



European Commission

Competition

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Review of the Vertical Restraints Framework

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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

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)



Hardcore restrictions

- **Draft BER does not change the scope of the hardcore restrictions:**

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)
- RPM remains a hardcore restriction



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



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



Online sales

- Guidelines maintain current distinction between active & passive sales
- Attempt to refine notion of active and passive sales as concerns on-line sales



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



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Current public consultation: if you want to submit your comments please do so at the latest by 28 September

Thank you for your attention