Brand bidding restraints revisited –

What is the appropriate economic and legal framework for the antitrust analysis of vertical online search advertising restraints?

Elias Deutscher[*]

Abstract

This article explores the law and economics of brand bidding restraints which constitute the most novel type of vertical restraints imposed by brand owners on their distributors in digital markets. The article tests and critically reflects on the restrictive approach European competition watchdogs have recently adopted towards these brand bidding restraints. It contends that this harsh antitrust treatment of brand bidding restraints is not sufficiently grounded in the economic analysis of vertical restraints. In proposing a comprehensive framework for the legal and economic analysis of brand bidding restraints, the article makes three principal contributions. First, it asserts that brand bidding restraints can have a number of procompetitive effects by internalising advertising-related externalities, addressing free-riding on display and traditional advertising and facilitating fixed cost recovery through price discrimination. Second, the paper considers different ways through which brand bidding restraints may harm competition and consumer welfare when they disproportionately affect infra-marginal consumers, prevent meaningful *intra*- and *inter*-brand comparisons or result in price discrimination on the basis of search costs rather than brand preferences. Moreover, brand bidding restraints are of particular concern when adopted in the context of dual distribution systems where vertically-integrated brand owners have an incentive to raise their retailers' costs to prevent them from cannibalising on their own sales channel. Third, the article considers various filters that may inform an effects-based analysis of brand bidding restraints. In this respect, the article makes a number of policy recommendations for the future antitrust analysis of brand bidding restraints. These proposals could also inform the ongoing revision of the Vertical Block Exemption Regulation and Vertical Guidelines in the EU and in the UK.

Keywords: brand bidding restraints; vertical online search advertising restraints; digital vertical restraints; e-commerce sector inquiry; B2-98/11 Asics; Case COMP/AT.40428 Guess; vertical restraints; Vertical Guidelines; Vertical Block Exemption Regulation, trademarks; Draft Proposal of the revised Vertical Block Exemption; Draft Proposal of the revised Vertical Guidelines.

Introduction

With the rise of digital technologies and e-commerce, competition authorities, policy makers and scholars have witnessed the emergence of new forms of vertical online restraints. Through these price and non-price restraints, manufacturers or brand owners contractually constrain retailers' ability to set prices, choose sales channels or advertise when they sell their branded products online. The most novel type of vertical online restraints are so-called brand bidding or online advertising restraints whereby a brand owner (trademark proprietor) restricts how its licensed retailers use its brand names and trademarks as keywords in paid search advertising. The most recurrent use of brand bidding restraints consist of a brand owner, say

[*] Lecturer in Competition Law and IP at the University of East Anglia Law School. Member of the Centre for Competition Policy (CCP) (e.deutscher@uea.ac.uk). The author is grateful to Morten Hviid for his insightful comments on an earlier version of this article. Pursuant to the ASCOLA Transparency and Disclosure Declaration the author declares not to have any conflicts of interests to disclose.

Adidas, asking its retailers not to reserve or bid on its trademarked brand name 'Adidas' as keyword when they run a search advertising campaign on Google AdWords.

Brand bidding restraints have recently attracted the interest of competition authorities[1] and commentators.[2] Though they have been so far only considered in a few cases, there appears to be an emerging consensus among competition authorities in Europe that brand bidding restraints are most of the time anticompetitive. In *Asics*,[3] decided by the German Federal Cartel Office ('FCO') and in *Guess*,[4] decided by the European Commission, brand bidding restraints were held to constitute restrictions of competition by-object in breach of Art. 101 TFEU[5] and 'hard-core restrictions' under Art. 4 (c) of the Vertical Block Exemption Regulation (VBER).[6] In *Adidas*, the FCO also obtained commitments from the brand owner Adidas not to hinder its authorized retailers from using its brand name and trademarks as keywords for search advertising.[7] The Dutch Authority for Consumers & Markets ('ACM') also recently labelled brand bidding restraints as 'hard-core restrictions'.[8] This restrictive approach towards brand bidding restraints is set to be codified as part of the ongoing reform of the EU competition rules on vertical agreements. Indeed, the Commission's recent draft revised Vertical Block Exemption Regulation and draft revised Guidelines on Vertical Restraints also qualify online advertising restraints as hardcore restrictions.[9]

---

[1] See for instance, B2-98/11 - Asics; Case COMP/AT.40428 Guess C(2018) 8455 final; Competition and Markets Authority, 'A new pro -competition regime for digital markets - Advice of the Digital Markets Taskforce'. CMA135; S. Haasbeek, J. Sviták and J. Tichem, 'Price effects of non-brand bidding agreements in the Dutch hotel sector' (2019). Working paper.

[2] G. Colangelo, 'Competing Through Keyword Advertising' (2020) 16(3) Journal of Competition Law & Economics 306; N. Jung, 'European Commission Fines Guess over Anti-Competitive Agreements to Block Cross-Border Sales (Case AT.40428 – Guess)' (2019) 20(3) Business Law International 295; T. Kuhn, 'Between Coty, Guess and the new V-BER - where do we stand on e-commerce restrictions?' (2019) 40(8) European Competition Law Review 376; W. Leslie, 'Brand bidding, search advertising and the quest to protect nonprice parameters of competition' (2021) 42(1) European Competition Law Review 9.

[3] B2-98/11 - Asics (n 1). Upheld by the German Federal Court in Beschluss KVZ 41/17 2017.

[4] Case COMP/AT.40428 Guess (n 1).

[5] B2-98/11 - Asics (n 1) paras. 259-274, 304-402; Beschluss KVZ 41/17 (n 3); Case COMP/AT.40428 Guess (n 1).

[6] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ, L 102/1 2010.

[7] B3-137/12 - adidas 10.

[8] ACM, Guidelines regarding arrangements between suppliers and buyers 2019 7.

[9] Annex to a Communication from the Commission - Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. C(2021) 5026 final Annex, recital 13 Art. 1 (n) in conjunction with Art. 4 (b) to (d). Annex to the Communication from the Commission - Approval of the content of a draft for a Communication from the Commission - Commission Notice - Guidelines on vertical restraints, Draft Revised Vertical Guidelines. C(2021) 5038 final Annex paras. 188 and 192 (f). Revision of the Vertical Block Exemption Regulation -Explanatory note, Revision of the Vertical Block Exemption Regulation - Explanatory note 5.

Brand bidding restraints are thus currently subjected to a similarly harsh antitrust treatment as resale price maintenance, territorial or customer restraints creating absolute territorial protection and bans on online sales. Their categorization as restrictions of competition by-object under Art. 101 (1) TFEU implies that brand biding restraints tend to be in such an overwhelming number of cases anticompetitive that the costs of a more elaborate analysis of their actual effects are not justified.[10]

This article asks the simple question of whether this 'inhospitable'[11] attitude of EU competition enforcers towards vertical brand bidding restraints is appropriate. The strict legal treatment of brand bidding restraints may, indeed, surprise as the economic impact of this novel category of vertical online restraints is not yet fully understood.[12] Economic evidence supporting the view that brand bidding restraints tend to be inherently anticompetitive remains sparse. The Commission's 2017 E-commerce sector inquiry, for instance, only discussed brand bidding restraints *in passim*. It did not provide any economic or empirical support for the preliminary conclusion that brand bidding restraints, unlike restrictions on the use of certain trademarks or brands as domain names, raise competition issues.[13] A 900 pages-strong support study commissioned by the EU Commission as part of the revision of the VBER discusses brand bidding restraints only in a few instances, without producing or considering economic evidence on their impact on competition.[14] The only existing empirical study by staff members of the Dutch competition authority ACM assesses brand bidding restraints in the Dutch hotel booking market. The study finds that brand bidding restraints consistently result in price increases of roughly 2 % on hotel websites relative to online travel agent websites.[15] Yet, these findings have not yet been tested by other studies and are subject to methodological limitations.[16]

---

[10] In this sense, Case C-67/13 P *Groupement des cartes bancaires v Commission* ECLI:EU:C:2014:2204 paras. 50-51.
[11]For the 'inhospitability tradition' in antitrust, see F. H. Easterbrook, 'The limits of Antitrust' (1984) 63(1) Tex. L. Rev. 1 4.
[12] The recent consultation on and revision of the Vertical Block Exemption Regulation (VBER) identified the legal status of brand bidding restrictions under Art. 101 TFEU and the VBER as one of the areas where further guidance is needed. European Commission, 'Evaluation of the Vertical Block Exemption Regulation: Commission Staff Working Document' . SWD (2020) 172 final 86, 200-222.
[13] Final report on the E-commerce Sector Inquiry - Staff Working Document. SWD(2017) 154 final paras. 631-632, 997-999.
[14] European Commission, 'Support studies for the evaluation of the VBER Competition: Final report' (2020) 482, 487, see also relatedly, 48-49, 72, 115-116.
[15] Haasbeek, Sviták and Tichem (n 1) 4.
[16] ibid 3.

It is hence not an overstatement that there is a considerable discrepancy between the economic and legal analysis of brand bidding restraints: Competition authorities in Europe have pressed ahead with condemning brand bidding restraints, while the economics of these practices are yet to be fully settled. This article seeks to address this mismatch and knowledge gap, by providing a consistent economic and legal framework to analyse vertical brand bidding restraints. The central claim of the article is that brand bidding restraints may serve brand owners as an essential tool to address vertical and horizontal externalities within their distribution network and/or to recover advertising-related fixed costs through price discrimination. Despite these potentially procompetitive rationales, brand bidding restraints may at the same time produce serious anticompetitive effects. These ambiguous welfare effects of brand bidding restraints on competition cast doubt on their outright condemnation as by-object restrictions. Instead, a more searching analysis that pays greater heed to the actual effects of brand bidding restraints on competition is warranted. The article explores how such an effects-based approach towards brand bidding restraints may look like and formulates policy proposals as to how the ongoing revision of the EU and UK Vertical Block Exemption Regulations and Vertical Guidelines could enhance the antitrust analysis of brand bidding restraints.

The remainder of the article is organized as follows. Section 1 sets the scene by providing an overview of the existing competition cases involving brand bidding restraints against the backdrop of the ever-growing importance of online search advertising. Section 2 advances with the ‘externality explanation’ and ‘price discrimination explanation’ two complementary procompetitive rationales for brand bidding restraints. Section 3 investigates the anticompetitive effects of brand bidding restraints. Section 4, in turn, explores various filters that may inform an effects-based analysis of brand bidding restraints. Section 5 concludes and provides some policy recommendations.

1 Setting the scene: Online search advertising and brand bidding restraints

The rise of digital markets has revolutionized the way how products are distributed in our economy. Products are no longer only sold and purchased through physical stores. Manufacturers and retailers increasingly use online stores, and, in particular, digital platforms as channels to market their products. In 2020, online sales accounted for about 18% of all worldwide retail sales. The Covid-19 pandemic has further accelerated the rise of online sales which are expected to reach 21.8% of all worldwide retail sales in 2024.[17] Together with the methods of distribution, the way in which products are advertised has changed dramatically. Over the last decade, spending on online advertising increased with an average annual growth rate of 14%.[18] In 2017, the investment in online advertising for the first time eclipsed the expenditure of UK companies for all other advertising.[19] In 2019, online advertising expenditures in the UK totalled about 15.7 bn GBP (up from 13.4 bn GBP in 2018), accounting for 62% of total advertising spending (up from 25% in 2010).[20]

1.1 Display and search advertising as two main forms of online advertising

Businesses today rely on two principal forms of online advertising to reach existing and new audiences. The first is online display advertising. This form of advertising has many features in common with traditional advertising, say through billboards or TV ads. It offers advertisers the possibility to advertise their brands by placing ads on websites of content providers, such as newspapers or streaming services. These ads can take various forms, ranging from banner adverts you can see on newspaper sites such as FT.com, over audio ads on Spotify or video ads on youtube.com.[21]

The second type of online advertising is online search advertising. When users enter a search query in the search bar of an online search engine, such as Bing! or Google, they will obtain two distinct types of results. The result page will, on the one hand, list a number of links to so-called 'generic' search results. The search algorithm of the search engine identifies and positions these generic search results based on their relevance for the keyword(s) the user entered as a search query. On the other hand, the search engine will also display so-called 'sponsored' search results which usually appear in a prominent placement on the search results page. Unlike generic search results, sponsored or paid search results are not identified and ranked exclusively on the basis of their relevance to the individual search query entered by the user. Instead, they are displayed and targeted to consumers because advertisers pay for their websites to be prominently linked on the result page when consumers enter a specific keyword

[17] statista, 'E-commerce share of total global retail sales from 2015 to 2024' (2021) <https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide/> accessed 4 June 2021.

[18] S. Adshead and others, 'Online advertising in the UKA report commissioned by the Department for Digital, Culture, Media &Sport' (2019) 35 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777996/Plum_DCMS_Online_Advertising_in_the_UK.pdf> accessed 30 March 2020.

[19] ibid.

[20] Competition and Markets Authority (CMA), 'Online platforms and digital advertising: Market study final report' (2020) para. 2.40.

[21] Adshead and others (n 18) 24 to 30; Competition and Markets Authority (CMA) (n 20) paras. 2.44-2.52.

as a search query. These links, accompanied by small text elements, will channel consumers clicking on them directly to the website of the advertiser. [22]

Search engines operate their paid advertising services through an auction mechanism, for instance, Google AdWords. Advertisers bid for certain keywords for which they wish to have a search ad placed on the result page of the search engine. If a user enters this reserved keyword or a phrase containing the keyword as a search query, the search engine will display and rank search ads taking into account two factors: the highest bidder and the relevance of the search ad for the user's search query. While advertisers usually pay for display ads depending on how many times consumers have viewed the ad (cost by thousand impressions ('CPM')), the costs of search advertising are typically calculated based on the number of users clicking on the link ('cost per click' ('CPC')). [23]

1.2 Online search advertising at the core of recent brand bidding restraint cases

The way retailers harness online search advertising to attract consumers to their online stores is at the heart of the *Asics* and *Guess* cases which lay the foundations of the strict antitrust treatment of brand bidding restraints in Europe. Both cases involved with Asics – a Japanese manufacturer of running shoes – and Guess – a US producer of fashionable apparel and accessories – two well-known brands. Both brands had in common that they used a dual distribution model to commercialize their products.[24] On the one hand, they were vertically integrated into the distribution level by selling their products through their own physical stores in various Member States of the EU[25] and by operating their own online shops.[26] On the other, Guess and Asics also operated selective distribution networks with independent mono-brand and multi-brand retailers. Under these selective distribution agreements, Asics and Guess entrusted wholesalers and retailers as sublicensees to distribute, promote, and, in the case of retailers, sell their product lines in their assigned territory through licensed stores. The authorized wholesalers and retailers were selected on the basis of qualitative criteria, for instance, pertaining to the store design and quality standards for pre-sale services and advertising. These quality criteria were geared towards the promotion of their brand image.[27]

[22] Adshead and others (n 18) 23 to 24; Competition and Markets Authority (CMA) (n 20) paras. 2.44-2.46.
[23] Competition and Markets Authority (CMA) (n 20) paras. 2.46 and 2.52.
[24] Case COMP/AT.40428 Guess (n 1) para. 20.
[25] ibid paras. 20-21.
[26] ibid paras. 20-22. B2-98/11 - Asics (n 1) paras. 49, 231.
[27] Case COMP/AT.40428 Guess (n 1) paras. 23, 25-28, 31; B2-98/11 - Asics (n 1) paras. 50-56.

As part of these selective distribution agreements, Asics and Guess imposed a set of vertical restraints on their authorized retailers which restricted how the latter could distribute the licensed products. The most novel amongst those restraints was a clause that *de facto* prohibited authorized retailers from using or bidding for Asics and Guess trademarks and brand names as keywords for online search advertising via Google AdWords. [28]

In both cases, the FCO and the Commission concluded that these brand bidding restraints violate Art. 101 (1) TFEU. Both competition authorities asserted that the brand bidding restraints could not be explained by an attempt on the part of Asics or Guess to preserve their trademark rights or brand image.[29] Instead, they found that the brand owners pursued a two-fold strategy by forcing brand bidding restraints on their authorized dealers. The first reason why the brand owners had recourse to these brand bidding restraints was to minimize their advertising costs. As Google AdWords selects advertisers displayed in Google's sponsored search results on the basis of an auction process, brand owners' advertising cost increase, the more players are bidding for the same keywords.[30] By prohibiting their dealers from using and bidding for their trademarks and brand names in Google AdWords, Asics and Guess thus sought to prevent them from driving up their search advertising costs.[31]

The second reason why brand owners imposed brand bidding restraints was to reduce the 'findability' of retailers' online presence, while reserving as much traffic as possible to the brand owners' own shop.[32] As a consequence, these restraints considerably dampened *intra*-brand competition in online distribution and restricted, in particular, the authorized retailers' ability to use the internet in order to sell their product outside their contractual territory or area of commercial activity.[33] In stressing their adverse impact on retailers' ability to engage in cross-border sales, both competition watchdogs likened brand bidding restraints with restraints on passive sales, preventing parallel trade. Brand bidding restraints were thus classified as a clear-cut by-object restriction of competition in breach of Art. 101 (1) TFEU.[34]

Asics and *Guess* moreover clarified that brand bidding restraints could not benefit from a general exemption under the VBER or an individual exception under Art. 101 (3) TFEU.

[28] B2-98/11 - Asics (n 1) paras. 28-32, 243-245; Case COMP/AT.40428 Guess (n 1) paras. 40-52.
[29] B2-98/11 - Asics (n 1) paras. 371-379; Case COMP/AT.40428 Guess (n 1) paras. 116-119, 122-133.
[30] Case COMP/AT.40428 Guess (n 1) para. 44; B2-98/11 - Asics (n 1) para. 312.
[31] Case COMP/AT.40428 Guess (n 1) para. 50.
[32] ibid paras. 120-121.
[33] B2-98/11 - Asics (n 1) para. 323. Case COMP/AT.40428 Guess (n 1) paras. 120-121.
[34] B2-98/11 - Asics (n 1) paras. 268-272. Case COMP/AT.40428 Guess (n 1) para. 114, 124-125; Case 86/82 *Hasselblad v Commission* ECLI:EU:C:1984:65 paras. 49, 52; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* ECLI:EU:C:2011:649 para. 47.

Rather, the competition authorities took the view that such restrictions amount to hard-core restrictions within the meaning of Art. 4 (c) of the VBER as they 'limited the ability of the authorized retailers' (sic!) to sell the contract products actively or passively (depending on the targeted audience or territory).'[35] In addition, the competition authorities concluded that the restrictions could not benefit from an individual exemption under Art. 101 (3) either. For there were 'no indications […] that the conduct was indispensable, for example to address free-riding, or protect [the defendant's] brand image.'[36]

The *Asics* and *Guess* decisions thus lay the foundations for a hostile competition law approach towards brand bidding restraints that treats restraints on retailers' search advertising as by-object restrictions of Art. 101 (1) TFEU,[37] which are unlikely to qualify for an exemption under the VBER or Art. 101 (3) TFEU. This strict approach is driven by the concern that brand bidding restraints foreclose retailers from online sales channels and thereby effectively ban them from using the internet to sell outside their assigned sales territory.[38] This strict treatment of brand bidding restraints is just the latest reminder that the goal of promoting the internet as a tool to enhance market integration constitutes a central rationale of the application of EU competition rules to vertical restraints.[39]

2 Potential procompetitive effects of brand bidding restraints

From an economic point of view, though, the strict antitrust treatment of brand bidding restraints in *Asics* and *Guess* remains puzzling. In both cases, the competition authorities provided very little economic reasoning in support of the strict prohibition of brand bidding restraints as by-object restrictions which presupposes that they have very rarely, if at all, procompetitive effects. The current antitrust approach towards brand bidding restraints in Europe, indeed, fails to ask and answer a simple, yet fundamental, question: 'Why should manufacturers ever want to restrict their retailers' advertising?'[40] The answer to this question is all but obvious. This section proposes two complementary accounts that may help shed light

---

[35] Case COMP/AT.40428 Guess (n 1) para. 157.
[36] ibid para. 164. B2-98/11 - Asics (n 1) paras. 391-392.
[37] Case 86/82 *Hasselblad v Commission* (n 34) paras. 49-52.
[38] See for a recent reaffirmation of this view ACM, Guidelines regarding arrangements between suppliers and buyers (n 8) 7; European Commission (n 12) 128, 218.
[39] Guidelines on Vertical Restraints, Guidelines on Vertical Restraints. OJ [2010] C 130/01 para. 52; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* (n 34) para. 47; G. Monti, 'Restraints on Selective Distribution Agreements' (2013) 36(489-512) World Competition 509–510.
[40] See for a similar puzzle, L. G. Telser, 'Why Should Manufacturers Want Fair Trade' (1960) 3 Journal of Law and Economics 86.

on why brand owners may have a procompetitive motive to regulate the amount of online search advertising provided by their retailers.

2.1 The externality explanation

The standard economic explanation for vertical restraints is that they primarily serve manufacturers as a tool to overcome coordination problems within their vertical supply chains. Vertical restraints allow non-integrated manufacturers or brand owners to address two types of externalities that would not materialize had they vertically integrated into the distribution of their products.

2.1.1 Vertical restraints as tools to internalize vertical and horizontal externalities

The first externality vertical restraints may tackle is vertical in nature. It flows from the fact that retailers do not appropriate the additional increment in profits that upstream manufacturers earn through the wholesale profit margin on each additional unit that retailers sell by lowering their retail price or expanding demand, for instance through promotional efforts such as advertising.[41] The vertical externality between retailers and manufacturers may notably stem from the fact that retailers do not account for the positive externality that demand expanding activities have on the manufacturer's profit margin and, therefore, under-invest in advertising.[42]

This vertical externality is further compounded by horizontal externalities that may arise between retailers. Competing retailers impose on each other a negative pecuniary externality as price increases will prompt consumers to switch to other retailers. Fierce competition may compel retailers to set their prices at too low a level and to underinvest in advertising. Moreover, when there are informational spillovers, retailers' advertising efforts create gains for other retail outlets that they cannot appropriate. The fear that other retail outlets would be able to ride on the coattails of their advertising efforts may further dampen retailers' advertising efforts.[43]

Economic theory suggest that vertical restraints often serve manufacturers, as tools to internalize these vertical and horizontal externalities arising from the under-investment in advertising and free-riding.[44] Resale price maintenance (RPM) and the allocation of exclusive distribution territories, for instance, enable manufacturers to eliminate the horizontal externalities retailers impose on each other through 'excessive competition' or free riding that

[41] G. F. Mathewson and R. A. Winter, 'An Economic Theory of Vertical Restraints' (1984) 15(1) The RAND Journal of Economics 27 32.
[42] ibid.
[43] Mathewson and Winter (n 41), 32; Telser (n 40), 89–96.
[44] Mathewson and Winter (n 41), 33–37.

lead to under-investment in advertising. This, in turn, also neutralizes the vertical externality that retailers' under-investment in advertising inflicts on the manufacturer's profit margin.

2.1.2 Brand bidding restraints and vertical externalities

Against this backdrop, brand bidding restraints that restrict retailer advertising may, at first glance, appear to run counter to the standard economic rationale underpinning vertical restraints. Indeed, standard economic theory would suggest that brand owners have an interest in promoting rather than restricting retailer advertising.[45] The reason why a brand owner, such as Guess or Asics, may nonetheless have a procompetitive motive to regulate the amount of retailer online search advertising lies with the specific issues that online search advertising raises in the context of a dual distribution system.

Unlike in the standard economic models of vertical restraints, in the context of dual distribution retailers' investment in search advertising imposes a negative vertical externality on the brand owner. When retailers start to use search advertising, brand owners are compelled to follow suit to prevent them from siphoning off traffic from their online outlets. The 'traffic stealing effect' of retailer online search advertising pushes the brand owner to adopt a defensive bidding strategy even though it inflates its advertising and, ultimately, its distribution costs.[46] As the costs (i.e. cost-per-click) of online search advertising are determined by an auction system, greater search advertising efforts drive up the advertising costs of the retailers and brand owners alike. In the context of dual distribution, retailer search advertising thus drags the brand owner and retailers into a prisoner's dilemma: they are forced to spend more on search advertising, although it might be more profitable for them to coordinate their advertising efforts or not to advertise at all.[47]

In contrast to the normal setting where retail advertising creates a positive externality for brand owners, in the presence of dual distribution, retailers' investment in search advertising imposes a negative externality on brand owners' margins by driving up the advertising and distribution costs of its retailers and its own retail presence. The size of this adverse effect of the competitive use of keywords by retailers on the brand owner's advertising cost and margins

---

[45] This may also explain why the Commission and the FCO rejected the free-rider explanation Case COMP/AT.40428 Guess (n 1) para. 164; B2-98/11 - Asics (n 1) paras. 260, 378, 394. 394.

[46] P. S. Desai, W. Shin and R. Staelin, 'The Company That You Keep: When to Buy a Competitor's Keyword' (2014) 33(4) Marketing Science 485 488; A. Sayedi, K. Jerath and K. Srinivasan, 'Competitive Poaching in Sponsored Search Advertising and Its Strategic Impact on Traditional Advertising' (2014) 33(4) Marketing Science 586 595; A. Simonov, C. Nosko and J. M. Rao, 'Competition and Crowd-Out for Brand Keywords in Sponsored Search' (2018) 37(2) Marketing Science 200 202.

[47] Desai, Shin and Staelin (n 46), 494–495.

largely depends on the number of authorized retailers bidding for the same trademark as keywords in Google AdWords.[48]

2.1.3 Brand bidding restraints and horizontal externalities

Along with creating a vertical externality, retailer advertising also involves important horizontal externalities. Brand owners, like Guess and Asics, must carefully coordinate with the members of their distribution networks how they attribute advertising expenditure across various advertising channels: in particular, online search, online display (e.g., banners, images or videos) and traditional offline advertising (e.g., TV, radio and print media).[49] This is a tricky exercise because each form of advertising performs a different role in promoting brand recognition and triggering purchasing decisions on the part of the consumers. Marketing studies show that various forms of advertising interact with consumers at different stages of the so-called 'conversion funnel' (Figure 1) that traces consumers' journey from becoming aware of a brand to making the final purchasing decision.[50] Online search advertising interacts with consumers closer to their actual purchasing decision than do online display and traditional forms of advertising. It also engages the consumers as it primarily relies on customer-initiated features and directly routes customers who click on the sponsored link to the advertisers' online store. As a result, the effectiveness of search advertising in eliciting customer behaviour and generating sales outperforms that of display and offline advertising.[51]

---

[48] In the *Asics* and *Guess*, this number was particularly high. Asics had about 2000 authorised dealers in Germany B2-98/11 - Asics (n 1) para. 52. In the European Economic Area (EEA), Guess' products were distributed by about 113 authorised mono-brand stores operated by 30 companies and by up to 3000-5500 independent multi-brand dealers Case COMP/AT.40428 Guess (n 1) para. 21.

[49] For a similar observation regarding the allocation of advertising expenses by a single firm I. M. Dinner, H. J. van Heerde and S. A. Neslin, 'Driving Online and Offline Sales: The Cross-Channel Effects of Traditional, Online Display, and Paid Search Advertising' (2013) 51(5) Journal of Marketing Research 527 527–528; E. Bayer and others, 'The impact of online display advertising and paid search advertising relative to offline advertising on firm performance and firm value' [2020] International Journal of Research in Marketing, 3, 14.

[50] P. Kireyev, K. Pauwels and S. Gupta, 'Do display ads influence search?: Attribution and dynamics in online advertising' (2016) 33(3) International Journal of Research in Marketing 475 476; Competition and Markets Authority, 'Online platforms and digital advertising: Market study interim report' (2019) 153–155 <https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf> accessed 30 March 2020.

[51] Dinner, van Heerde and Neslin (n 49), 528-530, 541-543; Bayer and others (n 49), 3,13; Kireyev, Pauwels and Gupta (n 50), 487–489.

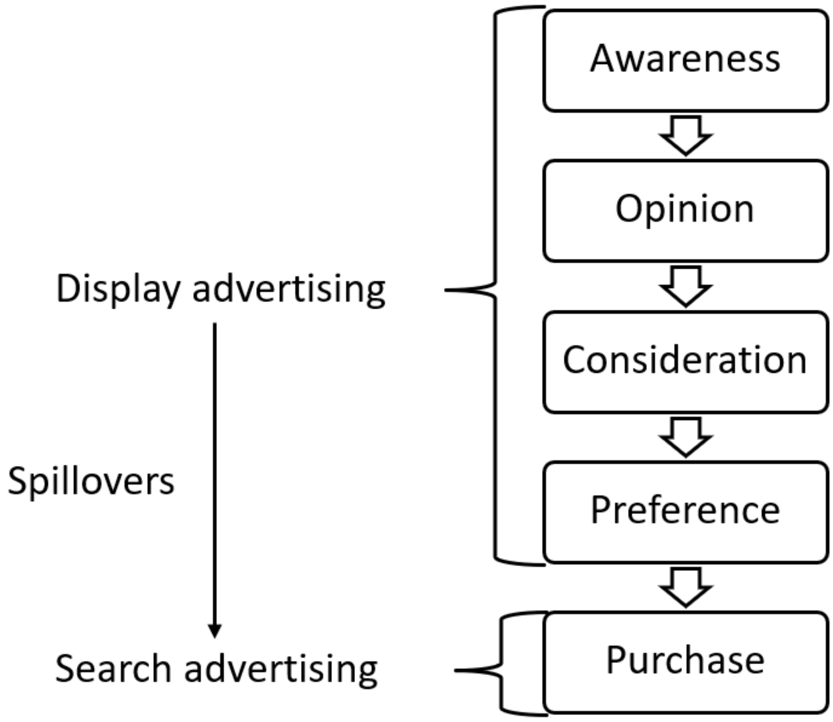

Figure 1 - The role of display and search advertising in the conversion funnel (Source: CMA[52])

Online display and traditional offline advertising, by contrast, interact with consumers primarily in the early stages of their purchasing decision-making process (Figure 1).[53] While eliciting only to a limited extent direct purchasing decisions, display and traditional advertising are particularly effective in raising awareness for a brand, attracting new audiences and differentiating the brand from competitors.[54] Most importantly, display advertising may also have significant positive spillover effects on search advertising. They create general consumer awareness for a brand or a specific need. In so doing, they indirectly prompt clicks and purchasing decisions.[55] In essence, without display and traditional advertising, consumers might simply not enter the brand name as a search term in Google's search bar in the first place.

Owing to these positive spillovers or positive externalities, the benefits of the investment in display advertising are more difficult to appropriate because they may often benefit other members of the distribution network. This explains why online display advertising and traditional advertising are widely perceived as less effective advertising methods than paid

[52] Competition and Markets Authority (CMA) (n 20) 216.
[53] Dinner, van Heerde and Neslin (n 49), 530.
[54] Bayer and others (n 49), 2–3; Dinner, van Heerde and Neslin (n 49), 542; Competition and Markets Authority, 'Online platforms and digital advertising: Market study interim report' (n 50) 49, 157.
[55] Dinner, van Heerde and Neslin (n 49), 530, 539-540; Kireyev, Pauwels and Gupta (n 50), 475-476, 487-489.

search advertising.[56] Investment in search advertising, by contrast, can be easily appropriated because it generates high click-through and conversion rates, while producing less positive spill-overs that benefit other members of the distribution network. Therefore, retailers tend to consider search advertising as the least risky alternative: the return on investment is higher and less uncertain than for other forms of advertising.

Retailer investment in search advertising thus generates two horizontal externalities. First, retailers are likely to over-invest in search advertising and to intensify *intra*-brand competition between the sellers of the same branded product. This imposes a negative horizontal pecuniary externality on other retailers and the brand owner's own sales channel. At the same time, owing to the informational spillovers of display advertising, retailers are likely to underinvest in display advertising or traditional advertising because they fear that other retailers will benefit from their investments. This, in turn, leads to a situation where retailers have an incentive to free-ride on the brand owners' expenses for online display and traditional advertising that are crucial for promoting the brand image and stimulate *inter*-brand competition.[57]

By restricting or entirely banning online search advertising on the part of retailers, brand bidding restraints allow the brand owner to internalize these negative pecuniary (intensified *intra*-brand competition) and positive (information spillovers) horizontal externalities and coordinate the different advertising channels of their distribution system. From this perspective, brand bidding restraints constitute nothing more (or less) than the attempt of the manufacturer to contractually integrate and control the advertising function of its distribution network online. While brand bidding restraints reduce the amount of online search advertising provided by retailers and dent *intra*-brand competition, this reduction may be outweighed by the positive impact of greater investment in display advertising that intensifies *inter*-brand competition.

In sum, like other vertical restraints, brand bidding restraints constitute contractual tools that allow brand owners to address three types of vertical and horizontal externalities that beset the provision of promotional services in the form of search advertising in (dual) distribution systems. Brand bidding restraints thus enable brand owners to coordinate their advertising across various channels and to implement an integrated outcome by internalising the:

[56] Kireyev, Pauwels and Gupta (n 50), 475.
[57] Bayer and others (n 49), 2.

- vertical externality that retailer search advertising exerts on the brand owner's advertising costs and margins through the competitive auction system of Google AdWords;
- horizontal pecuniary externality that retailer search advertising imposes on the brand owner's and other retailers' sales channels;
- horizontal informational externality/spill-overs of display advertising that results in retailers' free riding on the brand owner's investment in display advertising and over-investment in search advertising.

2.2 The price discrimination explanation

Antitrust literature mostly focuses on the role of vertical restraints in internalising vertical and horizontal externalities within distribution networks and, thereby, addressing free-riding issues.[58] This free-rider rationale often overshadows the longstanding economic insight that vertical restraints also allow brand owners to engage in price discrimination.[59] Vertical restraints enable brand owners to vertically segment their customer groups by offering high and low quality versions of their product in accordance with consumers' willingness to pay (i.e. so-called 'quality differentiation' or 'vertical differentiation'). Such vertical differentiation allows brand owners to price discriminate and extract a maximum amount of consumer surplus.[60]

2.2.1 Vertical restraints as tools to orchestrate *intra*-brand price discrimination

Vertical information restraints, such as restrictions on online search advertising, play a crucial role in facilitating or sustaining such a price discrimination strategy. Alongside the internalization of externalities and free-riding issues discussed in the previous subsection, this price discrimination strategy offers a complementary explanation for the use of brand bidding restraints.

[58] J. J. Spengler, 'Vertical Integration and Antitrust Policy' (1950) 58(4) Journal of Political Economy 347; Telser (n 40); Mathewson and Winter (n 41); H. Marvel and McCafferty, 'Resale Price Maintenance and Quality Certification' (1984) 15(3) RAND Journal of Economics 349; B. Klein and K. M. Murphy, 'Vertical Restraints as Contract Enforcement Mechanisms' (1988) 31(2) The Journal of Law and Economics 265.

[59] W. S. Bowman, 'The Prerequisites and Effects of Resale Price Maintenance' (1955) 22(4) The University of Chicago Law Review 825.

[60] ibid 833, 839-840. P. Bolton and G. Bonanno, 'Vertical Restraints in a Model of Vertical Differentiation' (1988) 103(3) The Quarterly Journal of Economics 555 555–556. See for further discussion of the relevant literature M. L. Katz, 'Chapter 11 Vertical contractual relations' in R. Schmalensee and R. D. Willig (eds), *Handbook of industrial organization* (Handbooks in economics vol 10, 1. ed. [10.] reprint. Elsevier 2008) 679–683. The analysis that follows differs from the one by Professor Chen who shows that RPM can be used to address distortions of the manufacturer's margin caused by price discrimination Y. Chen, 'Oligopoly Price Discrimination and Resale Price Maintenance' (1999) 30(3) The RAND Journal of Economics 441.

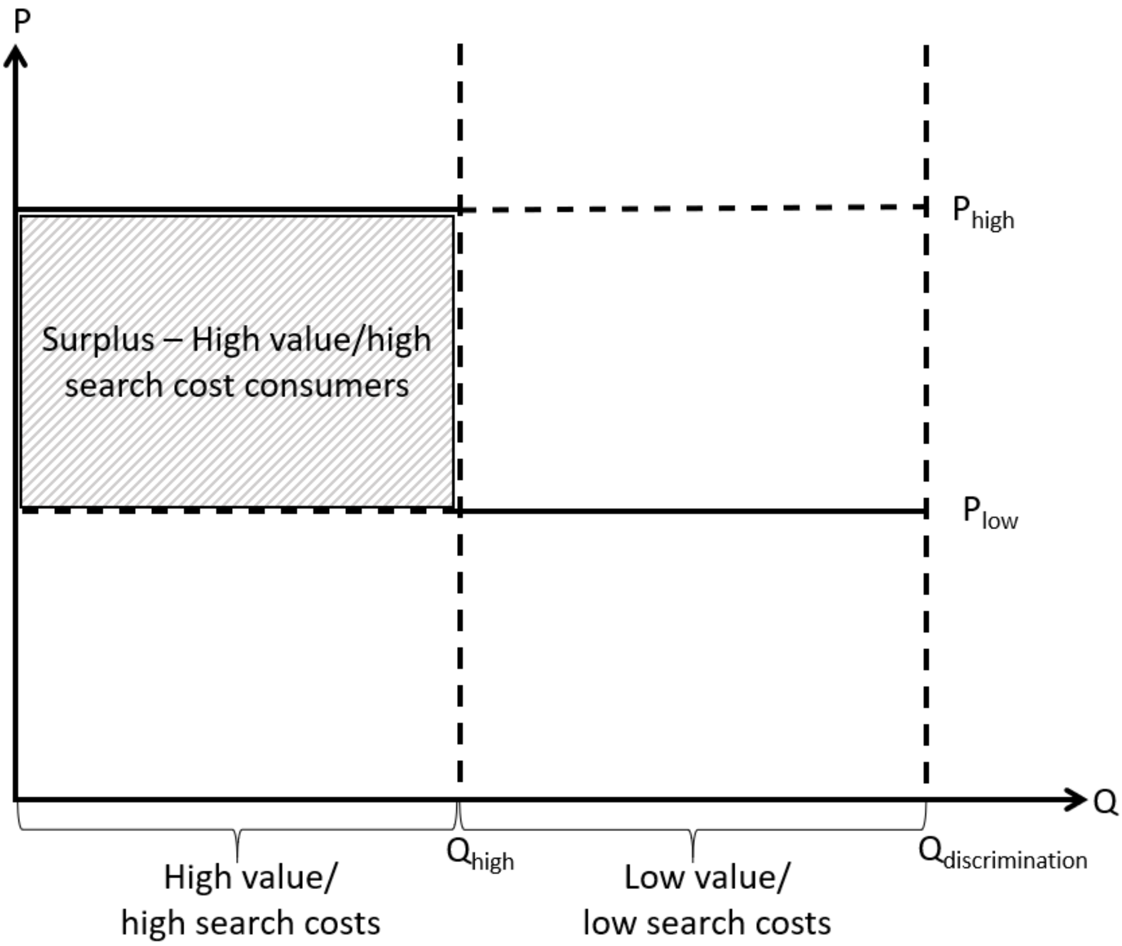

Figure 2 – Heterogenous customer groups and price discrimination

If consumers are heterogenous and differ in their valuation of the product or additional promotional services (high value and low value consumers in Figure 2),[61] manufacturers can maximise their profits by asking their retailers to provide diverging service levels at different prices (P_{high} and P_{low} in Figure 2). This combination of 'high-end' and 'no frills' retail distribution models would enable manufacturers to orchestrate *intra*-brand price discrimination at the retail level. Offering various levels of product/service quality through their retailers will allow manufacturers to segment their consumers in accordance with their willingness to pay. This brand-wide price discrimination enables them to extract additional surplus that high value consumers would retain if the retailers were to set a uniform price at P_{low} (see the shaded area in Figure 2). At the same time, consumers in the aggregate are better off relative to a situation

[61] For this model see Bolton and Bonanno (n 60), 557–558; Y. Spiegel and Y. Yehezkel, 'Price and non-price restraints when retailers are vertically differentiated' (2003) 21(7) International Journal of Industrial Organization 923 924, 928-929; J. Asker and H. Bar-Isaac, 'Vertical Information Restraints: Pro- and Anti-Competitive Impacts of Minimum Advertised Price Restrictions' (National Bureau of Economic Research 2016) 11.

where retailers set a uniform price at P_{high} because low value consumers continue to be served and are not priced out of the market. Brand-wide price discrimination thus allows for surplus extraction without leading to quantity restriction ($Q_{discrimination} > Q_{high}$ in Figure 2). [62] A similar outcome could be expected when manufacturers are vertically integrated, provide both service levels and revert to price discrimination.[63]

2.2.2 Brand bidding restraints as informational restraints sorting high- and low-value consumers

Appealing as it is, such a price discrimination strategy through the vertical segmentation of consumers is difficult to put in place. This is because the willingness of consumers to pay for additional services is not easily observable. Moreover, the price-discrimination strategy is difficult to police and only sustainable as long as high value consumers cannot purchase from 'no frills' retailers.[64] In other words, manufacturers would have to minimize the proportion of high value consumers churning from 'high-end' to 'no frills' retailers.[65]

If we assume that high value and low value consumers have different information costs (high search costs and low search costs in Figure 2), manufacturers can use contractual information or advertising restrictions, such as brand bidding restraints, to segregate customer groups and engage in price discrimination. [66] Suppose, for instance, that it is more costly for high value consumers to search for cheaper products than for low value consumers who have lower search costs. Information or advertising restraints, which prevent 'no frills' retailers from using certain forms of advertising that reduce search cost, allow manufacturers and their retailers to identify and segment high and low value customers. By limiting the retailers' use of its trademarks as keywords and leaving them just with the opportunity to bid on a long tail of less effective search terms with lower click-through-rates,[67] brand bidding restraints increase search costs and search friction for consumers. This, in turn, allows manufacturers to maintain price dispersion across their distribution systems if consumers have different valuations for its

[62] Asker and Bar-Isaac (n 61) 12–13.
[63] Bolton and Bonanno (n 60), 558–559; Spiegel and Yehezkel (n 61), 931.
[64] Bolton and Bonanno (n 60), 562.
[65] ibid 563–565; Spiegel and Yehezkel discuss the possibility of imposing a minimum RPM on high-end retailers as one way of maintaining the price discrimination and preventing high-end retailers from aligning their strategy with that of 'no frills' retailers. Spiegel and Yehezkel (n 61), 935–937; Asker and Bar-Isaac (n 61) 13.
[66] This argument draws upon the analysis of price-related information restraints by Asker and Bar-Isaac (n 61) 2, 11-17; J. Asker and H. Bar-Isaac, 'Advertising and Related Restraints' [2018] Competition Policy International Antitrust Chronicle 1.
[67] Dinner, van Heerde and Neslin (n 49), 543; O. J. Rutz, M. Trusov and R. E. Bucklin, 'Modeling Indirect Effects of Paid Search Advertising: Which Keywords Lead to More Future Visits?' (2011) 30(4) Marketing Science 646 648.

products and different search costs. [68] Brand bidding restraints thus might constitute an essential mechanism to insulate high value customers and facilitate brand-wide price discrimination Again, this price discrimination may be welfare-enhancing because it allows surplus extraction without resulting in output restriction. While high value consumers' surplus may be reduced, low value consumers benefit because they are not priced out of the market.[69]

This price discrimination rationale may explain the use of brand bidding restraints in cases such as *Guess* and *Asics*. The only difference to the stylized example above is that Asics and Guess were partially vertically integrated into the retail level as they relied on a dual distribution system. This difference, however, does not undermine the price discrimination explanation.[70] On the contrary, the price discrimination story becomes even more plausible, as Guess' and Asics' own retail outlet would take the place of 'high end' retailers and could skim off the additional surplus and profits by adopting a 'high end' business model. As they enable the brand-owner to price discriminate, brand bidding restrictions offer a handy tool to recover the fixed cost it incurs by investing in its online shop or in display advertising.[71]

2.3 Two complementary pro-competitive rationales for brand bidding restraints

Along with the internalization of externalities (discussed in sub-section 2.1.), the price discrimination account thus may offer a second potentially procompetitive explanation for the use of brand bidding restraints in distribution systems. This price discrimination explanation importantly adds to the analysis of brand bidding restraints because it suggests that brand bidding restrictions may have a welfare-enhancing effect irrespective of whether they are used to address free-riding problems or internalize other externalities.[72] Even in the absence of any externality or free-rider issues, the potentially procompetitive welfare effects of brand bidding restraints thus do not support their outright condemnation as by-object restrictions. The price discrimination explanation also shows that the finding of the Commission and the FCO that

[68] S. Salop, 'The Noisy Monopolist: Imperfect Information, Price Dispersion and Price Discrimination' (1977) 44(3) The Review of Economic Studies 393 393-394, 402-403. Asker and Bar-Isaac (n 61) 2, 11-17; Asker and Bar-Isaac (n 66).

[69] Salop (n 68), 402.

[70] Spiegel and Yehezkel (n 61), 941. See also Y. Yehezkel, 'Downstream competition between an upstreamsupplier and an independent downstream firm: Working Paper' (2003) 12.

[71] For the importance of price discrimination for fixed cost recovery see D. Ridyard, 'Exclusionary pricing and price discrimination abuses under Article 82 - an economic analysis' (2002) 23(2) European Competition Law Review 286 287–289.

[72] Spiegel and Yehezkel (n 61), 925.

brand bidding restraints in *Guess* and *Asics* could not be explained by free riding issues should not have precluded their analysis under Art. 101 (3) TFEU. [73]

That being said, it bears noting that the externality and price discrimination stories may often constitute complementary explanations for the use brand bidding restraints. By enabling brand owners to engage in brand-wide price discrimination and to regulate the amount of search advertising, brand bidding restraints may play an important role in coordinating and financing a brand's advertising strategy. In facilitating *intra*-brand price discrimination, brand bidding restraints offer brand owners a handy tool to recover the fixed cost they incur by investing in more expensive and risky forms of display and additional advertising.[74] At the same time, they allow the brand owners to mute vertical and horizontal externalities arising from over-investment in retailer online search advertising. While reducing *intra*-brand competition, online search advertising restraints may stimulate *inter*-brand competition and preserve the short- and long-term incentives of brand owners to invest in brand recognition and the creation of new brands.

3 Anticompetitive effects of brand bidding restraints

The 'externality' and 'price discrimination' explanations discussed in the previous section provide two complementary accounts of procompetitive rationales why manufactures may want to impose brand bidding restraints on their authorized retailers. They thus enrich the existing antitrust analysis of brand bidding restraints in Europe which currently calls for strict antitrust liability without delving into their economic rationale and effects. This however should not suggest that brand bidding restraints are invariably welfare enhancing or innocuous. There are at least four channels through which brand-bidding restraints may lead to anticompetitive effects and reduce consumer welfare.

3.1 Over-investment in promotional services and harm to infra-marginal consumers

A first situation in which consumers may be harmed by brand-bidding restraints arises if they result in over-investment in promotional services. This would be the case if a majority of consumers does not value additional promotional services to the extent marginal consumers do when they purchase products online, but instead use the internet to shop around to find the best deal. Brand bidding restraints may – as we have seen in the previous section – increase

[73] This may also explain why the Commission and the FCO rejected the free-rider explanation Case COMP/AT.40428 Guess (n 1) para. 164; B2-98/11 - Asics (n 1) paras. 260, 378, 394. 394.
[74] For the importance of price discrimination for fixed cost recovery see Ridyard (n 71), 287–289.

consumer welfare if they ensure the brand owners' and retailers' incentives to invest in promotional efforts, such as display or traditional advertising, that expand demand and intensify quality competition between different brands (*inter*-brand competition). Greater investment in promotional efforts however does not necessarily make consumers always better off. The aggregate welfare implications of brand bidding restraints, like that of other vertical restraints, depend on how much different consumer groups value the increase in quality competition made possible by the restraints.[75]

Brand owners will have an incentive to impose brand bidding restraints to increase the level of service quality or promotional efforts (e.g. display advertising) whenever the value marginal consumers attribute to a slight increase in product/service quality or promotional efforts exceeds the accompanying price increase.[76] Brand bidding restraints may, in this case, constitute a profit-maximising strategy that increases the surplus of marginal consumers. By contrast, the welfare of infra-marginal consumers whose initial valuation of the product exceeds the original market price by far may be harmed. They will continue to buy the product after a price increase, even if, in their view, the increase in promotional efforts or product/service quality is not worth the additional price increase.[77] The price increase ensuing from brand bidding restraints will harm infra-marginal consumers, who would prefer to purchase the branded product at a lower price without additional advertising or investment in the brand image, for instance because they already know the product fairly well.[78]

In case the harm inflicted by vertical brand bidding restraints on these infra-marginal consumers outweighs the benefit that marginal consumers draw from the additional advertising or intensified quality competition, brand bidding restraints will result in an 'over-investment' in promotional services and harm consumers in the aggregate. Consequently, even if they were to enable greater investment in promotional services, brand bidding restraints do not necessarily have welfare-enhancing effects if they disproportionately harm infra-marginal consumers. This would in particular be the case if a majority of consumers who are purchasing the product online are infra-marginal consumers who are using the internet to shop around and find the best deal, without attributing any particular importance to the brand image or promotional services.

[75] For a summary of this post-Chicago analysis F. M. Scherer and D. Ross, *Industrial market structure and economic performance* (Houghton Mifflin 1990) 541–547.
[76] W. S. Commanor, 'Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy' (1985) 98 Harvard Law Review 98 991.
[77] ibid.
[78] F. M. Scherer, 'The Economics of Vertical Restraints' (1983) 52 Antitrust L.J. 687 699–704; Commanor (n 76), 990–999.

3.2 Excessive information and search costs

A second channel through which brand bidding restraints may harm consumer welfare is by increasing information and search costs to the extent that *intra-* and *inter*-brand competition are significantly diminished.[79] Restrictions on online search advertising introduce significant search frictions and reduce the ability of consumers to carry out informed *intra*-brand price comparisons between different online shops selling the same brand. If brand bidding restraints constrain how authorized multi-brand dealers advertise their products on Google, the ability of consumers to carry out meaningful *inter*-brand price and quality comparisons may suffer, too.[80]

In inflating search or information costs brand biddings may not only reduce consumer welfare but also raise distributional concerns. The distributional effects of brand bidding restraints are particularly acute if the infra-marginal consumers are less willing to pay for additional advertising or quality certification exactly because they are less affluent and, hence, face greater budgetary constraints than the less price-sensitive marginal consumers who value additional sales services or quality certification. Vertical restraints may have even greater distributive effects if the search frictions they create prevent vulnerable consumers, who are subject to cognitive biases and find it more challenging to engage with markets, from finding a lower-priced product.[81] Brand bidding restraints may thus disproportionately harm low-income or vulnerable consumers.

3.3 Adverse welfare effects of brand bidding restraints inducing price discrimination

A third situation in which brand bidding restraints may stymie competition and lead to consumer harm arises when they are used by brand owners to orchestrate *intra*-brand price discrimination based on search costs rather than brand preferences. Economic literature on price discrimination in a competitive or oligopolistic setting[82] indeed indicates that the impact of

---

[79] R. L. Steiner, 'The Nature of Vertical Restraints' (1985) 30 Antitrust Bulletin 143 146, 190.

[80] ibid 183.

[81] See in this respect Competition and Markets Authority, 'Tackling the loyalty penalty' (2018) <https://www.gov.uk/government/publications/tackling-the-loyalty-penalty/tackling-the-loyalty-penalty>.

[82] M. L. Katz, 'Price Discrimination and Monopolistic Competition' (1984) 52(6) Econometrica 1453; S. Borenstein, 'Price Discrimination in Free-Entry Markets' (1985) 16(3) The RAND Journal of Economics 380. T. J. Holmes, 'The Effects of Third-Degree Price Discrimination in Oligopoly' (1989) 79(1) The American Economic Review 244; M. Armstrong and J. Vickers, 'Competitive Price Discrimination' (2001) 32(4) The RAND Journal of Economics 579.

price discrimination on competition importantly depends on the type of consumer information that allows the discriminating firm to identify and sort price-inelastic consumers.[83]

Price discrimination by brand owners may have an unambiguously positive impact on competition and consumer welfare if it is conditioned on information about the brand preferences of consumers.[84] In the case of brand-preference-based discrimination, competing brands will charge high prices to their group of ‘strong’[85] customers who have a strong preference for and loyalty to their branded product. At the same time, they will charge a low price to win over ‘weak’ customers who prefer the product of a rival brand. If price discrimination is based on differences in brand preferences, a best-response asymmetry emerges between rival branded sellers.[86] The strong consumers of brand A, are weak consumers for the other brand B, and *vice versa*. In this setting, each rival brand A and B has an incentive to charge high prices to their strong consumers while heavily discounting to their weak consumers. As a consequence, price discrimination may intensify price competition and increase consumer welfare in the aggregate relative to uniform pricing.[87]

This finding that price discrimination in a competitive setting may have unambiguously welfare-enhancing effects and reduce prices for all consumers hinges on the assumption of best-response asymmetry. This assumption only holds as long as various producers rank different customer groups as ‘strong customers’, as it is the case for preference-based discrimination.[88] The outcome is different, though, when competing firms perceive the same customer group as their ‘strong consumers’. This occurs where price discrimination is not informed by the strength of consumers’ brand preferences but is conditioned on information about their search and switching costs.[89] In this case, brand owners will charge high prices to ‘strong’ consumers who face high search costs and are not searching around to find the cheapest deal, while imposing

[83] C. Townley, E. Morrison and K. Yeung, ‘Big Data and Personalized Price Discrimination in EU Competition Law’ (2017) 36 Yearbook of European Law 683 692–693; K. S. Corts, ‘Third-Degree Price Discrimination in Oligopoly: All-Out Competition and Strategic Commitment’ (1998) 29(2) The RAND Journal of Economics 306 307; M. Armstrong, ‘Recent Developments in the Economics of Price Discrimination’ in R. Blundell, T. Persson and W. K. Newey (eds), *Advances in economics and econometrics: Theory and applications, Ninth World Congress : Volume 2* (Econometric Society monographs vol 42. Cambridge University Press 2006) 110–113.

[84] Armstrong (n 83) 113–115; J.-F. Thisse and X. Vives, ‘On The Strategic Choice of Spatial Price Policy’ (1988) 78(1) The American Economic Review 122 134.

[85] For this traditional terminology of strong and weak markets J. Robinson, *The Economics of Imperfect Competition* (Macmillan 1933); Holmes (n 82), 245.

[86] The concepts of best-response symmetry and asymmetry have been coined by Corts (n 83), 311–315.

[87] Townley, Morrison and Yeung (n 83), 692–693; Thisse and Vives (n 84), 134; Corts (n 83), 307-308, 311-316; Armstrong (n 83) 111–115; Armstrong and Vickers (n 82), 594.

[88] Corts (n 83), 311.

[89] Y. Chen, ‘Paying Customers to Switch’ (1997) 6(4) J Economics Management Strategy 877 893; Armstrong (n 83) 111; Chen (n 60), 442.

low prices to ‘weak’ consumers who have low search costs and shop around. In this setting, strong and weak consumer groups are no longer different across sellers. Rather, all sellers face the same group of strong customers to whom they can charge high prices because search costs prevent them from shopping around. As these consumers are relatively price-insensitive, the rival brands have little incentive to compete for their respective strong customers by lowering prices. As a consequence, price discrimination based on search costs entails a best response symmetry rather than best response *a*symmetry between all sellers.[90] Price discrimination practised under best-response symmetry between competing brands may hence dampen price competition between brands and make consumers worse off compared to uniform pricing. [91]

Economic analysis of competitive price discrimination thus suggests that the impact of brand bidding restraints depends on whether they are driven by preference-based or search-cost-based price discrimination. Our previous discussion of brand bidding restraints as tools to implement price discrimination (in section 2.2) assumed that brand preference and search costs coincide. In this setting, search costs are just a proxy for brand preferences. Brand bidding restraints, by increasing search frictions, thus serve as pointers from which competing brands can infer privately held information about consumers’ brand preferences to orchestrate preference-based (third degree) price discrimination. ‘Strong consumers’ of one brand, remain weak customers of the other. If high value and high search cost consumers are identical, best response asymmetry prevails and brand bidding restraints while restricting *intra*-brand competition may intensify *inter*-brand competition. The opposite situation applies if we relax the assumption that high value customers are also high search cost customers and, instead, suppose that search costs are not correlated with brand preferences. In this situation of best response symmetry, brand bidding restraints restrict not only *intra*-brand competition but also dampen *inter*-brand price competition between brands who face the same category of strong consumers. If brand bidding restraints are used to implement search-cost-based price discrimination, they may have an adverse effect on competition and consumer welfare relative to uniform pricing.

3.4 Raising retailers’ cost in dual distribution settings

A fourth reason why brand bidding restraints may raise competition concerns is that they are often adopted in the context of dual distribution models. In this setting, they may be

[90] Corts (n 83), 315; Armstrong (n 83) 112; Townley, Morrison and Yeung (n 83), 693–694; Chen (n 89), 893–894.
[91] Corts (n 83), 315; Holmes (n 82), 249–250; Chen (n 89).

used by manufacturers to raise rival retailers' costs in order to substantially dampen retail price competition or engage in 'reverse free riding'.

In the context of dual distribution, the hybrid role of brand owners acting both as manufacturers and retailers injects an important horizontal element into the analysis of vertical restraints.[92] As they are vertically integrated into the retail level, brand owners directly compete with their authorized dealers. In the context of dual distribution models, the seminal distinction between vertical and horizontal relationships that importantly guides the legal analysis of agreements under Art. 101 TFEU becomes increasingly blurred.[93] This blurring of vertical and horizontal relationships in dual distribution systems may be the source of important conflicts of interest. On the one hand, brand owners have an interest in stimulating their retailers' investment in promotional efforts to build up and secure their brand reputation. On the other hand, they may have a significant interest in restricting retailers' access to online sales channels lest they cannibalize the profitability of the brand-owned online outlet.

This conflict of interest arising from the horizontal element brought about by dual distribution models calls into question the basic assumption that vertical restraints are less restrictive than horizontal agreements which is usually advanced in support of a more lenient treatment of vertical restraints.[94] Most importantly, the assumption that the manufacturers' interests are largely aligned with that of consumers because both benefit from fierce retail competition and lower retail prices does not necessarily hold in a dual distribution setting.[95] In the context of dual distribution systems, the brand owner's interest in maintaining retail competition is considerably attenuated. The manufacturer benefits from higher retail prices and from a weakening of the competitive pressure of its retail competitors as it can maximize the profits of its own outlet.[96] Dual distribution importantly changes the brand owner's incentive structure because the sales efforts of its distributors impose a direct horizontal negative externality on its sales. Brand owners may hence have an incentive to dampen retail price

[92] Kuhn (n 2), 379.
[93] I. Lianos, 'The Vertical Horizontal Dichotomy in Competition Law: Some Reflections with Regard to Dual Distribution and Private Labels' in A. Ezrachi and U. Bernitz (eds), *Private labels, brands, and competition policy: The changing landscape of retail competition* (Oxford Univ. Press 2009).
[94] Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160 para. 43.
[95] Telser (n 40); Mathewson and Winter (n 41); D. Gilo, 'Private Labels, Dual Distribution and Vertical Restraints: An Analysis of the Competitive Effects' in A. Ezrachi and U. Bernitz (eds), *Private labels, brands, and competition policy: The changing landscape of retail competition* (Oxford Univ. Press 2009) 19.
[96] Gilo (n 95) 19–20; G. T. Gundlach and A. G. Loff, 'Dual Distribution Restraints: Insights from Business Research and Practice' (2013) 58(1) The Antitrust Bulletin 69 86–96.

competition and hinder retailers from cannibalising their own retail sales by rising rivals' cost[97] or reserving the most profitable sales channels to themselves.[98]

Moreover, the presence of dual distribution systems may weaken or even reverse the logic of the free-rider explanation for vertical restraints. In the context of dual distribution models, vertical restraints may even result in some form of a 'reverse free-riding problem'. Such opportunistic behaviour arises when vertical restraints, such as brand bidding restraints, allow the brand owner to take a free ride on the investments of its retailers in their offline sales channel and promotional services. This may be the case when the brand owner uses vertical restraints to reserve the most profitable online sales channel to its own outlet, without offering comparable offline or online sales services.[99] The specific features of dual distribution models thus explain, at least in part, the strict treatment of brand bidding restraints as by-object restrictions in *Asics* and *Guess*.

While dual distribution models attenuate or even mute some of the potentially procompetitive effects of vertical restraints that underpin their more lenient legal treatment, commentators advise against automatically equalising vertical restraints in the context of dual distribution with horizontal agreements. Instead, they point out that the competitive effect of vertical restraints applied in the context of a dual distribution system depends on context-specific factors.[100] The economic literature on franchising, for instance, documents a number of procompetitive reasons why suppliers may want to blend elements of vertical integration and vertical separation in their distribution network.[101] Although the existence of dual distribution systems weakens some of the procompetitive rationales of vertical restraints, they may also provide explanations for the need of vertical restraints to internalize the externalities that potentially competing sales channels impose on each other and to avoid multichannel conflict.[102]

---

[97] Gilo (n 95) 23; Yehezkel (n 70). For the raising rivals' cost analysis T. G. Krattenmaker and S. C. Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price' (1986) 96(3) The Yale Law Journal 209.
[98] Gilo (n 95) 20–26.
[99] B3-137/12 - adidas (n 7) 6.B2-98/11 - Asics (n 1) paras. 42, 84.cs (n 1) paras. 42, 84.
[100] Gilo (n 95) 19-20, 22.
[101] F. Lafontaine and P. J. Kaufmann, 'The evolution of ownersip patterns in franchise systems' (1994) 70(2) Journal of Retailing 97 101–102; F. Lafontaine, 'Franchising versus corporate ownership' (1999) 14(1) Journal of Business Venturing 17 18–22. See also J. A. Brickley and F. H. Dark, 'The choice of organizational form: The case of franchising' (1987) 18(2) Journal of Financial Economics 401.
[102] Lafontaine (n 101), 20–21; Gundlach and Loff (n 96), 96–98.

4 A more effects-based analysis of brand bidding restraints

The preceding sections of this article provide a detailed analysis of the potential pro- and anticompetitive effects of brand bidding restraints. They show that their impact on competition and consumer welfare may be more complex than what the current legal characterization of brand bidding restraints as by-object or hard-core restrictions may suggest. Given their potentially ambiguous effects on competition, a categorical treatment of all types of brand bidding restraints as hardcore or by-object restrictions, envisaged by the Commission's revised VBER and Guidelines on Vertical Restraints,[103] appears to be unwarranted. Instead of subjecting brand bidding restraints to a broad presumption of anticompetitiveness, competition authorities should account for their potentially ambiguous effects by attributing greater weight to the analysis of their actual impact on competition.

This raises the question of how a more effects-based analysis of brand bidding restraints could look like. The CMA's 2017 Digital Comparisons Tools Market Study Paper E provides a number of helpful factors around which a more effects-based analysis of brand bidding restraints could be structured. As a starting point, a more effects-based analysis should account for the market power of brand owners and retailers. No such market power analysis has been carried out in Asics and Guess. This is unfortunate because a market power analysis would provide a first proxy for the significance of any consumer harm and foreclosure effect resulting from brand bidding restraints. The larger the market share of the brand owner, the higher the number of consumer searches affected by brand bidding restraints. Moreover, the larger the market shares of the retailers to which the restraints apply ('restricted advertiser'), the larger is the impact on competitive advertising that consumers would have seen in the absence of the agreement.[104]

The restrictive scope or degree of foreclosure brought about by brand bidding restraints is a second relevant factor for the assessment of their competitive impact. The specific design of brand bidding restraints is essential in this respect. Brand bidding restraints can take three different forms. First, brand owners can impose narrow brand bidding restraints whereby the retailers ('restricted advertisers') commit not to bid on the brand owner's brand name when a

[103] Annex to a Communication from the Commission - Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (n 9) Art. 1 (n) in conjunction with Art. 4 (b) to (d); Annex to the Communication from the Commission - Approval of the content of a draft for a Communication from the Commission - Commission Notice - Guidelines on vertical restraints (n 9) paras. 188 and 192 (f).

[104] Competition and Markets Authority, 'Digital comparison tools market study - Final Report: Paper E: Competitive landscape and effectiveness of competition' (2017) 4.63.

search term entered by consumers only includes that brand name (and not other words).[105] The foreclosure effect and consumer harm caused by narrow brand bidding agreements tend to be limited as they are likely to affect a relatively small number of search queries. This is because narrow brand bidding restraints merely restrict search advertising by retailers in instances where consumers only use the brand name as a keyword. Moreover, narrow brand bidding restraints are likely to affect search queries of consumers who were actually looking for the brand owner's website rather than consumers who are shopping around.[106]

Brand bidding restraints can also take the form of wide brand bidding restraints. Such wide brand bidding restraints prevent the restricted advertisers not only from bidding on the brand owner's brand name when the search query only contains the brand name alone, but also affect search queries which include the brand name and some additional generic non-brand related words (such as 'compare Brand X with Y').[107] Broad brand bidding restraints are, hence, likely to affect a greater number of search queries and are more likely to lead to foreclosure of retailers and consumer harm than narrow brand bidding restraints. Whereas under narrow brand bidding restraints, retailers remain free to bid for search terms that include the brand name together with generic terms, this is not the case for broad brand bidding restraints. Also, broad brand bidding restraints are more likely to affect customers that are shopping around and comparing various sellers rather than merely looking for the brand owner's online store.

Negative matching agreements are arguably the most restrictive type of brand bidding restraints. They go even one step further than broad brand bidding restraints, in so far as the restricted advertisers agree to add the brand owner's name to their list of negative keywords. This automatically prevents their adds from appearing when a consumer search term includes the brand name alone or with other generic terms.[108] Negative matching agreements eliminate any possibility for the restricted advertisers' add to appear when consumers use the brand owner's name as a standalone search term or together with other search terms. Whereas broad brand bidding restraints leave some possibility that the restricted advertiser's ad appears when consumers enter search terms that contain the brand name and other generic words that are not covered by the broad brand bidding agreement, negative matching agreements preclude that possibility as the restricted advertisers' adds are automatically removed from the auction.[109]

[105] ibid 4.47.
[106] ibid para. 4,63.
[107] ibid 4.47.
[108] ibid.
[109] ibid 4.52–4.53, 4.62-4.63 and Figure 4.1.

Negative matching agreement thus make brand bidding restraints "waterproof" and are likely to have the most important impact on search queries. Negative matching agreements are therefore most likely to entail foreclosure and consumer harm.

A third factor for the determination of the competitive harm likely to arise from brand bidding restraints is how they affect traffic, as well as the clicking and search behaviour of consumers. The harm to competition increases with the number of search queries affected by the restraints and the degree to which consumers would have otherwise shopped around and purchased from competing retailers in the absence of the brand bidding restraints.[110] That, in turn, depends on the likelihood of consumers to click on a competing retailer's link (click-through rate) and the probability of consumers clicking on the link to purchase on the website of the retailer (conversion rate). The higher the click-through and conversion rate on retailers' links in the absence of the bidding restraint, the larger the anticompetitive harm. The impact of the brand bidding restraints on the click-through and conversion rates on the brand owner's website is also relevant for the analysis of potential anticompetitive effects.[111]

As part of a counterfactual analysis, competition authorities should also assess consumers' search and clicking behaviour with respect to sponsored and generic search. The analysis should in this respect not only focus on the quantity but also take into account the quality of clicks. A high return rate showing that consumers swiftly return in 30 seconds or less to the search results after having clicked on sponsored links (so-called 'quick back rate') would suggest that brand bidding restraints have little impact on search behaviour as a high ranking in generic search results tends to compensate for sponsored search.[112] In *Asics* and *Guess* the Commission authorities paid little attention to the degree of foreclosure brought about by the brand bidding restraints at issue. They therefore disregarded that brand bidding restraints may often only lead to the partial foreclosure of retailers. While they limit or entirely restrict retailers' ability to place online search advertising, retailers may nonetheless continue to appear in the generic search results and remain free to bid for non-branded keywords such as 'jeans' or 'running shoes'.[113]

A fourth factor for the assessment of the anticompetitive effects of brand bidding restraints is their overall market impact. This market impact is likely to be greater, if they affect

[110] ibid paras. 4.60–4.61; 4.79.
[111] ibid paras. 4.61.
[112] A. Simonov and S. Hill, 'Competitive Advertising on Brand Search: Traffic Stealing, Adverse Selection and Customer Confusion' [2018] Columbia Business School Research Paper No. 18-59, 4.
[113] Leslie (n 2), 13–14.

not only *intra*- but also *inter*-brand competition. This would occur when the restraints are not only constraining the search advertising of mono-brand retailers but also cover multi-brand retailers or price comparison websites.[114] In this case, brand bidding restraints may create information costs that prevent consumers from accessing competing brands on multi-brand retailer or price comparison sites altogether. The impact of online brand bidding restraints is likely to be greatest when other firms also impose similar restraints. Moreover, the foreclosure effect and harm to consumers depends on the importance of online search advertising as a distribution channel relative to brick-and-mortar sales or direct sales via retailer websites. In this respect, it is also relevant to assess whether the brand bidding restraints are part of a broader set of vertical restraints imposed by a brand owner or whether they are standalone restraints.[115] The cumulative effects of multiple restraints imposed by a single brand owner or the use of brand bidding restraints by multiple brand owners may reinforce their anticompetitive impact on *intra*- and *inter*-brand competition.

The analysis of brand-bidding restraints should also consider whether they are likely to entail best response symmetry or asymmetry between different brands. If brand-bidding restraints are used to implement information-cost-based instead of brand-preference-based price discrimination and, thereby, strengthen best response symmetry between brands, they may lead to anticompetitive outcomes irrespective of the market power of the brand owner. [116]

Having a closer look at the type of product for which brand bidding restraints are imposed may also provide competition authorities with a rough idea of whether harm to infra-marginal consumers is likely to outweigh the gains that marginal consumers derive from greater promotional efforts and advertising. For fairly well-established and well-known products, the harm of higher prices for infra-marginal consumers who have little preference for additional promotional efforts may mute the benefits of additional advertising services for marginal consumers. In this case, free riding or externality considerations should carry less weight relative to situations where brand bidding restraints are imposed for new products.[117]

This list of factors may constitute the basis for an effects-oriented analysis of online search advertising restrictions under the reformed EU and UK Vertical Guidelines. Such framework would comprise the analysis of market power of brand owners and retailers, the

[114] Haasbeek, Sviták and Tichem (n 1) 2, 22.
[115] Kuhn (n 2), 380.
[116] M. E. Levine, 'Price Discrimination Without Market Power' (2002) 19(1) Yale Journal on Regulation 1; Townley, Morrison and Yeung (n 83), 698–699; Chen (n 89), 893–894. In the case of best response asymmetry, market power may even increase consumer surplus Thisse and Vives (n 84).
[117] Guidelines on Vertical Restraints (n 39) para. 107 (a).

design of brand bidding restraints (narrow or broad restraints, or negative matching agreements), their coverage, duration and their cumulative effect in combination with other restraints imposed by the brand owner or similar brand bidding restraints adopted by competing suppliers.

The absence of a serious consideration of the competitive effects of brand bidding restraints constitutes a major limitation of the proposed revisions of the EU rules on vertical restraints. In their current state, the Commission's draft of the revised Guidelines on Vertical Restraints omits to lay down a framework for an effects-based analysis of brand bidding restraints. This is all the more surprising as the draft Guidelines provide detailed guidance on the analysis of other online sales restraints, such as restraints on the use of online market places,[118] parity obligations ('MFN clauses')[119] and restrictions on price comparison websites,[120] which the Commission labels as a specific form of online advertising restrictions.[121] Such disparate treatment of online and, notably, online advertising restraints is difficult to square with an effects-based approach and should, therefore, be reconsidered.

Instead of considering the competitive effects of brand bidding restraints, the draft Guidelines seemingly codify the broad presumption – initially coined in *Asics* and *Guess* – that the effects of online advertising restrictions are similar to those of absolute online sales bans. This presumption appears to be limited to online advertising restrictions that 'have as their object to prevent the buyers or their customers from effectively using the internet'.[122] Yet, it remains unclear how much case-specific evidence is necessary to activate the presumption and under which circumstances the presumption can be rebutted by parties to a brand bidding agreement. The draft Guidelines thus fail to clarify whether brand bidding restraints must entail a substantial foreclosure effect or consumer harm to qualify as hardcore restrictions and, conversely, whether such a presumption can be rebutted by case-specific evidence demonstrating that a specific brand bidding restraint is unlikely to result in a material consumer harm or foreclosure of online sales channels.

---

[118] Annex to the Communication from the Commission - Approval of the content of a draft for a Communication from the Commission - Commission Notice - Guidelines on vertical restraints (n 9) paras. 313-322.
[119] ibid paras. 333-353.
[120] ibid paras. 323-332.
[121] ibid paras. 324, 327.
[122] ibid para. 188.Annex to a Communication from the Commission - Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (n 9) recital 13, Art. 1 (n).

The filters discussed above may address this shortcoming. They could inform the design of a (optimally) differentiated[123] better-tailored presumption of illegality against the most harmful forms of brand bidding restraints, while other types of brand-bidding restraints may be exempted or subjected to a case-by-case analysis. These factors may also provide pointers on the type of countervailing evidence that parties to brand-bidding restraints may have to advance to rebut the presumption that brand bidding restraints have a similar effect to absolute online sales bans. The missing guidance on the effects-based analysis of brand bidding restraints and the scope and weight of the presumption of anticompetitiveness affixed to brand bidding restraints in the draft Guidelines on Vertical Restraints is a major omission that needs addressing.

5 Conclusion

This article explores the law and economics of brand bidding restraints which constitute the most novel type of vertical restraints imposed by brand owners on their distributors in digital markets. The article tests and critically reflects on the restrictive approach towards brand bidding restraints European competition watchdogs have adopted in recent cases, policy documents and the proposed reform of the VBER and Vertical Guidelines. So far, brand bidding restraints have been broadly condemned as by-object or hard-core restrictions of competition in breach of Art. 101 (1) TFEU which are unlikely to lead to procompetitive efficiencies cognisable under Art. 103 (3) TFEU.

The article shows that this strict antitrust treatment of brand bidding restraints is not sufficiently grounded in the economic analysis of vertical restraints. On the contrary, the article asserts that brand bidding restraints can have a number of procompetitive rationales. They can be used to internalize free-riding on display and traditional advertising, coordinate different types of advertising and reduce advertising costs.[124] The article also demonstrates that brand bidding restraints constitute a handy tool to orchestrate *intra*-brand price discrimination that may benefit consumers and enable the brand owner to recover fixed costs, for instance, in the form of advertising expenditure.

Second, the article considers different ways through which brand bidding restraints may harm competition and consumer welfare when they disproportionately affect infra-marginal

[123] A. Christiansen and W. Kerber, ‘Competition Policy with Optimally Differentiated Rules Instead of per se Rules vs. Rule of Reason’ (2006) 2(2) Journal of Competition Law and Economics 215.
[124] This has also been recently recognised by some competition authorities Competition and Markets Authority (n 104) paras. 4.64-4.73; Haasbeek, Sviták and Tichem (n 1) 2–3.

consumers, prevent meaningful *intra-* and *inter*-brand comparisons or result in price discrimination on the basis of search costs rather than brand preferences. Moreover, brand bidding restraints are of particular concern when adopted in the context of dual distribution systems where vertically-integrated brand owners have an incentive to raise their retailers' (aka. rivals') costs to prevent them from cannibalising on their own sales channel.

Third, the article argues that a better understanding of the competitive impact of brand bidding restraints on competition and consumers is needed. To this end, the article discusses various legal filters that can be used to analyse the competitive effects of brand bidding restraints. These filters could inform the revision of the VBER and Vertical Guidelines in the EU and in the UK with a view to aligning the assessment of brand bidding restraints with an effects-based approach. Such an effects-based analysis should account for the market share of the parties to a non-brand bidding agreement, the specific design of the brand bidding restriction (narrow, broad brand bidding restriction, or negative matching agreements), as well as their impact on clicking behaviour, traffic and online sales channels. Gaining a better understanding of the actual effects of brand bidding restraints does not necessarily mean that all brand bidding must be subject to a case-by-case analysis. On the contrary, these factors may also form the basis for the design of (optimally) differentiated rules that might create a rebuttable presumption of illegality against the most egregious forms of brand bidding restraints, while other types may be exempted or subjected to a case-by-case analysis.

Yet, even if the revised VBER and Guidelines were to address these points, brand bidding restraints raise some broader questions about the current approach of EU and UK competition law towards vertical restraints. First, brand bidding restraints in the context of dual online distribution add an interesting twist to the ongoing policy debate on how the rise of digital platforms has created new forms of conflicts of interest for vertically integrated gatekeeper platforms.[125] The recent brand bidding restraint cases show that these conflicts of interest stemming from the dual role that vertically integrated upstream firms play as vertical input-providers and horizontal competitors are not limited to large online platforms but also affect interactions between smaller players within vertical value chains. One might wonder how a sufficient degree of consistency between the application of competition law and the proposed

[125] J. Furman and others, 'Unlocking digital competition: Report of the Digital Competition Expert Panel' (2019) 41, 47; J. Crémer, A.-Y. de Montjoye and H. Schweitzer, 'Competition policy for the digital era' (2019) 54, 60-63; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). COM/2020/842 final, recitals 2-6; Art. 3; Competition and Markets Authority (n 1) paras. 2.4, 4.17-4.22.

new platform regulations to these instances of conflicts of interest can be ensured. Relatedly, the brand bidding cases raise questions about when such conflicts of interest stemming from the hybrid role of brand owners in dual distribution systems create a sufficient risk of anticompetitive harm to warrant antitrust intervention in the form of *ex ante* prohibitions (e.g., the treatment of brand bidding restraints as by-object restrictions).

Second, while this article approaches brand bidding restraints from the perspective of welfare economics, one may wonder whether the current restrictive approach towards brand bidding restraints is at all grounded in concerns about consumer welfare. A central concern that permeates *Asics* and *Guess* is that brand bidding restraints undermine the economic liberty and opportunities of smaller retailers to harness the internet as a sales channel.[126] The restrictive approach towards brand bidding restraints thus stands in continuation of the existing EU policy towards vertical restraints which seeks to ensure that retailers remain free to sell their products via the internet and to choose the advertising tools they would like to use for this purpose. The restrictive policy towards brand bidding restraints is hence less concerned about consumer welfare than about the question of how the surplus created by the rise of digital markets is distributed amongst online platforms, large, international brand-owners and their local, small or medium-sized retailers. The critical impact these political economy considerations have on the current policy towards vertical restraints is not a problem in itself, but it should be more clearly articulated in the revised Guidelines and legislation.

Third, even if it is rather informed by political economy than welfare considerations, the strict antitrust treatment of brand bidding restrictions may have some important counterintuitive implications. The use of Art. 101 TFEU to protect retailers' ability to harness the new opportunities of online search advertising and thus to intensify *intra*-brand competition does not only help small and medium-size online dealers. After all, more competition on AdWords means more advertising revenue for Google. Strict antitrust treatment of brand bidding restraints aimed at helping the 'little guy' (here small and medium-size retailers) may also have the unintended consequence of supporting the 'big guy' (here Google). Greater attention should be paid to these unintended consequences and spill-overs in the ongoing policy debate about the reform of competition policy towards vertical online restraints and the regulation of digital platforms.

[126] B2-98/11 - Asics (n 1) paras. 29-30, 41,87, 253-254, 272-273, 307, 312-219, 327-328. Case COMP/AT.40428 Guess (n 1) paras. 120-121, 124-125, 157.