



European Commission

Competition

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Review of the Vertical Restraints Framework

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Outline of the presentation

- Introduction
 - Past experience & objectives of the ongoing review
 - Presentation of the Vertical Restraints Framework
- Clarifications and changes to the scope of the block exemption
 - Agency agreements
 - Notion of agreement
 - Agreements between competitors
 - Market share threshold
- Clarifications to the assessment of hardcore restrictions
 - Framework of analysis
 - Resale price maintenance
 - Resale restrictions & Online sales
- New specific restraints
 - Upfront access payments (slotting allowances)
 - Category management



Introduction

- Positive past experience:
 - Current framework = effects based approach
 - Principle of market share threshold well accepted
 - Meaningful enforcement = relevant issues of foreclosure & softening of competition (collusion) + taking account of efficiencies
 - Satisfactory interaction between NCAs & Commission post modernisation

- Objective: to update current effects based approach



Introduction

This effects based approach means:

- (a) Authority/plaintiff must show likely negative effects under Article 81(1)
- (b) Defendant must show likely efficiencies under Article 81(3) once likely negative effects are established (“consumer welfare test”)
- (c) “Safe harbour” as long as market share does not exceed 30% = block exemption => net positive balance presumed
- (d) Guidelines provide interpretation of the BER + guidance on a case by case assessment of negative and positive effects where the BER does not apply (above 30% MS)



Scope of the block exemption

- Agency agreements:
 - No change of policy: determining factor is risk borne by agent in relation to activities for which he is an agent
 - Risks taken by the agent for after-sales services or in other product markets are relevant if they are indispensable to engage in selling or purchasing goods or services on behalf of the principal
 - Case T-325/01, Daimler Chrysler, point 113



Scope of the block exemption

Notion of agreement:

- If no express agreement => unilateral request + acquiescence
 - Acquiescence can be deduced from a general agreement drawn up in advance
 - Tacit acquiescence = implementation of the unilateral policy by distributors

- Agreements between undertakings at different levels of the supply chain => exclusion of B2C agreements



Scope of the block exemption

Vertical agreements between competitors
(Article 2(4) draft BER):

- Coverage by the block exemption limited to dual distribution at the retail level
=> no turnover threshold anymore



Scope of the block exemption

Market share threshold: benefit of BER depends not only on the supplier's MS, but also the buyer's MS:

- Not only suppliers, but also distributors may have market power (e.g. supermarkets) => coverage by the BER should also depend on buyer's market share
- To bring rules on vertical agreements in line with other competition rules (e.g. De minimis Notice & technology transfer BER)
- Change supported by NCAs



Hardcore restrictions

- **Draft BER does not change the scope of the hardcore restrictions:**
 - RPM remains a hardcore restriction
 - Passive sales restrictions are hardcore (but selective distribution)
 - Active sales restrictions are hardcore except to protect areas where there is exclusive distribution
 - Active and passive sales restrictions necessary to protect market entry (new brand or new geographic market): outside Art 81(1) for 2 years (GL §56)



Hardcore restrictions

Clarifications on “hardcore approach”

- hardcore = no block exemption + presumption of negative effects under Article 81(1) + presumption it is unlikely that the conditions of Art 81(3) are fulfilled, but individual exemption is not excluded in case of convincing evidence of likely efficiencies
- Hardcore approach = a “rule of reason” approach where the order of bringing forward evidence and showing effects is reversed
 - first likely efficiencies need to be shown by the firm
 - before the likely negative effects are shown by the authority



Hardcore restrictions

RPM:

- Possible negative effects:
 - facilitation of collusion (both up- and down-stream), in particular if interlocking relations
 - elimination of intra-brand price competition: direct effect is price increase
 - loss of pressure on the supplier's margin
 - loss of dynamism and innovation from in particular discounters

- Possible positive effects:
 - New entry (efficiency already recognized for resale restrictions)
 - Avoid delisting of product in case of sale as loss leader
 - Support short term low price advertisement campaigns



Online sales

- Guidelines maintain current distinction between active & passive sales
- Attempt to refine notion of active and passive sales as concerns on-line sales
- Approach generally supported by national competition authorities



Online sales

- Internet sales are generally passive sales => distributors should be free to engage in internet sales and Guidelines provide examples of restrictions of passive sales: obligation to automatically reroute customers or terminate their transactions, obligation to limit the proportion of sales made online, dual pricing
- But possibility to restrict active sales to protect exclusive distribution: unsolicited e-mails, targeted (online) advertisement
- To preserve the quality of distribution and prevent free riding the Guidelines clarify that the BER covers obligations to have a « brick and mortar » shop, to impose a minimum amount of sales off-line and to require quality and service conditions to be fulfilled for on-line sales that are equivalent to the conditions applicable for off-line sales



Specific vertical restraints

Upfront access payments

- Block exempted up to 30% MS
- Possible negative effects:
 - Downstream foreclosure
 - Upstream foreclosure
 - Downstream collusion
- Possible positive effects:
 - Asymmetry of information between supplier & distributor => successful market entry through better allocation of shelf space
 - Risk shifting back to suppliers (no free riding of suppliers on sales efforts of distributors)



Specific vertical restraints

Category Management

- Block exempted up to 30% MS
- Possible negative effects:
 - Foreclosure of other suppliers
 - Collusion between distributors
 - Collusion between suppliers (exchange of info)
- Possible positive effects:
 - Improved presentation and assortment of products, leading to higher consumer satisfaction



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Thank you for your attention

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