



European Commission

Competition

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New Vertical Restraints Framework

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Outline of the presentation

- **Introduction**
 - Past experience & objectives of the review
 - Presentation of the Vertical Restraints Framework

- **Clarifications and changes to the scope of the block exemption**
 - Agency agreements
 - Agreements between competitors
 - Market share threshold

- **Hardcore restrictions**
 - Framework of analysis
 - Resale price maintenance
 - Resale restrictions & Online sales



Introduction

- Positive past experience:
 - Framework of 1999 = 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 effects based approach
- Result: Commission adopts BER 330/2010 (OJ L 102 of 23.4.2010)
Guidelines adopted “en principe”, final text to be published in May



Introduction

This effects based approach means:

- (a) Authority/plaintiff must show likely negative effects under Article 101(1)
- (b) Defendant must show likely efficiencies under Article 101(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
Exception: hardcore restrictions
- (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 (GL § 12 – 21):
 - 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
 - Clarification: only risks taken by the agent in the same product market are relevant => not possible to be “true” agent for one product and independent distributor for another product of the principal if these products are in the same product market



Scope of the block exemption

Vertical agreements between competitors
(Article 2(4) 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
- For supplier: share on the market where supplier sells contract products to the buyer
- For buyer: share on the market where buyer purchases the contract products from the supplier
- Main reason for transitional period of 1 year (art. 9 BER)



Hardcore restrictions

Clarifications on “hardcore approach” (GL section III.3)

- hardcore = no block exemption + presumption of negative effects under Article 101(1) + presumption it is unlikely that the conditions of Art 101(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

RPM (GL section VI.2.10):

- 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 suppliers
 - loss of dynamism and innovation from in particular discounters

- Possible positive effects:
 - Launching a new product
 - Support short term low price advertisement campaigns
 - Free riding between distributors



Hardcore resale restrictions (1)

- **New BER does not fundamentally change the hardcore list of resale restrictions:**

- Passive sales restrictions are hardcore (but selective distribution)
- Active sales restrictions are hardcore except to protect areas where there is exclusive distribution

But:

- Restrictions on the buyer's place of establishment are not hardcore
- Not only possible to prevent wholesalers to sell to end users, but also to allow wholesalers to sell to some bigger end-users while not to others



Hardcore resale restrictions (2)

Exclusive distribution:

- restrictions of active sales by a buyer party to the agreement are not hardcore, i.e. possibility to restrict active sales at more than one level of trade
- Exclusivity requires protection against active sales of all other buyers but not of the supplier, i.e. possibility to share exclusive territory with the supplier

Selective distribution: restrictions of sales to unauthorised distributors is not hardcore in the territory reserved to operate selective distribution, i.e. possibility to reserve territory for future expansion of distribution network



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 one or more « brick and mortar » shops (but not to punish successful online sales),
 - 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
 - use of third party platforms only in accordance with standards and conditions agreed between parties



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Thank you for your attention

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