



European Commission

Competition

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Review of the Vertical Restraints Framework

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Outline of the presentation

- Experience and objectives of the ongoing review
- Clarifications and changes to the scope of the block exemption
 - Agency agreements
 - Agreements between competitors
 - Market share threshold
- Clarifications to the assessment of hardcore restrictions
 - Framework of analysis
 - Resale price maintenance
 - Resale restrictions & Online sales



Introduction

Current framework = effects-based approach, which 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) No safe harbour for limited list of hardcore restrictions
- (e) 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)



Introduction

- Positive past experience:
 - Principle of market share threshold well accepted
 - General support for keeping BER + GL
 - Meaningful enforcement = focus on hardcore restrictions and relevant issues of foreclosure & softening of competition (collusion) + taking account of efficiencies
 - Satisfactory interaction between NCAs & Commission post modernisation in ECN
 - Enforcement shifted to NCAs

- Aim of review: to update current effects-based approach



Scope of the block exemption

- Agency agreements:
 - No change of policy: intra-brand restrictions fall outside Art 101(1) if no risk borne by agent in relation to activities for which he is an agent
 - Discussion on risks taken by the agent in other product markets versus risks taken in the same product market
 - Case T-325/01, Daimler Chrysler



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
- Exclusive supply, exclusive distribution, minimum supply obligations, upfront access payments, post term supply restrictions
- To bring rules on vertical agreements in line with other competition rules (e.g. De minimis Notice & technology transfer BER)



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



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 (examples in Guidelines)
- 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



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
 - Foreclosure of smaller rivals
 - loss of dynamism and innovation from in particular discounters



RPM

- Possible positive effects:
 - Facilitate entry during introductory period of expanding demand
 - Support short term low price advertisement campaigns
- Serious doubts about the effectiveness of and the likelihood that RPM will help:
 - To overcome service & promotion free riding between retailers
 - Make retailers to keep more stocks
 - Convince high end retailers to list the product
 - Avoid delisting of product in case of sale as loss leader



RPM – empirical results

- Many cases (mostly by NCAs): no credible efficiency defences found
- UK: RPM for books, children's toys and football kits
- France: 22 cases since 2000
- Natural experiment with Loi Galland: widespread RPM led to increased prices, also in less concentrated markets



Online sales

- Guidelines maintain current distinction between active & passive sales
- Attempt to refine notion of active and passive sales as concerns on-line sales
- Allow consumers to benefit from the internet while allowing manufacturers to prevent possible free riding between distributors/distribution formats



Online sales

On the one hand: Distributors should be free to have a website and engage in internet sales

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



Online sales

On the other hand:

- 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,
 - impose a minimum amount of sales off-line
 - require quality and service conditions to be fulfilled for online sales that are equivalent to the conditions applicable for off-line sales



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Thank you for your attention

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