

---

# Reform of the VBER and VGL: from an economic perspective

---

Concorrenze open seminar

Avantika Chowdhury  
Oxera

11 June 2020



# Balancing anti- and pro-competitive effects

- no case for hardcore category as not obviously anti-competitive
- Why? Example: SDSs necessarily reduce retail competition and so, can increase retail prices and reduce sales. So, why would a manufacturer want this? Or, does it increase quality of retail service and therefore sales?

## Potential anticompetitive effects

- **softening of intra-brand and/or inter-brand competition**—e.g. through selective distribution of a brand; or single branding
- **facilitating collusion**—e.g. through RPM or network of MFNs
- **foreclosure**—e.g. through exclusivity clauses or MFNs

## Potential efficiencies/benefits

- **addressing vertical & horizontal externalities**—e.g. by solving the incomplete contracting problem (principal/agent problem); incentivising retail service provision and preventing free-riding by other retailers
- **reducing transaction costs**—e.g. by reducing the # of trading partners and frequency of negotiations
- **signalling high quality** (through high prices or retailer reputation) **or signalling a status good** (limited availability provides higher benefit to target consumers)

See Section 4 of Oxera study for the CMA for summary of literature. Oxera (2016), 'Vertical restraints: new evidence from a business survey', [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/511332/Final\\_report\\_on\\_vertical\\_restraints\\_240316.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/511332/Final_report_on_vertical_restraints_240316.pdf)

# Impact of ecommerce

<p><b>CJEU on luxury image (Coty, para 49)</b></p> <p><i>The internet sale of luxury goods via platforms which do not belong to the selective distribution system for those goods, in the context of which the supplier is unable to check the conditions in which those goods are sold, involves a risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character</i></p>	<p><b>Business rationale on free riding (Oxera/CMA study)</b></p> <p><i>[...] there's normally <u>someone that's done the work and you want to reward the person that's done that six month sale cycle, not be undercut by 1%...</u></i></p> <p><i>[...] it would be <u>very unhealthy and risky for a patient to try and access our product without going through a [specialised retailer]</u>;</i></p> <p><i>[retailers] in an effort to try and protect and say, you know, any margin that they can, <u>reduce the amount of time they spend, reduce the effort they spend, don't add as much value to the patient [...]</u></i></p> <p><i>there are already the warning signs [...] I can't [make] any money out of [product] cause I'm being killed by the Internet, so therefore <u>I just don't really bother doing that anymore</u></i></p>
<p><b>[Add quote from Commission study]</b></p>	

- digitalisation → increased scope of inter- and intra-brand competition and higher risk of free-riding
- how do you balance the two sides (of the same coin)? High inter-brand competition reduces harm from lower intra-brand competition

# Implications for VBER and VGL?

## Example: MFNs

---

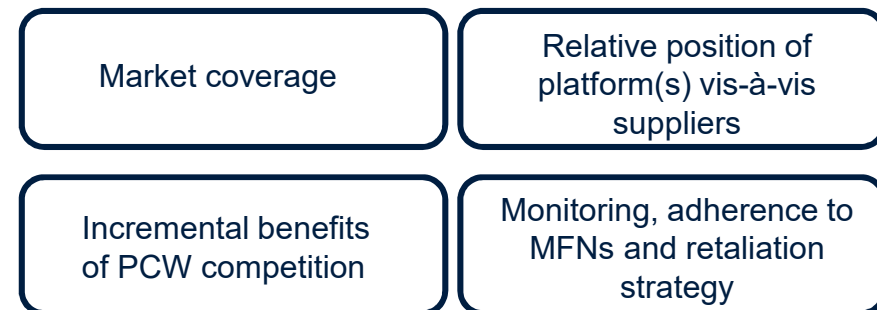
- Commission cases, also NCAs (hotels, insurance). Two questions arise:
  1. Are wide MFNs likely anti-competitive and hence likely to be ‘by-object’ cases, or could they be pro-competitive?
  2. Do narrow MFNs have the same effect as wide MFNs, or are they less likely to be anti-competitive?
- current case law and evidence base?
  - mixed NCA decisions: some but not all, banned narrow MFNs
  - ...and some reversals (Dusseldorf Court: narrow OK)
  - ex-post assessments: ECN study on hotels, New EC study on narrow MFNs in hotels, CMA analysis of ban of wide MFNs in motor insurance

# Implications for VBER and VGL?

## Example: MFNs

- does this give us enough?
  - mixed results on price decreases after bans
  - which is the relevant outcome metric (commissions or end consumer prices?); how about market share of the platforms and of suppliers?
- can the evidence be generalised?
  - market features key: e.g. compare hotels vs. insurance (ongoing UK case)
  - recognised in [New EC study]
- Update to VBER? VGL?

### Relevant market features



# Implications for VBER and VGL?

## Example: SDSs

---

- selective distribution systems: reduction of intra- and potentially inter-brand competition
  - potential efficiency justifications as before
- *Coty (CJEU)*: ban on authorised retailer reselling through marketplace; *Ping (UK CMA and CAT)*: ban on online sales of authorised retailer
- how about the selection criteria of an SDS? E.g. brick-and-mortar (BM) requirement, *L'Oréal v Beauty Bay* (UK High Court)
  - 'legitimate objective' and whether the criteria go 'beyond what is necessary'
  - e.g. depends on free-riding: which way is it: 'showrooming' vs 'webrooming'? EC study shows similar (and low) levels of free-riding; how about free-riding within the online channel?
  - relative value of BM services vs online? May depend on customer demographic
  - update to VBER? VGL?

---

**Contact:**

**Dr Avantika Chowdhury, Partner**  
**Brussels and London**  
[avantika.chowdhury@oxera.com](mailto:avantika.chowdhury@oxera.com)

---

[www.oxera.com](http://www.oxera.com)  
Follow us on Twitter  
[@OxeraConsulting](https://twitter.com/OxeraConsulting)

Oxera Consulting LLP is a limited liability partnership registered in England and Wales No. OC392464, registered office: Park Central, 40/41 Park End Street, Oxford, OX1 1JD, UK. The Brussels office, trading as Oxera Brussels, is registered in Belgium, SETR Oxera Consulting LLP 0651 990 151, registered office: Avenue Louise 81, Box 11, 1050 Brussels, Belgium. Oxera Consulting GmbH is registered in Germany, no. HRB 148781 B (Local Court of Charlottenburg), registered office: Rahel-Hirsch-Straße 10, Berlin 10557, Germany.

Although every effort has been made to ensure the accuracy of the material and the integrity of the analysis presented herein, Oxera accepts no liability for any actions taken on the basis of its contents. No Oxera entity is either authorised or regulated by the Financial Conduct Authority or the Prudential Regulation Authority. Anyone considering a specific investment should consult their own broker or other investment adviser. Oxera accepts no liability for any specific investment decision, which must be at the investor's own risk.

© Oxera, 2017. All rights reserved. Except for the quotation of short passages for the purposes of criticism or review, no part may be used or reproduced without permission.

---

**oxera**  
compelling economics