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To be agents or not to be agents, that is the question: The impact of the online platforms revolution on the notion of agency under EU competition law*

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ABSTRACT: In recent years, practitioners, commentators and competition authorities have been facing the question of whether online platforms fit the mould of a typical agent under EU competition law. The stakes are high. If online platforms could be qualified as agents, obligations imposed on them in relation to the contracts concluded and/or negotiated on behalf of their principal(s) might fall outside Article 101 (1) TFEU.

This article wishes to contribute to the debate in two ways. First, it offers an assessment on whether, under existing EU competition law, online platforms can be qualified as agents. Second, it provides a conceptual framework to determine whether the existing rules are fit for purpose.

After a brief overview of the relevant case-law, the article finds that, as a matter of current law, online platforms can fall under the definition of agents. However, existing rules should be updated to reflect the disruptive changes brought by the online platform revolution, since they were conceived at a time when value was created and transferred following the traditional value chain (or pipeline) model: value flew in a linear way from producers to consumers. Yet, companies are nowadays increasingly shifting from the value chain model to a more complex business model, *i.e.* the platform model, which has re-shaped ordinary competitive dynamics. Under the platform model, value is created through a complex array of interactions among producers, principals, consumers and online platforms. The output is a package of products and services. Online platforms compete with each other, with other market players and sometimes even with their principals. In our view, these new challenges are not

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adequately addressed by the EU Guidelines on Vertical Restraints, which should be reviewed accordingly to catch up with the online platform revolution.

KEYWORDS: Vertical restraints; agency agreements; guidelines on vertical restraints; online sales; online platforms.

1. Introduction

Online platforms are under the spotlight of the European Commission ("EC" or "Commission").[1] This comes as no surprise – the benefits of the online platform economy are as many as the challenges it poses.

Competition law is called to a difficult task. The emergence of online platforms has profoundly impacted competition policy and has forced the Commission to consider whether its toolkit is fit for purpose. A number of online platforms are being prosecuted for alleged competition law infringements. Conducts under investigation include data leveraging, geo-blocking and data collection practices.[2] Many more investigations are reported to be imminent. Sector inquiries on online platforms are being launched throughout the world.[3] In parallel, the Commission is stepping up its efforts to tackle so-called "gatekeeping platforms".[4]

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[1] Further information on the Commission's initiatives involving online platforms can be found at https://ec.europa.eu/digital-single-market/en/online-platforms-digital-single-market. The Commission also established an Observatory on the Online Platform Economy. The Observatory monitors and analyses the latest trends and data in the online platform economy and has a dedicated website. Further information can be found at https://ec.europa.eu/digital-single-market/en/eu-observatory-online-platform-economy.

[2] See for instance the ongoing investigations involving Valve (See https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2010#:~:text=The%20Commission%20opened%20formal%20antitrust,publishers%20on%202%20February%202017.&text=A%20Statement%20of%20Objections%20is,violations%20of%20EU%20antitrust%20rules for the press release following the Statements of Objections) and Amazon (See https://ec.europa.eu/commission/presscorner/detail/mt/ip_19_4291 for the press release following the opening of the investigation).

[3] For instance, the CMA published the interim report of its investigation into *Online platforms and digital advertising* (available at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf); the Australian competition authority published the final report of its *Digital Platforms Inquiry* (available at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report).

[4] For a brief description of the initiatives aimed at tackling gatekeeping platforms, see Commissioner Vestager's speech during ASCOLA Annual Conference of 26 June 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en.

This is the natural consequence of the "online platform revolution"[5] or "platformisation" of our economy.[6]

We believe that this fast-paced evolution of competition law enforcement in the digital sphere has led researchers and policy makers to be over-oriented to specific novel issues. This came at the expense of building a robust legal framework for the analysis of vertical agreements involving online platforms. There are very few, albeit meaningful, exceptions.[7]

This article aims at fostering the debate on one particular aspect of the relationship between online platforms and the EU rules on vertical agreements, namely whether online platforms can be considered agents under EU competition law, focusing therefore on online transaction platforms that employ a commission-based business model. For the purposes of this article, transaction platforms are those facilitating online buying and selling between providers and their customers. Under the commission-based business model, platforms charge a commission for each transaction they facilitate. The commission can either be a percentage of the transaction value or a flat fee.

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[5] See Geoffrey G. Parker, Marshall W. Van Alstyne and Sangeet Paul Choudary, *Platform Revolution: How Networked Markets are Transforming the Economy – And How to Make Them Work for You* (New York: W. W. Norton & Company, 2017).

[6] See Josefine Hedeström and Luc Peeperkorn, "Vertical restraints in on-line sales: Comments on some recent developments", *Journal of European Competition Law & Practice* 7, no.1 (2015): 10-23.

[7] See in chronological order Pinar Akman, "Online platforms, agency, and competition law: Mind the Gap", *Fordham International Law Journal* 43, no. 2 (2019): 209-319; Nelson Jung, "European Union – Restrictions of online sales, including geo-blocking and geo-filtering", *Global Competition Review – E-Commerce Competition Enforcement Guide*, 2019, https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/second-edition/article/european-union-restrictions-of-online-sales-including-geo-blocking-and-geo-filtering; Charlotte Breuvart and Yannis Schlüter, "Disrupting the traditional value chain: How online platforms challenge competition rules on vertical restraints and RPM", *Concurrences*, no. 2 (2019); Lars Kjølbye, Alessio Aresu and Sophia Stepanou, "The Commission's e-commerce sector inquiry – Analysis of legal issues and suggested practical approach", *Journal of European Competition Law & Practice* 6, no. 7 (2015): 465; Ioannis Kokkoris, "Expedia and Booking.com: Agent or distributor?", *Competition Policy International*, 2013, https://www.competitionpolicyinternational.com/expedia-and-booking-com-agent-or-distributor/; Matthew Bennet, "Online platforms: Retailers, genuine agents or none of the above?", *Competition Policy International*, 2013, https://www.competitionpolicyinternational.com/online-platforms-retailers-genuine-agents-or-none-of-the-above/.
For a comprehensive assessment of EU competition law rules on vertical agreements, see Frank Wijckmans and Filip Tuytschaever, *Vertical Agreements in EU Competition Law* (Oxford: Oxford University Press, 2018); Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (Oxford: Oxford University Press, 2014); Vito Auricchio, Matteo Padellaro and Paolo Tomassi, *Gli Accordi di Distribuzione Commerciale nel Diritto della Concorrenza* (Padova: CEDAM, 2013).

From a legal perspective, this type of platforms often operates through agency-types contracts – the platform facilitates transactions between (a multitude of) principals and customers in exchange for the commission. The issue of whether these platforms can be qualified as agents under EU competition law is highly intricate. This is because "traditionally, retailers can be either independent or a pure agent of the manufacturer. However, platforms do not fit either of these categories neatly since they have the characteristics of both agents and independent retailers at the same time".[8]

Providing an answer to the issue is of paramount importance to ensure legal certainty when assessing agreements involving online platforms. If online platforms could be considered agents, they would benefit from the more lenient regime provided by the Guidelines on Vertical Restraints ("Guidelines").[9] Yet, the applicable legal framework provides limited guidance. This has been recently highlighted in the Commission staff working document evaluation of the vertical block exemption regulation ("VBER"),[10] which confirms that "the main concern that arises from the evaluation is the fact that the VBER and the Vertical Guidelines are not well adapted to the market developments that took place since the adoption of the rules, notably the growth of online sales and of new market players such as online platforms. Both developments raise issue […] these include […] the assessment of agency agreements […] these issues […] should be taken into account in any next steps following the evaluation".[11]

Market players, practitioners and competition authorities are thus struggling to come to a satisfactory solution to the issue. Three schools of thought are facing each other. Some commentators argue that, normally, online platforms cannot be qualified as agents. This is because online platforms are said to bear significant risks, with particular regard to market specific investments.[12] Other commentators come to the same conclusion through a different avenue. They argue that the Guidelines have unduly foregone the so-called "integration criterion" – given the market power that some online platforms manage to enjoy, they cannot be considered auxiliary

[8] Breuvart and Schlüter, "Disrupting", 4.
[9] See Guidelines on Vertical Restraints, OJ C 130, 19 May 2010.
[10] See SWD(2020) 173 final.
[11] See page 92.
[12] See for instance Hedestrom and Peeperkorn, "Vertical restraints".

to their principals and therefore cannot qualify as agents.[13] Finally, other Authors argue that online platforms can be considered agents under the Guidelines. According to this line of thought, the integration criterion bears no relevance to the assessment and online platforms do not bear significant risks on the market for the contract products or services.[14]

Our view is that, as a matter of current law, online platforms can be qualified as agents. However, the existing rules appear to be formalistic and by now outdated. The upcoming review of the Guidelines and of the VBER is an opportunity not to be missed to revamp the relevant rules. Our assessment is premised on the following pillars:

i. Online platforms are highly differentiated. Each of them has specific features and incentives. The assessment on whether an online platform can qualify as an agent under EU competition law has to be performed on a case-by-case basis.
ii. Under the Guidelines, the so-called "integration criterion" bears no relevance to the assessment. The assessment is exclusively based on the financial or commercial risk born by the agent. In our view, the risk-centered approach embraced by the Guidelines entails that online platforms can be qualified as agents. In our view, most of the times online platforms do not bear the financial or commercial risks that are given relevance by the Guidelines. Arguing otherwise means over-stretching the boundaries of the notion of risk.
iii. We think that the debate on the integration criterion is of limited relevance. While it is true that the Guidelines overlooked case-law of the European Court of Justice ("ECJ" or the "Court"), we doubt that the integration criterion would do the trick.
iv. The test provided by the Guidelines is formalistic and outdated. First, they rely on a number of form-based categories like the one of agency. This is not in line with the evolutionary path of competition law and fails to capture the specificities of online platforms. Furthermore, they are modelled upon a traditional value chain

[13] See for instance Pierre Goffinet and Frédéric Puel, "Vertical relationships: The Impact of the internet on the qualification of agency agreements", *Journal of European Competition Law & Practice* 6, no. 4 (2015): 242.

[14] Pinar Akman, "Online platforms", and "A competition law assessment of platform most-favoured-customer clauses", *Journal of Competition Law & Economics* 12, no. 4 (2016), convincingly argues the same.

> model. The online platforms' business model is much more complicated. The mere fact that the taxonomy of agency agreements has been left unchanged since 1962 should suggest that it is time to recast the relevant rules.

Before diving into the legal assessment, we believe it is helpful to briefly discuss the reasons why online platforms are challenging the tenets of competition law, with particular regard to agency agreements.

The Stigler report refers to the rise of online platforms as "one of the key defining factors of the past decade".[15] The impact of online platforms on competition has been described in many different ways. Well-known officials of the EC included "platformisation" among the most distinguishing evolutionary trends in on-line competition.[16] Books have been written on the "platform revolution".[17]

Online platforms have indeed exercised a disruptive influence on society. This is well portrayed in the Stigler report, according to which online platforms changed the way "we work, study, travel, communicate, shop and even date". In parallel, online platforms play an increasingly important role in economic growth. They foster innovation and help enhance the choice of goods and services, thus contributing to consumer welfare.

From a competition standpoint, online platforms have brought about a new way to create value. In economic terms, value is the "amount buyers are willing to pay for what a firm provides them".[18] Creating value "that exceeds the cost of doing so is the goal of any [business] strategy".

In traditional business management, the set of activities performed by each market operator in order to create value and the interactions between those activities is referred to as "value chain". The father of the value chain theory is Professor Michal Porter, who first addressed the issue in 1985. According to Professor Porter, a value chain is the set of strategically relevant activities performed by a certain market operator to create value. Value chains are made of so-called "value activities", i.e. "the physically and technologically distinct activities a firm performs. These are the building

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[15] See Luigi Zingales and Filippo Maria Lancieri, "Stigler committee on digital platforms: Policy brief", *Stiegler Center for the Study of the Economy and the State (Chicago)*, 2019, 6.

[16] Hedeström and Peeperkorn, "Vertical restraints", 17

[17] See Parker, Van Alstyne and Choudary, *Platform Revolution*.

[18] See for instance Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (New York: NY Free Press, 1985) and David Barnes, *Understanding Business: Processes*, (Brighton: Psychology Press, 2001).

blocks by which a firm creates a product valuable to its buyers". According to Professor Porter, "each value activity employs purchased inputs, human resources (labor and management), and some form of technology to perform its function".

The idea is that productive input is pushed down the supplier's value chain to be processed. By doing so, suppliers create upstream value. Suppliers' output is then pushed further down through the value chain of distributors, and then through the value chain of buyers, all the way down to end customers. The sum of suppliers', distributors' and buyers' value chains is what Professor Porter calls a value system. In such a system, value is created and transferred in a linear way – value flows from the supplier to the customer following a straight line, and each market operator contributes by adding its own portion of value.

Professor Porter's model is the cornerstone of modern business management theories, and rightly so. It captures traditional market dynamics across several industries. The draftsmen of the Guidelines had this standardised, linear value chain model in mind. That is the reason why the Guidelines proved to be time-resistant and managed to cover so many different business models. However, we also believe this is the reason why the Guidelines start showing signs of age when it comes to online platforms. The most distinguishing feature of the platformisation of modern economy is in fact that online platforms do not fit the mould of the traditional value chain (or value system) theories.

Under the traditional value chain model, the end product is the key driver of value. This is not the case in the world of online platforms. The key driver of value is often a package of services resulting from diagonal interactions among entities that exchange value through the platform. It is what Hedeström and Peeperkorn called "service-isation" of our economy.[19] A good example is provided by modern gaming platforms, i.e. online platforms where users can purchase videogames that are sold by publishers/developers and play the game while benefitting from the platform's additional features. These platforms offer gamers an all-encompassing experience made of multi-players mode, instant messaging systems and many more game improvement features. The platform thus becomes the forum where games developers, gamers and service providers meet and exchange

[19] Hedeström and Peeperkorn, "Vertical restraints", 16. According to these Authors, "one characteristic of on-line selling is that it tends to promote a shift from the 'proprietary economy' (where goods change ownership) towards an 'access economy' (where consumers buy access to services)".

value. The end product offered by the platform is not the video-game – it is a complex experience that includes a number of services. The same applies to other economic sectors, such as the sale of hotel rooms.

The immediate consequence of the above is that the traditional value system in which one supplier interacts with its downstream counterparties is being replaced by a new paradigm in which an unprecedented number of suppliers has multiple, simultaneous and mutual relationships with a wide array of entities by means of a single entity, i.e. the online platform.

This phenomenon is well described by Parker, Van Alstyne and Choudary. According to the authors, the traditional business model works as a pipeline – "a pipeline is a business that employs a step-by-step arrangement for creating and transferring value, with producers at one end and consumers at the other". The authors further note that "in recent years […] the simple pipeline arrangement [has been] transformed into a complex relationship in which producers, consumers and the platforms themselves enter into a variable set of relationships. In the world of platforms, different types of users – some of them producers, some of them consumers, and some of them people who may play both roles at various times – connect and conduct interactions with one another". In sum, "rather than flowing in a straight line from producers to consumers, value can be created, changed, exchanged and consumed in a variety of ways and places, all made possible by the connections that the platform facilitates".

From a competition law standpoint, this means that enforcers cannot adopt a standardised approach when assessing competitive dynamics involving online platforms. A case-by-case assessment is required to capture the specificities of the competitively relevant interactions that are going on.

Furthermore, the ubiquitous nature of online platforms acts as a multiplier of the relevant competitive dynamics. Online platforms compete among themselves. They sometimes compete with their partners. They compete with off-line rivals. Meanwhile, partners compete among themselves, can compete with the platform and can multi-home among different platforms. As a result, when dealing with vertical relationships involving online platforms, competition authorities must safeguard not only competition among merchants (or principals), but also among platforms. To borrow from the agency jargon, competition authorities must be in the position to ensure that competition on the price that online platforms charge for their services, i.e. competition on the commission, is protected.

Finally, online platforms can benefit from significant network effects. The high number of interactions facilitated by the platform, coupled with network effects, can cause platforms to grow at a significant pace. It is indeed increasingly frequent that online platforms manage to enlarge to the point that they can behave independently from the entities they intermediate. In competition law terms, this means that online platforms sometimes get to enjoy a higher degree of market power than the entities they put in contact. As a result, online platforms can often determine their conduct on the market in an independent way.

Each of these topics will be factored into the legal assessment below. To do so, we will first provide an overview of the treatment of agency agreements under the Guidelines and the early case-law (Section 2). We will then apply such principles to agency agreements (Section 3). Finally, we will try to suggest a possible way forward in the context of the upcoming review of the Guidelines (Section 4).

2. Agency Agreements Under EU competition law

2.1. Agency agreements under the Guidelines. The 'risk criterion'

Part II of the Guidelines sets out the principles applicable to vertical agreements which "generally fall outside the scope of Article 101(1) TFEU", namely *de minimis* agreements, agency agreements and subcontracting agreements. Agency agreements are addressed under section 2, paragraphs 12-21. Paragraphs 12-14 set out the two "constituent elements"[20] of the EU competition law notion of agent.

First, an intermediary can be qualified as an agent if it is vested with the power to negotiate and/or conclude contracts on behalf of the principal, either in the agent's own name or in the name of the principal, for the purchase or sale of goods or services by or from the principal.[21]

Second, the "determining factor" in defining an agency agreement is the "financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal". It is not material for the assessment "whether the agent acts for one or several

[20] Expression used by Wijckmans and Tuytschaever, "Vertical agreements", 299.

[21] Guidelines, paragraph 12.

principals".[22] In so doing, the Guidelines anchor the notion of agent to the one of "financial or commercial risk".

The impact of a pure risk-based assessment for the purposes of this article will be discussed in Section 3 – at this stage, it suffices to emphasise that the Guidelines leave no room for doubts. The key factor is the (degree of) financial or commercial risk borne by the agent. This the so-called "integration criterion" leaves out of the picture. According to the integration criterion, an agent can be considered as such if it is integrated within its principal's business organisation. Until the Nineties, the risk criterion and the integration criterion complemented each other. However, the 2000 vertical guidelines made a U-turn and deprived the integration criterion of any relevance. Yet, as discussed in Section 1, some of the commentators argue that the integration criterion should be factored into the assessment to cope with the platformisation of competition law.

There are three types of financial or commercial risks that are "material to the definition of an agency agreement" under the Guidelines. First, there are "contract-specific risks". These are risks "directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal". Second, there are "market-specific investments". These are investments "specifically required for the type of activity for which the agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract". These investments are usually sunk. Third, there are "risks related to other activities undertaken by the agent on the same product market", such as after-sale services, to the extent such activities are requested by the principal.[23]

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[22] Guidelines, paragraph 13.

Angela Huyue Zhang, "Toward an economic approach to agency agreements", *King's College London Legal Studies Research Paper Series*, no. 2013-5, 5 argued that "the prevailing approach adopted […] in the EU for dealing with the issue of 'genuine' agency is ill-focused". According to Zhang, "the real question to ask is not whether the agent has incurred any specific cost or risk, but rather whether agency, rather than distribution, is a more efficient form to organize distribution functions between the contracting parties". This Author draws upon Judge Posner's opinion in the US *Morrison* case, i.e. Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986). This was a typical RPM case – the parties argued that their relationship was one of agency and therefore price fixing obligations fell outside the scope of application of antitrust rules. Judge Posner considered that the key issue was to determine whether the establishment of an agency agreement was conceived to circumvent the rule against price fixing or whether this was motivated by efficiency reasons in setting up a distribution system. In that case, given that there was no evidence of the circumvention rationale, the agreement was found not to constitute unlawful RPM.

[23] Guidelines, paragraph 14.

According to the Guidelines, an agent can be qualified as such under EU competition law if it does not bear any of these risks, or only bears insignificant risks, in relation to the contracts concluded and/or negotiated on behalf of the principal. On the other hand, the risks related to the provision of agency services are not material to the assessment.[24] This is key for the purposes of this article – it is necessary to distinguish between the market for the contract products or services and the one for agency services. On the market for agency services, the agent acts as an ordinary undertaking – it offers its agency services in exchange for the commission and competes with other agents. Competition among agents is usually driven by the level of commission and by the quality of the agency services provided. The risks incurred by the agent to become more competitive on the market for agency services are not material to the assessment. The opposite is true when it comes to the market for the contract products or services – on such market, the agent acts as an extension of its principal(s). Its task is to place the principal's products or services on the market. The risks borne by the agent to do so are material to the assessment. If the intermediary bears the risks arising from the sale of the contract products or services, it becomes a distinct competitive entity on the market and falls outside the notion of agent.

The Guidelines further clarify that an agreement will normally be considered an agency agreement when the property in the contract goods bought or sold by the agent does not vest in the agent, or where the agent *(i)* does not contribute to the costs relating to the supply/purchase of the contract goods or services, including transport costs, *(ii)* does not maintain at its own cost or risk stocks of the contract goods and can return unsold goods to the principal without charge, *(iii)* does not undertake responsibility towards third parties for damage caused by the product sold, *(iv)* does not take responsibility for customers' non-performance of the contract,[25] *(v)* is not obliged to invest in sales promotion, *(vi)* does not make market-specific investments in equipment, premises or training of personnel, and/or *(vii)* does not undertake other activities within the same product market required by the principal.[26]

[24] Guidelines, paragraph 15.

[25] Goffinet and Puel, "Impact of the internet", 244 consider that this is true "with the exception of the loss of the agent's commission, unless the agent is liable for fault […] for example, if an agent in the travel sector bears the risk of losing its commission in case of cancellation of a booking, the contract will still be considered as an agency agreement under EU competition law".

[26] Guidelines, paragraph 16.

If an agreement amounts to one of agency, all the obligations "imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101 (1) TFEU".[27] In particular, *(i)* limitations on the territory in which the agent may sell goods or services; *(ii)* limitations on the customers to whom the agent may sell these goods or services and *(iii)* the prices and conditions at which the agent must sell or purchase these goods or services are considered to form part of the agency agreement and thus fall outside the scope of Article 101(1) TFEU.

The rationale underpinning this favourable treatment is that "the selling or purchasing function of the agent forms part of the principal's activities" – the obligations imposed by the principal on the agent are "essential [because] the principal is [taking] the risks and therefore [it must be] in a position to determine the commercial strategy".[28] As Jones and Sufrin put it, "the close economic links existing in the agency relationship may mean that an agent is so closely interrelated with its principal that, as with the relationship between a parent and a subsidiary, the agent forms an integral part of the principal's business and the relationship is characterized by economic unity".[29] Odudu and Bailey rightly point out that "the agent acts as the behest of the principal and is incapable of competing with its principal". According to the Authors, "the absence of risk shows that the agent has no presence on the market that is independent from the principal".[30]

On the other hand, the agent is "a separate undertaking from the principal" on the market for agency services, *i.e.* it does not "form part of the principal's activities".[31] This is because on the market for agency services there is no "close economic link" between the principal and its agent – the agent is a separate entity that engages in competitively relevant interactions with the principal and with other agents. It follows that the obligations imposed on the agent (or on the principal) outside the context of the contracts concluded and/or negotiated on behalf of the principal, such as exclusive agency or single branding provisions, must be assessed under Article 101 TFEU.[32]

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[27] Guidelines, paragraph 18.

[28] Guidelines, paragraph 18.

[29] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2011), 634.

[30] Okeoghene Odudu and David Bailey, "The single economic entity doctrine", *Common Market Law Review* 51, no. 6 (2014): 1735.

[31] Guidelines, paragraph 19.

[32] Guidelines, paragraph 20.

2.2. Agency agreements and EU competition law – the most relevant cases

Having clarified the status of the art on agency agreements, we now provide a brief summary of the relevant precedents of the Commission and the ECJ on agency agreements.

We do so with particular emphasis on the criteria employed by the Commission and the ECJ in the context of the assessment. This will help a better understanding of the debate on the so-called integration criterion.

The Commission issued its first notice on agency agreements in 1962. At the time the notice was issued, the 1962 enforcement regulation[33] had just entered into force and the first Commission decision on a competition case had not been published yet.[34] However, surprisingly enough, the 1962 notice set a number of principles that have remained unaltered to the present day. For instance, the definition of agents included in the 1962 notice is basically the same adopted by the Guidelines, with minor lexical variations.[35] Furthermore, the 1962 notice already considered the risk-allocation criterion as the key factor to distinguish between agents and independent intermediaries.[36] The risks material to the assessment were similar as well – the 1962 notice gave relevance to what the Guidelines would call "contract-specific investments" and "market-specific investments". Finally, if a certain agreement qualified as an agency agreement under the notice, it was considered not to "fall under the prohibition in Article 85(1) of the Treaty".

The judgements rendered by the ECJ on the basis of the 1962 notice have significant commonalities. While the 1962 notice – just like the Guidelines – embraced an early risk-centred assessment, the ECJ adopted a functional

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[33] See Council Regulation 17/62/EEC, *First Regulation implementing Articles 85 and 86 of the Treaty*, OJ 013, 21/02/1962, pp. 0204-0211.

[34] See decision 64/233/CEE, *Décision de la Commission, du 11 mars 1964, relative à une demande d'attestation négative présentée conformément à l'article 2 du règlement nº 17 du Conseil* (IV/A-00061 - Grosfillex-Fillistorf), OJ 58, 9.4.1964, pp. 915-916. For an analysis of the early Commission practice, see the review by Martin Carree, Andrea Guesnter, and Martin P. Schinkel, "European antitrust policy 1957-2004: An analysis of Commission decisions", *Review of Industrial Organization* 36, no. 2 (2010): 97-131.

[35] See page 1 of the notice.

[36] Under the 1962 notice, the "decisive criterion" to differentiate between the two was the "responsibility for the financial risk bound up with the sale or with the performance of the contract". The "decisive criterion" has later become the "determining factor" foreseen by the Guidelines, whereas the "financial risk bound up" with the performance of the tasks assigned by the principal has become the "financial or commercial risk" born "in relation to the activities for which it has been appointed as an agent". Yet, the conceptual framework is unchanged.

approach. The focus of the ECJ was on the relationship between the principal and its agent(s) – if the agent performed an auxiliary function compared to the principal and was integrated within the principal's undertaking, an agency relationship was deemed to arise regardless of a full-fledged risk assessment. The ECJ thus gave birth to the so-called "integration criterion".

The first relevant judgement is the notorious *Consten-Gruding.*[37] The ECJ rejected Grundig's argument according to which the 1962 notice had to apply seamlessly to independent distributors and agents because they both play the same economic role in the market (i.e. in both cases there is one offeror on the market, either the distributor or the agent). The Court rather held that "two marketing organizations, one of which is integrated into the manufacturer's undertaking whilst the other is not, may not necessarily have the same efficiency. The wording of Article 85 causes the prohibition to apply […] to an agreement between several undertakings. Thus it does not apply where a sole undertaking integrates its sole distribution network into its business organization".[38] No mention of risk. It was just a matter of integration.

The EC then referred to the rationale of *Consten-Gruding* in *Pittsburgh Corning.*[39] The Commission dismissed the parties' claim that the 1962 note on agency agreements had to be applied because the alleged agent was not "economically dependent" from Pittsburgh Corning Europe. In this respect, the Commission considered that the alleged agent's revenues mainly came from the sale of its own products rather than from its activity as an (alleged) agent. Furthermore, the alleged agent was part of a large multinational group and had the economic strength and independence necessary to behave independently from its alleged principal. Therefore, the Commission concluded that the alleged agent did not perform the auxiliary function referred to by the 1962 notice and the *Grundig-Consten* case. No mention of the risk criterion. This is all the more surprising because, had it applied a pure risk-based criterion, the Commission would

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[37] Judgement of 13 July 1966, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. *Commission of the European Economic Community*, C-56/64, ECLI:EU:C:1966:41. For an early commentary on the judgement, See Lawrence F. Ebb, "The Grundig-Consten case revisited: Judicial harmonization of national law and treaty law in the common market", *University of Pennsylvania Law Review* 115, no. 6 (1967): 855-889.

[38] Judgement of 13 July 1966, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. *Commission of the European Economic Community*, C-56/64, ECLI:EU:C:1966:41, p.340.

[39] See the decision of 23 November 1972, *Pittsburgh Corning Europe*, OJ 1972 L 272, p.35.

have arguably concluded that the agreement was one of agency, as the alleged agent did not bear any financial or commercial risk.

The following evolutionary step was *Suiker Unie*.[40] The ECJ considered that "if the agreements entered into between the principal and his agents […] confer upon these agents or allow them to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the said agents accepting the financial risks of the sale or of the performance of contracts entered into with third parties […] the agents cannot be regarded as auxiliary organs forming an integral part of the principal's undertaking".

The risk allocation criterion thus made its debut in the case law of the ECJ. However, when the ECJ unravelled its reasoning, it actually referred to the *Pittsburgh Corning* rationale: "the agents in question are large business houses, which at the same time as they distribute sugar for the account of the applicant […] undertake a very considerable amount of business for their own account on the sugar market".[41] As Lianos put it, "the Court reaffirmed the importance of the criterion of the allocation of risks as an element distinguishing the situation of a commercial agent from that of an independent trader, but avoided examining the allocation of risks between the parties. It focused instead on the economic function of the representatives and concluded that the agreements were not genuine commercial agencies and could infringe Article [101 (1)]".[42]

The integration criterion had its peak with *Flemish agents*.[43] The Court stated that "a travel agent of the kind referred to by the national court must be regarded as an independent agent wo provides services on an entirely independent basis. He sells travel organized by a large number of different tour operators and a tour operator sells travel through a very large number

[40] Judgement of 16 December 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission of the European Communities*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECLI:EU:C:1975:174.

[41] Judgement of 16 December 1975, *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission of the European Communities*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECLI:EU:C:1975:174, paragraph 544.

[42] Ioannis Lianos, "Commercial Agency Agreements, vertical restraints, and the limits of article 81(1) EC: Between hierarchies and networks", *Journal of Competition Law and Economics* 3, no. 4 (2007).

[43] Judgement of 1 October 1987, *VZW Vereniging van Vlaamse Reisbureaus v. VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, case C-311/85, ECLI:EU:C:1987:41.

of agents […] a travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator's undertaking".

The integration criterion at its best – given that travel agents simultaneously offer their services to multiple principals, they are not integrated into their principals' businesses. Therefore, they cannot be qualified as agents.

The importance of the integration criterion in the early case law is confirmed by the draft 1990 notice of the EC on commercial agency agreements. While the draft was never adopted, it provides helpful insights for the purposes of this article. The Commission considered the integration criterion as a viable one. An intermediary qualified as an independent trader "unless activity on his own behalf is ancillary to activity on behalf of his principal". An intermediary was qualified as an agent insofar as it did not "take over most of the typical functions of the principal", like "where the commercial agent determines the principal's product and marketing strategy in respect of the product distributed under the agency agreement, thereby relegating the principal to the position of a subcontractor". The integration test was considered to be met not only when "the agent has a particularly intensive link with the principal which […] leads customers or suppliers with whom the agent deals not to expect autonomous commercial behavior from the agent but to identify him with the principal", but also when the agent's interests outside the agency relationship were limited and did not interfere with the subject matter of the agency agreement (*i.e.* where they did not conflict with the duty of loyalty of the agent under the agreement, for instance carrying competing product ranges).

The mid-nineties represent a major shift in the approach towards the assessment of agency agreements. From 1995 to 2006, the Commission and the ECJ gradually abandoned the integration criterion to embrace the risk-centred approach.

In 1995, the ECJ rendered its preliminary ruling in *Volkswagen*.[44] The ECJ considered that "representatives can lose their character as independent traders if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking". In the case at stake, "the […] dealers assume, at least in part, the financial risks linked to the transactions concluded on behalf of VAG Leasing, in so far

[44] Judgement of 24 October 1995, *Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*, C-266/93, ECLI:EU:C:1995:345.

as they repurchase the vehicles from it upon the expiry of the leasing contracts. Furthermore, their principal business of sales and after-sales services is carried on, largely independently, in their own name and for their own account". In sum, "no reference was made to the possible economic dependence of the dealers towards Volkswagen or to the fact that the dealers worked exclusively for Volkswagen and not for other car suppliers. The Court instead focused on the criterion of financial risks".[45]

In 2000, the Commission finally issued its revised vertical guidelines.[46] The impact of the 2000 guidelines on the assessment of agency agreements was quite significant – for instance, the 2000 guidelines introduced the notion of genuine agent. For the purposes of this article, suffice it to say that the 2000 guidelines clarified that "it is not material for the assessment whether the agent acts for one or several principals". The integration criterion had officially been dropped. As Goffinet and Puel put it, the integration criterion "was not consistent with the pro-competitive objective of making it possible for agents to work for several principals (ie fostering inter-brand competition or competition between brands/products of different suppliers). Therefore, as a matter of policy, the Commission gave [it] up".[47]

The first relevant judgement after the 2000 guidelines is *Daimler Chrysler*.[48] Daimler Chrysler argued before the EC that its dealers could be qualified as genuine agents. The Commission sharply rejected the argument because "the criterion of integration is, unlike risk allocation, not a separate criterion for distinguishing a commercial agent from a dealer". Interestingly enough, the footnote accompanying this statement refers to paragraph 19 of *Volkswagen*, which in turn referred to paragraph 539 of *Suiker Unie* – and that, despite the fact that both those judgements came to a different conclusion on the integration criterion! The Commission also argued that (i) *Volkswagen* had to be interpreted as meaning that the ECJ no longer treated the criterion of "integration" as being a separate concept from that of risk sharing and (ii) *Suiker Unie* confirmed the trend as the ECJ held that an agent could be treated as being "integrated" in the undertaking of his principal if he did bear certain risks. The Commission also

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[45] Lianos, "Commercial Agency", 11.

[46] See Guidelines on Vertical Restraints (2000/C 291/01).

[47] Goffinet and Puel, "Impact of the internet", 246.

[48] Judgement of 15 September 2005, *DaimlerChrysler AG v. Commission of the European Communities*, T-325/01, ECLI:EU:T:2005:322.

curtly considered that "the judgment of the Court of Justice in [Flemish Agents] bears no relevance to the resolution of these proceedings, as the facts which arose in that case differ from those which arise in the present dispute".

The General Court ("GC") put significant emphasis on the analysis of risks. More specifically, the GC considered *inter alia* that the agent had "no authority with regard to the price of the vehicle" and that it did not bear material, financial or commercial risks, including the ones related to transport of vehicles. Therefore, the ECJ concluded that those entities had to be considered agents: "the commercial freedom of a German agent in relation to the sale of Mercedes-Benz vehicles is extremely limited, so that he is not in the position to influence competition on the market in question […] it is clear […] that […] it is Mercedes-Benz, and not its German agents, which determines the conditions applying to all car sales, in particular the sale price, and which bears the principal risks".

The issue was not settled yet. The ECJ would intervene again in the Spanish cases dealing with commercial agency agreements concluded between service-station operators and oil companies in Spain. It is what has been called "the Repsol Saga".[49]

In 2006, the ECJ delivered its judgement in *CEPSA*.[50] According to the Court, "when an intermediary […] while having separate legal personality, does not independently determine his conduct on the market since he depends entirely on his principal […] because the latter assumes the financial and commercial risks as regards the economic activity concerned, the prohibition laid down in Article [101 TFEU] is not applicable to the relationship between that intermediary and the principal". Therefore, the "decisive factor" for the purposes of determining whether a service-station operator is an independent economic operator is to be found in the assumption of the financial and commercial risks linked to sales of goods to third parties. The ECJ also set out the criteria enabling an assessment to be made as to the actual allocation of the financial and commercial risks. The assessment should take account, "first, of the risks linked to the sale of the goods […] and, second, of the risks linked to investments specific to the market". Interestingly enough, AG Kokott considered in a footnote

[49] Pablo Ibanez Colomo, "The 'Repsol saga': Background note on 'genuine' agency agreements in Spanish competition law", *e-Competitions* I, no. 503 (2016).

[50] Judgement of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, ECLI:EU:C:2006:784.

of her opinion that "the judgement in Volkswagen and VAG Leasing […] should not be understood as meaning that whether the agent is assimilated into his principal's undertaking and whether the principal bears the risk of the transactions are two different, independent criteria […] in the market for the sale of the principal's goods, the agent's assimilation into the principal's undertaking and the principal's bearing of the transactional risks are two sides of the same coin". We respectfully disagree – the wording of the judgements makes it clear that the two criteria were considered cumulative. In any case, as discussed under Section 4.1, the issue is not material for the purposes of this article.

More recently, the GC dealt with agency agreements in *Voestalpine*.[51] The agency issue arose because one of the agents that took part in the allegedly anti-competitive meetings did so for more than one principal. However, the GC stated that "the double representation […] cannot upset the finding that, so far as the activities entrusted […] were concerned, [the agent] was not in a position to carry out duties economically comparable with those of an independent trader". The GC also considered that "in order to determine the existence of an economic unit between the agent and one of his principals, it is necessary to ascertain whether that agent is in a position, as regards the activities entrusted to him by that principal, to act as an independent trader free to determine his own business strategy. If the agent is not in a position to act in that way, the function which he carries out on behalf of the principal form an integral part of the latter's activities".

In recent years, the issue of whether online platforms can be considered agents has been brought to the attention of several competition authorities. In some instances, the authorities (whether or not consciously…) moved the focus of the case to other issues. This was the case in the *E-book* before the Commission.[52] The Commission focused on the alleged horizontal cooperation between the parties rather than facing the agency issue before closing the case with commitments. The second precedent worth mentioning is the German *Hotel booking* case.[53] A number of national competition

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[51] Judgement of 15 July 2015, *Voestalpine AG and Voestalpine Wire Rod Austria GmbH v. European Commission*, T-418/10, ECLI:EU:T:2015:516.

[52] Case COMP/AT.39847 E-Books of 12 December 2012.

[53] Bundeskartellamt, Decision of 20 December 2013, HRS-Hotel Reservation Service, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D33.

authorities started investigations concerning online sales of hotel bookings. The key issue was whether price parity clauses requiring hotels to offer the same or a better room price on Booking.com's platform as they offered on their other sales channels were compliant with EU competition law. The French, Italian, Swedish and German competition authorities started parallel investigations under the oversight of the Commission. The German case went further. The Bundeskartellamt considered that HRS cannot qualify as a genuine agent and adopted a prohibition decision against the German OTA Hotel Reservation Service ("HRS"). The Regional Court of Düsseldorf subsequently confirmed the HSR decision on appeal.[54]

3. To be agents or not to be agents, this is the question

In light of the principles described under Section 2, we now turn to the question that lies at the heart of this article – can online platforms be qualified as agents under EU competition law?

The answer depends on whether online platforms meet the constituent elements described under Section 2, i.e. whether they fall under the notion of agents and bear the risks that are given relevance by the Guidelines.

3.1. The notion of agent

We believe that online platforms can fall under the notion of agents adopted by the Guidelines. As discussed in Section 2, according to the Guidelines agents are (i) legal or physical persons that are (ii) vested with the power to negotiate and/or conclude contracts on behalf of the principal, either in the agent's own name or in the name of the principal, (iii) for the sale or purchase of goods or services by or from the principal.

It goes without saying that online platforms can be legal persons. Moreover, online platforms can be granted the power to negotiate and/or conclude contracts on behalf of their principal(s).

To take a famous example, under Booking.com's terms and conditions, the company provides an online platform "through which [providers of accommodation services] can advertise, market, sell, promote and/or offer […] their products and services […] visitors of the platform can discover,

[54] See Oberlandesgerichts Düsseldorf, "HRS-Hotelbuchungsportal: ' Bestpreisklauseln' kartellrechtswidrig und damit unzulässig".

search, compare and make an order, reservation, purchase or payment".[55] By making a reservation on Booking.com, users enter into an agreement with providers of the accommodation service (*i.e.* not *with* the platform, but *through* the platform – ubiquitous relationships!). Borrowing from the Guidelines, Booking.com is granted the power to negotiate contracts on behalf of its (thousands of) principals.

The first step is met.

3.2. Risks material to the assessment

As discussed under Section 2, the Guidelines give relevance to three types of financial or commercial risks. Contract-specific risks and market-specific assessments will be assessed below. The issue of risks related "to other activities undertaken by the agent on the same product market" is not of immediate relevance to this article – we believe it is unlikely that principals would require online platforms to invest in after-sales services as they are usually provided by the principals themselves.

(a) Contract-specific risks

Contract-specific risks are risks "directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal". In practice, this means that these risks arise directly from the contractual relationships that the agent seeks to build on behalf of its principal.

A typical example of contract-specific risk is the inventory risk, *i.e.* the chance that the agent will not manage to sell the contract product and shall keep it in stock. This would in turn decrease the contract product's value and/or increase the agent's costs to keep its stock. Overcoming contract-specific risks normally does not help the agent to conclude other contracts. For instance, overcoming the inventory risk through the sale of the contract products will allow the agent to free up capacity to sell other products, but will not make the agent more attractive in the context of future negotiations for the same products.

To take a famous example, the Bundeskartellamt considered that, in the hotel accommodation sector, contract-specific investments are those arising from a single contractual relationship with a certain hotel company that cannot be used for the distribution of accommodation services of other hotel companies.

[55] https://www.booking.com/content/terms.en-gb.html.

In our view, contract-specific risks in the realm of online platforms tend to be limited or non-existent. First, online platforms rarely bear inventory risks and the related costs. As discussed under Section 1, more and more often the end product that is placed on the market is an intangible package of services. Therefore, financing of contract-specific stocks is often not required. Second, online platforms often rely on secured payment methods. Therefore, they rarely bear the risk of unsuccessful payment. Third, even when such risks exist, they entail negligible costs. An example could be the cost borne by an online platform to advertise one specific product. As will be discussed in detail below, most of the expenditure of online platforms aims at improving the platform itself. Once the platform is up and running, the cost of advertising one specific product is so limited that it likely amounts to a "non-significant risk" under the Guidelines.[56]

This has been confirmed by the Bundeskartellamt in the HRS decision. As discussed under Section 2, the authority ultimately considered that HRS cannot be considered an agent for competition law purposes. However, it still acknowledged that "the contract-specific investments of the relevant hotel portal, i.e., the investments that arise only on the basis of the contractual relationship with a certain hotel company and cannot be used for the distribution of accommodation services of other hotel companies, such as investments in photos and text processing, are relatively low".[57]

We agree with this proposition. As discussed below, an online booking platform arguably invests much more money in making sure that users find its interface appealing and the platform is adequately sponsored rather than in sponsoring one single hotel. To advocate the opposite is to disregard the functioning of an online platform. As discussed under Section 1, online platforms aim at stimulating as many interactions as they can. Investing in a single transaction, e.g. in selling a single hotel room, is at odds with the ordinary functioning of online platforms.

[56] As discussed under Section 2, the Guidelines do not clarify what is meant by "significant". This creates a relevant loophole in the assessment envisaged by the Guidelines. For an example of how the significance of risks can influence the assessment, see the French *Mango* case, Case 09-D-23 of 30 June 2009. Further guidance on this point as a result of the review of the Guidelines would be welcome.

[57] Decision B 9-121/13, page 83.

(b) Market-specific investments

The second prong of the risk test is more controversial. Do online platforms bear (material) market-specific investments? This is the subject of heated discussion among commentators, who focused mainly on the role played by advertising expenditure. Before diving into the issue, it is helpful to remind that market-specific investments under the Guidelines are those specifically required for the type of activity for which the agent has been appointed by the principal. These investments are usually sunk. For instance, an intermediary would be found to bear market-specific investments if it was forced by the principal to purchase demonstration products (e.g. demonstration vehicles for a car dealer). These would be sunk costs required to perform the kind of activity for which the intermediary has been appointed (e.g. selling cars).

The Staff Working Document accompanying the Report from the Commission on the E-commerce Sector Inquiry ("SWD") is a good starting point for the analysis.[58] The Commission considered under paragraph 321 that "the online retail investments costs that are most referred to are the costs of promoting the website, including search engine optimization, platform commissions and online advertising, the costs (including human resources and software) of creating and maintaining the website, costs of maintaining a full online (interactive) catalogue on all websites, for all language versions, the costs of a call centre". While the list is not necessarily exhaustive and the concept of "costs" is not exactly the same as "investments", paragraph 321 helps framing the analysis – all the cost items listed under paragraph 321 amount to market-specific investments under the Guidelines.

First, the Commission gives relevance to the costs "(including human resources […]) of creating and maintaining the website […] the costs of a call-centre". The cost of the human factor under the SWD echoes the Guidelines' "investments in […] training of personnel". While it is true that online platforms carry the cost of their workforce, in our view such cost does not amount to a market-specific investment under the Guidelines. As the Commission itself considers in the SWD, investments in the workforce are aimed at "creating and maintaining the website" – the bulk of workforce investments does not go into hiring and training personnel with an

[58] See Commission Staff Working Document Accompanying the document Report from the Commission to the Council and the European Parliament – Final Report on the E-commerce Sector Inquiry COM (2017) 229 final.

expertise in providing the underlying service. Roughly speaking, Booking.com does not need to hire personnel that can sell hotel rooms. Its personnel must be versed in creating and maintaining the platform.[59]

Second, the Commission refers to the costs of "search engine optimization […] maintaining a full online (interactive) catalogue on all websites, for all language versions". These costs lie at the heart of the functioning of an online platform. Maintaining an updated, well-functioning and appealing platform is the key to attract users on both sides of the platform and to keep the platform value system working. Investing in the functioning and appeal of the platform is to online platforms as investing in the premises is to brick and mortar retailers.

The fact that online platforms spend a lot of money to maintain and update the platform is beyond doubt. The EU Industrial R&D Investment Scoreboard is a good proxy.[60] According to the report, Amazon, i.e., an online platform, would likely be the company with the highest expenditure in R&D in 2018/2019. However, the Commission lacked hard data to support this view.[61] Not a big deal for the purposes of this article – the first place in the report is still occupied by an online platform. Over the last 15 years, 8 companies have moved up in the global ranking by 70 or more places – 5 of these 8 companies operate online platforms (the other 3 being active in the pharmaceutical sector). In general, R&D expenditure is dominated by companies active in the ICT sector – the only other sectors that can compete in terms of expenditure are pharmaceutical and automotive. This suggests that online platforms tend to spend considerable amounts of money in their own infrastructures.

The relevance of market-specific investments to online platforms has been confirmed by the Bundeskartellamt in *Booking*. According to the authority, Booking's "advertising investments, for instance in the form of buying advertising space, of paying for a high ranking on Google or other metasearch engines or by pay-per-click payments […] to the metasearch engines are extremely high […] only its pay-per-click expenses for Google and other metasearch engines in Germany constitute between [30 and 60%] of its German commission sales from bookings that result from PPC advertising for Google and other metasearch engines […] to the extent that

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[59] See also Akman, "Online platforms", 250.

[60] The 2019 edition of the EU Industrial R&D Investment Scoreboard is available at https://iri.jrc.ec.europa.eu/scoreboard/2019-eu-industrial-rd-investment-scoreboard.

[61] See page 6 of the report.

Booking, by contrast, makes such general, non-contract specific investments, they serve in particular to improve its image and increase its popularity as such. Consequently, these investments are not lost for Booking".[62]

Where does it leave us? Does it mean that online platforms bear significant market-specific investments, thus losing their qualification as online agents? We do not think this is the case. R&D/maintenance expenditure and similar cost items do *not* amount to a market-specific investment. These are rather *platform-specific investments*. Investing in an online platform's mechanics does not mean investing in the specific "type of activity for which the agent has been appointed by the principal". Keeping an algorithm up and running is not equal to investing in the sale of hotel rooms or videogames.[63] These investments are necessary in an online environment regardless of the underlying service – as discussed under Section 1, online platforms work well insofar as they manage to attract users and to offer a comprehensive experience, thanks to which users can interact with each other and create value.

The idea that these are market-specific investments is premised on the misconception that online platforms create value as a result of a pipeline value-chain model, where R&D/maintenance expenditure is factored into the value chain, applied to the input and pushed down the chain until the end product is created. This is not how online platforms work – online platforms proliferate insofar as they manage to facilitate a multitude of interactions between their users. R&D/maintenance expenditure is not what allows the online platform to place a product or a service on the market. It is what allows the online platform to enable those interactions. To borrow from the Guidelines, R&D/maintenance expenditure is what makes the platform more competitive in the market for agency services by investing in an infrastructure. Thanks to R&D/maintenance expenditure, an online platform increases its chances to be picked as an agent by the principal and/or to intermediate transactions with final customers.

As discussed, often the end product of an online platform is not a good, but a package of services incorporating a good and a service provided by the platform. R&D/maintenance is what allows the online platform to add the service bit of the package on top of the good/service provided by the principal. The example of gaming platforms comes in handy again. These

[62] Decision B 9-121/13, page 84.

[63] See Akman, "Online platforms".

platforms do not merely allow end users to purchase video games. They offer a comprehensive gaming experience made of playing a video game, interacting with other users through a webchat and improving the gaming experience through in-game purchases. These other services are the platform's added value. These investments are not aimed at selling videogames. They are aimed at selling *the platform* to both users and video game developers.

Finally, the Commission considers that online platforms carry "online advertising" costs. This is the heart of the issue. The very definition of online platforms as agents depends on how to allocate online advertising costs – are these market-specific investments or are these *platform-specific investments*?

It has been argued that they are market-specific investments. After all, online platforms' expenditure for online advertising is almost as high as their R&D expenditure. Online platforms often incur significant costs for different forms of advertising, including pay-per-click advertisements. For instance, Booking.com has been identified as the main spender for pay-per-click advertisement in the entire travel sector.[64] "Hotels" is reported to be "keyword with the highest spending", whereas "accommodation tops the keyword charts, but the battleground is for cheap holidays".

Hedeström and Peeperkorn confirm that advertising costs are crucial to the assessment. They believe that "market-specific investments will generally be significant for on-line platforms, such as investments to create, maintain and update their specialized website to be active on a particular market. It is, in particular, difficult to imagine how these market-specific investment costs and risks can be transferred to the supplier, if other suppliers' products are also sold on the same distributor's website".[65] Goffinet and Puel consider that "there is no certainty as to whether sunk investments in the advertising of the agent's distribution services (such as 'Google AdWords' in relation to the brand of the agent) also constitute (i) risks that are related to the activity of providing agency services in general, or (ii) market-specific risks. On the one hand, as these investments have a significant influence on the success of the agent, they could be considered as risks related to the activity of providing agency services in general. On the other hand, as these investments are

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[64] https://www.retailtimes.co.uk/booking-com-leads-the-big-spenders-for-ppc-in-the-travel-sector/.

[65] Hedeström and Peeperkorn, "Vertical restraints", 18.

sunk and cannot be recouped (cannot be sold without significant losses), they could be considered as market-specific risks".[66]

We believe that online advertising costs do not amount to market specific investments. Online platforms do not invest in advertising to be able "to conclude and/or negotiate" contracts on behalf of their principal. Advertising expenditure is an inherent feature of any online platform. The latter must invest in advertising, with specific regard to pay per click advertising, in order to be able to provide their (agency) services – absent these investments, online platforms would not manage to offer intermediation services to their principals at all. Online platforms survive insofar as they manage to gather as many users as they can on both (or on all) sides of the platform – pay per click advertising is key to enable users to gather on the platform. This is key for the platform to gain users, regardless of the package of services that is ultimately sold on the market.

Furthermore, it seems to us that the whole debate on platforms having significant market power, risk of market tipping and the need to regulate gatekeeping platforms provides an argument in favour of considering that online platforms bear significant platform-specific investments (as opposed to market-specific investments). The Progress Report from the Expert Group for the Observatory on the Online Platform Economy on Differentiated Treatment[67] considers that online platforms' expansion "is not constrained by costly investments as in the case of supermarkets, as platforms do not need to invest in the production of the contents, goods or services or other forms of capital they give access to".[68] The debate on gatekeeping platforms focuses on the purportedly significant scale advantages enjoyed by online platforms. This is another evidence of the absence of market-specific investments – as pointed out in the report, "platforms […] can decide to start selling the exact same product as offered by a business user […] this way, without taking the same risk, the platform can compete intensely with businesses who took the risk in growing a market for a product whose success among consumers was not yet established at the initial launch of the product in the platform". In other words, the Commission is concerned about the ability of gatekeeping platforms to expand in neighbouring markets by leveraging on data and on the scale effects they enjoy

[66] Goffinet and Puel, "Impact of the internet", 245. See also Jung, "European Union".

[67] https://ec.europa.eu/digital-single-market/en/news/commission-expert-group-publishes-progress-reports-online-platform-economy.

[68] See page 7 of the Report.

on their market of origin. The very fact that online platforms can seamlessly kick-off another activity in a neighbouring market proves that they do not need to incur significant market-specific investments to start operating or to expand on a certain market. The Commission does not consider that market-specific advertisement costs could be an issue for platforms expanding in neighbouring markets and is right to do so. The platform does not bear any of them – it just leverages on the advertisement investments it incurred for the purpose of existing as a platform.

In sum, we do not think that online platforms bear (significant) market-specific investments. We respectfully submit that arguing the contrary means confusing two different assessments. On the one hand, there are risks in the market for the contract products. On the other hand, there are risks in the market for agency services. What most of the commentators define as "market-specific investments" are actually platform-specific investments. They have little to do with the activities for which the platform is appointed by the principal(s). But they have a lot to do with making the platform more attractive on the market for agency services.

Our impression is that the tendency to confuse market-specific investments and platform-specific investments is due to the perceived need to look into the competitive dynamics occurring at the platform's level. If online platforms were considered agents, competition authorities would be deprived of the opportunity to check whether something competitively relevant is happening due to the exemption from the application of Article 101 TFEU. While this is an understandable policy goal, this should be achieved through a consistent enforcement of the applicable legal framework. Arguing that online platforms bear market-specific investments means over-stretching the boundaries of the notion of market-specific investments in order to bring online platforms back to the realm of Article 101 TFEU.

4. What next?

The Commission is currently reviewing the rules applicable to vertical agreements, i.e. the VBER and the Guidelines. The review process is divided into two steps: (i) the evaluation phase and (ii) the impact assessment phase. The goal of the evaluation phase is to gather evidence on the functioning of the VBER and the Guidelines. This phase also features a public consultation to allow interested stakeholders to take part in the process. It will draw on the outcome of the e-commerce sector inquiry as well as on the enforcement experience of the Commission and of national competition authorities. The impact assessment phase aims at informing and supporting the decision of the Commission to determine whether it should let the VBER lapse, prolong its duration or revise it based on the evidence gathered during the evaluation phase.[69]

The relevant submissions have been published on the Commission's website. Interestingly enough, a significant number of contributors raise the issue of the lack of clarity surrounding agency agreements, with particular regard to the deficiencies that the current rules prove to have when coping with the technological development. The most interesting input came from national competition authorities. According to their submission, "there seem to be diverging views among NCAs as to whether [online platforms] can qualify as genuine agents. Some NCAs consider that certain characteristics of online platforms indicate that they cannot form an integral part of the principal's distribution system and should therefore not be treated as genuine agents […] other NCAs take the view that, depending on the circumstances, online platforms could qualify as an agent, with the result that Article 101(1) TFEU does not apply to intra-brand restrictions agreed between the platform and the principal". In light of the above, the national competition authorities "advocate for more guidance on relevant factors to be taken into account in the assessment whether online platforms can qualify as agents, which should be carried out on a case-by-case basis [taking] into account the following aspects: (i) in some circumstances online platforms appear to bear more than insignificant risks; (ii) the nature of the relationship between suppliers and online platforms is very different from a traditional agency model where large suppliers act as principals using various smaller (independent) sales agents to sell their goods or services".[70]

As discussed earlier, we believe that the review of the legal framework applicable to vertical agreements is in fact an opportunity not to be missed to fill the gaps of the current framework. We provide a few thoughts below.

4.1. Re-discovering the integration criterion. Viable option or siren song?

As discussed under Section 2, there are a number of early precedents (e.g. *Consten-Grundig*, *Pittsburg Corning* and *Flemish Agents*) that give relevance to the integration criterion. However, since the Nineties the

[69] https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

[70] See the Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) No. 330/2010.

Commission has consistently interpreted the legal test to assess agency agreements as meaning that the integration criterion bears no relevance. As discussed under Section 2, this gave rise to a risk-centred approach that we believe allows us to conclude that online platforms can be considered agents under EU competition law.

Some Authors believe that the integration criterion has been unduly foregone by the Guidelines and that it should be re-discovered as it does not actually conflict with the Commission's policy goals.[71]

We agree that the Guidelines left out *Flemish Agents* and the other cases giving relevance to the integration criterion. Therefore, we agree that bringing the integration criterion back to life would be legally sound. After all, the Court and the Commission have already endorsed this criterion. And they rightly did so – a few decades ago, agents could meaningfully be integrated within their principal's business. Furthermore, re-discovering the integration criterion appears to be more sensitive than over-stretching the boundaries of the market-specific investment test. At first sight, the integration criterion would be the online platforms panacea – it would allow to rule out with certainty that online platforms can be qualified as agents and provide an answer to our questions. As discussed under Section 1, the fact that online platforms get to have thousands of principals is an undeniable truth. It is in fact the very reason why they manage to provide services. However, we are not totally convinced with this line of thought.

First, from a legal perspective, in principle the ECJ's preliminary rulings have no *erga omnes* value. It follows that, while preliminary rulings have a strong persuasive value, *Flemish Agents* does not create any *per se* obligation to behave accordingly in similar cases. It is what the Commission argued in *DaimlerChrysler*. Furthermore, from the Nineties onwards both the Commission and the Court have denied that the integration criterion bears any relevance to the assessment. One may argue whether this is consistent with the early case law, but from a policy perspective it would be hard to justify another U-turn to embrace a criterion in vogue before the Nineties.

Second, from a conceptual perspective, the integration criterion appears to be outdated. Agents are "no longer individuals walking from door to door with a bag of samples".[72] Agents – regardless of whether they are

[71] Goffinet and Puel, "Impact of the internet".

[72] Akman, "Online platforms", 288.

online platforms – are usually companies that will run their agency business in an entrepreneurial manner. To borrow from the Commission's language, in *Pittsburgh Corning* (on which the GC drew in *Voestalpine*), modern agents often have the economic strength and independence to behave independently from their principals. Furthermore, as discussed above, it happens more and more that online platforms work with a significant number of principals and that in so doing they manage to gain more competitive relevance than their principals. Performing the assessment based on whether these entities can be considered "auxiliary" or not is at the very minimum a naïve exercise. To borrow from well-reputed Authors, "these platforms seem very different from the classic agency model where a principal determines the commercial conditions under which an agent can sell its products because the principal takes responsibility for all the relevant costs and risks. Often, in the platform cases, the 'agent' is a large multinational, whose size and scope of activity may exceed those of its 'principal(s)'". However, the Authors argue that "such a return to the auxiliary organ test is not necessary" because "under the financial and commercial risk test it is highly unlikely that such platforms will qualify as 'genuine' agents".[73] While we respectfully disagree with the last part, we agree that the integration criterion is of limited help to get a modern understanding of agency.

In sum, our view is that the Guidelines overlooked the early case law of the ECJ. This is a fact. However, dusting off the integration criterion for the purpose of assessing whether online platforms are agents would not solve the issue, as it would entail the application of an old-fashioned test to a dramatically modern issue.

4.2. Towards a different paradigm

If the current framework is not fit for purpose and the integration criterion does not help much, what is the possible way forward?

We believe that the competition assessment of agency agreement is in need of a drastic rethink. We provide a few thoughts below that we believe should inform the review process.

[73] Hedeström and Peeperkorn, "Vertical restraints", 18.

(a) Less form-based categories, more effects-based assessment

As discussed under Sections 1 and 3, the Guidelines embraced a standardised approach to agency agreements that does not capture the specificities of online platforms. Assessing online platforms against this background is tricky because the framework is not flexible enough to cope with platformisation. As some Authors rightly pointed out, "the vertical guidelines have many artificial form-based legal categories that justify different legal treatments, e.g. agency".[74]

As discussed under Section 1, online platforms physiologically multiply the competitive dynamics a competition authority should look at. Principals compete among themselves. Online platforms compete among themselves. Online platforms sometimes compete with their principals. In the same way competition law aims at ensuring that fair competition occurs among principals, it also has to protect competition among platforms and between principals and platforms. No restriction in passing on the commission should be permitted.

One of the main competitive variables when it comes to online platforms is the price of the intermediation service, i.e. the commission that is charged by the platform. Commission-based competition must be safeguarded. As a result, we think it would be key for the revised Guidelines to introduce a distinction between the price of the product (that could be lawfully imposed by the principal on the platform) and the level of the commission, that must be up to the platform. Platforms must be free to determine the amount of their commission.

To do so, we advocate to leave aside the form-based approach to agencies. When dealing with vertical agreements involving online platforms, the adoption of a case-by-case approach is key. The first concern of a competition authority should be to understand the functioning of a platform's model. Then, the competition authority should be in the position to safeguard competition among the relevant actors. The adoption of a form-based approach under which, if an online platform is an agent, the merchant is automatically free to impose price and sales conditions to the platform does not allow competition authorities to ensure that competition is in place among platforms. An effects-based approach would be advisable.

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[74] See Aleksandra Boutin, "Vertical restraints and the digital world. Time for a more economic approach", Slide presentation at *GCLC Annual Conference*, 2019.

This evolution is actually coherent with the evolutionary path of competition law, with particular regard to vertical agreements. Before Regulation 1/2003[75] removed the mandatory notification regime, the Commission was in dire need of a way to make the system procedurally sustainable – by the time the ECJ rendered its *Grundig-Consten* judgement,[76] almost 35,000 exclusive distribution agreements had been filed to the Commission for *ex ante* approval. The Commission initially embraced a form-based approach to streamline the assessment. Under certain conditions, some vertical agreements were block-exempted;[77] others, including agency agreements, were said to fall outside the scope of competition rules. It was not until the 1997 Green Paper on vertical restraints[78] that the effects-based revolution started. The press release accompanying the Green Paper pointed out that "the current block exemptions [lack] flexibility […] and are over-regulatory […] too much emphasis is put on analysis of clauses and not enough on the economic impact of the agreements".[79] The Green Paper thus paved the way for the 1999 block exemption regulation[80] and to the 2000 guidelines.[81] The focus increasingly shifted to the effects of a certain conduct on the market and to the legal and economic context framing the assessment. This approach was substantially confirmed in the VBER and the Guidelines, with a few variations.[82]

In sum, EU policy towards vertical agreements has faced a multifaceted evolution. However, the rules on agency agreements have not followed the same path. The effects-based approach has not disrupted the assessment of agency agreements. Interestingly enough, the Green Paper expressly confirmed that it would not "cover […] commercial agents […] the focus

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[75] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1-25.

[76] Judgement of 13 July 1996, Établissements Consten S.à.R.L. *and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*, joined cases C-56 and C-58/64, ECLI:EU:C:1966:41.

[77] Carree, Guesnter, and Schinkel, "European antitrust policy 1957-2004", 111 consider that "vertical restraints have a long history of block exemption regulations".

[78] *Green Paper on Vertical Restraints in EC Competition Policy*, COM(96) 721 final, 22 January 1997.

[79] See https://ec.europa.eu/competition/speeches/text/sp1997_002_en.html.

[80] See Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29/12/1999 P. 0021 – 0025.

[81] See Guidelines on Vertical Restraints (2000/C 291/01).

[82] Like the extension of the 30% market share threshold to buyers.

is primarily on vertical restraints in the distribution chain".[83] The first Commission notice on agency agreements was issued as early as 1962. The criteria to assess whether an agreement is one of agency have been slightly amended since then. However, the treatment of agency agreements under EU competition law has remained unchanged. Peeperkorn confirms that the entry into force of the VBER and the Guidelines brought "no fundamental change in policy with regard to agency agreements" compared to the 1999 block exemption regulation and to the 2000 guidelines, which in turn were drawn upon the previous rules.[84]

This alone should suggest that the rules on agency agreements would benefit from a refresh – "agents are no longer individuals walking from door to door with a bag of samples".[85] Lianos also commented that "it is […] remarkable that, despite this evolution towards a more economic approach, the agency agreements exception has remained untouched".[86] In essence, assessing whether online platforms can be qualified as agents under EU competition law means applying rules conceived almost sixty years ago to a contemporary issue. This helps explaining the hurdles and inconsistencies of assessing the legal qualification of online platforms under the Guidelines.

We are now at a turning point similar to the one experienced in 1997 – the effects-based revolution must be extended to agency agreements.

(b) Abandoning the market-specific investments criterion

Against this background, old-fashioned concepts like market-specific investments should be abandoned as well. Any business incurs risks. As Akman put it, one should not confuse "the fact that the agency business has its own costs and risks itself as a business with the decision on whether the business acts as an agent of another party in a given transaction with a third party: the mere fact that an agency business has costs cannot disqualify the business from being an agency".[87]

As discussed, agents are more and more often companies that carry their own business. As a result, the Guidelines should not give relevance to

[83] See page 4.

[84] Peeperkorn, "Revised EU competition rules", in *Kilpailuoikeudellinen Vuosikirja*, ed. Artuu Mentula (Helsinki, 2010): 207.

[85] Akman, "Online platforms", 288.

[86] Lianos, "Commercial Agency", 4. The Author then concludes that "the specific regime for commercial agency agreements is justified".

[87] Pinar Akman, "A competition law assessment", 808.

obsolete categories like market-specific investments, but to the economic reality of the alleged agent. In this respect, Akman suggests to make use of the fiduciary criterion borrowed from agency law – according to the Author, the new rules should provide that online platforms could be qualified as agents insofar as their interests are aligned to the ones of their principal. When they are not, e.g. because the platform is active in the same market of its principal, the agency rule could not be applied. The argument is robust and makes good legal sense.

We would bring it even further – according to *Voestalpine* (which, as discussed under Section 2, ends up borrowing from *Pittsburgh Corning* and, to a certain extent, from the never adopted 1990 guidelines), the intermediary amounts to an agent if it is not in a position to act as an independent entity that is free to determine its own business strategy (i.e., to borrow from the 1990 notice, if it is not in the position to determine the principal's product and marketing strategy, including most notably risks related to the sale of the product, not market-specific investments). In our view, a good way forward would be for the intermediary to lose its qualification as an agent if it was left free to determine its business conduct with reference to the contract products. This would apply regardless of whether the intermediary would be pursuing its own interest or the principal's (after all, a complete commonality of interests between principal and agent would always be a legal *fictio*). But if the intermediary was free to autonomously determine itself on the market, then something competitively relevant would be happening on the market for the contract products, as the agent would build up its own business strategy. In any case, the agent should be free to determine its commission and to pass it on to consumers if it so wishes.

This also means that an intermediary could be considered an agent within the context of a certain product and not of another. This is consistent with certain precedents like *Willis v. Office of Fair Trading*, in which the UK Competition Appeal Tribunal ruled that an individual could qualify as an agent for a certain conduct (provision of pricing information), but not for another (providing the cover price). As Odudu and Bailey pointed out, "this suggests a functional approach to the question of attributing liability for something that the agent has done on behalf of a principal".[88]

[88] Odudu and Bailey, "The single economic entity", 1754.

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