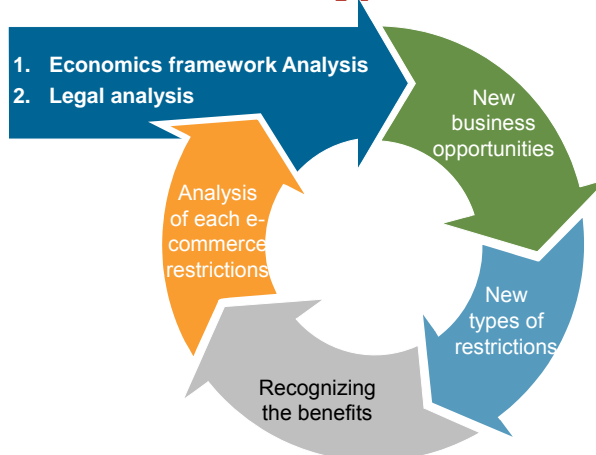
Definition	Efficiency Motives
One brand resold by the reseller (e.g., through non-compete for 80% or more of the reseller's need and quantity-forcing clauses)	<ul style="list-style-type: none"> <li>- Ensure investment by resellers</li> <li>- Brand protection</li> </ul>
Theories of Harm	
Reduction of inter-brand competition	

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## Impact of e-commerce on legal analysis of traditional vertical restraints: a similar approach



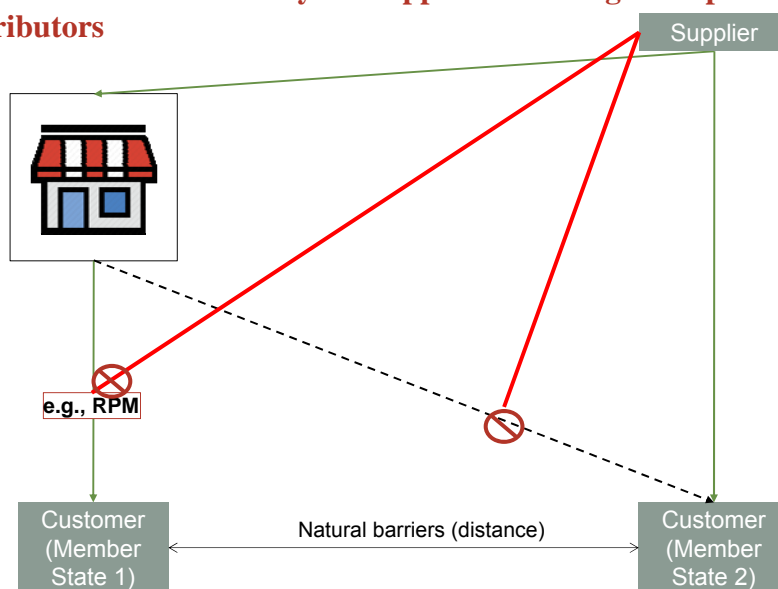
**Note: Similar approach for e-commerce of Digital Content**  
(2017 EU E-commerce Sector Inquiry)

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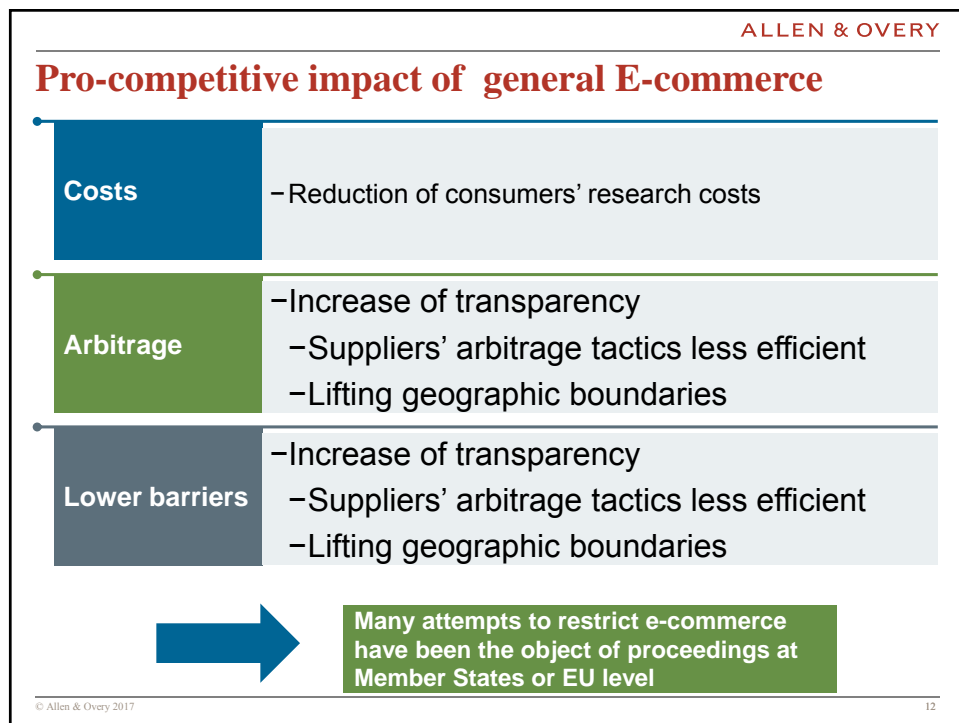
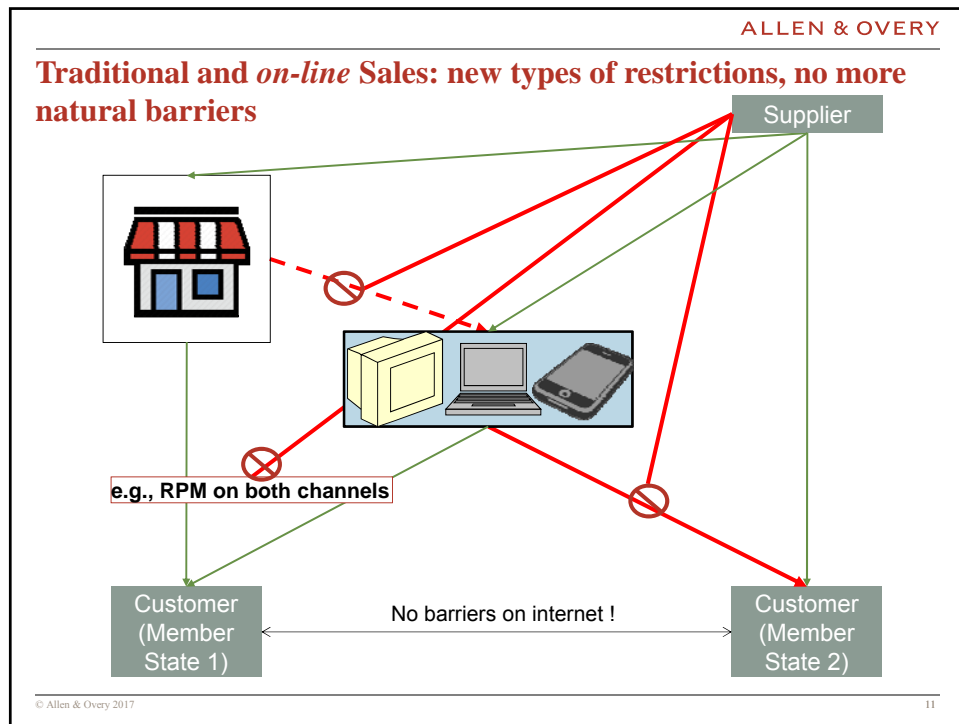
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## Traditional Sales: direct by the supplier or through independent distributors



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## Specific anticompetitive restrictions to general E-commerce

### Prohibited On-line restrictions

- **Complete ban of internet selling** (*Pierre Fabre*) or limitation of **the proportion** of permitted online sales.
- Requiring to pay a higher price for products intended to be resold online (**dual pricing**).
- Re-routing of customers or termination of consumers' internet transactions ("**geo-blocking**").
- **MFNs** and across-platforms parity agreements

### Acceptable On-line restrictions

- A supplier is for example:
  - not required to accept Internet-only distributors (**brick and mortar requirement is OK**).
  - permitted to impose a **minimum amount of sales offline**.
  - permitted to require **quality standards** for advertising and sales online (relevant for selective distribution).

## Anticompetitive attempts to reduce E-commerce (examples)

Country	Cases	Description
EU	<b>Asus, Denon &amp; Marantz, Philips and Pioneer</b> (consumer electronics products such as household appliances, notebooks and hi-fi products)	<ul style="list-style-type: none"> <li>– Restricting the ability of online retailers to set their own prices</li> <li>– Use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors. As a result, the alleged behaviour may have had a broader impact on overall online prices for the respective consumer electronics products</li> </ul>
	2016: <b>Pay TV</b>	– Prohibition of clauses imposed by supplier restricting the ability of broadcasters to offer their content across borders
	<b>E-Book, Expedia, Amazon</b>	– MFN requirement for best price compared to other platforms or suppliers' own website (parallel investigations in many Member States)
Denmark	2016: <b>Canett Furniture</b> (furniture)	– Prohibition of passive sales in Norway/Germany does not restrict competition in Denmark (although the case was based on Art 101)

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## Anticompetitive attempts to reduce E-commerce (examples)

Country	Cases	Description
Germany	2015: <b>Asic</b> (sport shoes)	– Restriction of online trade and of use of price-comparison websites
	2014: <b>Adidas</b> (sport shoes)	– Ban on selected distributors to sell via online market places (eBay and Amazon) – “Manufacturers can select their distributors according to certain quality requirements. However, both under European and German competition law they are prohibited from largely eliminating a principal distribution channel such as the web” – (commitment offered)
	2013: <b>Bosch Siemens Hausgeräte</b> (Household appliance) 2013: <b>Gardena</b> (garden products)	– Hybrid dealers (selling household appliances both in a brick-and-mortar shop and via a webshop) at a disadvantage: the more turnover hybrid dealers generated via their webshop, the less rebates they received. (commitment to discontinue and information of all dealers) – “In structuring his distribution system a manufacturer may well take account of the different conditions in the different distribution channels. Nonetheless, he should always be well aware of the fact that he cannot simply eliminate or discriminate against online sales” (GARDENA)

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## Anticompetitive attempts to reduce E-commerce (examples)

Country	Cases	Description
France	2013: <b>Pierre Fabre</b> (cosmetics) 2012: <b>Bang &amp; Olufsen</b> (hi-fi products)	Complete ban of e-commerce sales of PF (prohibition of passive sales) and B&O's products by its selected distributors: “not indispensable to ensure a quality consumer service”
	2016: <b>Coty</b> (perfume)	Anticompetitive prohibition to sell to unauthorized online distributors, while the selective distribution system contains other hard-core restraints rendering it anticompetitive (under review)
Netherlands	2017: <b>Nike</b>	Prohibition to sell Nike shoes through Amazon platform protects selective distribution network
UK	2014: <b>Pride Mobility Products</b> (“Mobility Scooter”)	– Prohibition of online advertising by certain retailers of below certain resale prices – Manufacturer of mobility scooters and some of its retailers unlawfully entered into anti-competitive agreements that prevented the retailers advertising their prices online.

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## Pro-competitive impact of E-commerce of digital content, especially copyright protected (2017 EU E-commerce Sector Inquiry)

- online provision of audio-visual and music products
- Involves **digital content providers** (which offer digital content to consumers or provide services to offer content), and copyright holders.
- **Usual and generally accepted contractual restrictions**, e.g., (long-term) exclusivity clauses, limited territorial scope, specific release windows and technologies (note that digital content is protected by MS copyright)

### Pro-competitive aspects

- new business opportunities for all
- encouraging innovation
- new service offerings and business models.
- lower transmission costs per user
- more flexibility and scalability
- creation of interfaces accessible on multiple devices

## Specific anticompetitive restrictions to E-commerce of digital content, especially copyright protected (2017 EU E-commerce Sector Inquiry)

Traditional prohibitions	Not always of concern in the context of e-commerce of digital content
RPM	Price monitoring may lead to RPM (as easier to detect deviations from manufacturers' pricing recommendations) but general rule persists: recommended or maximum resale price remains allowed
Dual pricing prohibition	Potentially recognized as efficient to address free-riding: <ul style="list-style-type: none"> <li>• charging different (wholesale) prices to different retailers is generally considered a normal part of the competitive process.</li> <li>• Dual pricing for one and the same (hybrid) retailer is generally considered as a hardcore restriction</li> <li>• possibility of exempting dual pricing agreements e.g., where a dual pricing arrangement would be indispensable to address free-riding.</li> </ul>
(Absolute) marketplace bans	(absolute) marketplace bans should not (but are likely to) be considered as hardcore restrictions

## Questions?



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