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# Review of the Vertical Restraints Framework

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# Outline of the presentation

- Introduction
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  - 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

- **<u>Draft BER does not change the scope</u> 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 <u>individual exemption is not excluded</u> 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

# Thank you for your attention

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