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Revision Of EU Vertical Restraints Rules

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Overview

- Background
- Selected issues
 - Online sales
 - Agents vs. Distributors
 - RPM
 - Category management
 - Restrictions of territory and customers

Background

Status Quo

- 2010 Block Exemption Regulation
 - 30% share threshold for supplier and buyer
 - Black-listed clauses (RPM and certain sales restrictions), Article 4
 - Grey-listed clauses (non-compete, post-term restrictions), Article 5
- Historically little enforcement activity by EU Commission, but now picking up again (e-commerce sector inquiry and infringement decisions, *Asus*, *Denon*, *Philips*, *Pioneer*, *Guess*, *Nike*)
- Member State agencies have been leading case law development, notably on RPM and online sales restrictions

Court case law

- Recent *Coty* judgment provides some clarification on platform bans, but there is controversy on the judgments interpretation

- ECJ makes clear that concept of by object restrictions under Article 101 TFEU needs to be applied narrowly as a general matter
 - *Mastercards* and *Maxima Latvija*

- Very little case law on application of Article 101(3) TFEU
 - But see judgments in *GSK Spain* where the Courts criticized the EC for having conducted only a superficial 101(3) analysis

Online Sales

Prohibition of online sales

- 2010 Guidelines treat prohibition as by object restriction
- ECJ *Pierre Fabre* confirmed this for selective distribution
- But query whether logic of judgment holds for non-selective distribution agreements
 - In non-selective distribution agreements dealers are free to sell to non-authorized dealers that are not subject to the online sales prohibition
 - Should degree of competition that is „open“ not matter?
 - *Mastercards* and *Maxima Latvija* define by object restrictions narrowly
- In *Ping*, UK CAT qualified online sales prohibition as unlawful but recognized possibility in principle of justifying restriction
- e-Commerce Sector Inquiry report suggests that certain brick&mortar restrictions in selective distribution agreements need to be re-assessed

Platform bans

- 2010 Guidelines took a permissive approach (para. 54)
- Bundeskartellamt and some German courts took a more restrictive approach treating platform bans as by object restriction
- *Coty* judgment makes clear that platform bans in selective distribution agreements are not by object restriction or hardcore restriction under the VBER
- President of Bundeskartellamt has tried to suggest that judgment is limited to luxury goods
- But the reasoning and logic of the judgment is of general application: The key point is that a platform ban cannot be equated with a sales restriction
- What about restrictions on usage of price comparison services or online advertising more generally?
- e-Commerce Sector Inquiry report suggests that they are not by object restrictions either

Reverse MFNs

- Hotel booking cases
 - Broad MFNs prohibiting better prices on both rival platforms and hotel's own site qualified as unlawful by several national authorities
 - Main concern is foreclosure of rival platforms
 - Bundeskartellamt in Booking.com qualifies narrow MFN limited to hotel's own site as unlawful too, contrary to other authorities
- Are reverse MFNs exempt within the scope of the VBER?
 - Bundeskartellamt in *HRS* suggests that reverse MFNs amount to hardcore restriction excluding application of VBER
 - But Article 4 deals only with resale price imposed on distributor not supplier
- Relevant considerations for analysis:
 - MFNs are a milder restriction than exclusivity
 - Ability to guarantee best price is a key quality factor for a platform

RPM

Should there be a safe harbor for RPM?

- 2010 Guidelines recognize possibility to exempt RPM, but conditions are vague and uncertain. No published case where RPM would have been accepted
- But see *Haladjian* where need to protect repair network from low-priced spare parts imports from outside the EU was recognized as legitimate
- How could a safe harbor be defined?
 - Market share coverage of practice
 - Duration and frequency of practice
 - Life cycle stage of product
 - Certain business models, e.g., franchisees, pre- or after-sale services
- For a genuine safe harbor – a change of the VBER would be needed – mere clarifications in the Guidelines would not be enough
- But currently the trend at EU level seems to be to act against RPM, rather than liberalize it (*Pioneer, Asus, Philips, Denon*)

Where is the line between permissible recommendations and RPM?

- Bundeskartellamt goes far, suggesting that a combination of recommendation with monitoring could be sufficient to amount to RPM
- Pricing software: National authorities have qualified provision of pricing software and data by supplier as RPM if prices cannot be changed easily
- With increasing use of digital data collection and analysis systems and closer cooperation between dealers and suppliers clarity on dividing line become more important

Agents vs. Distributors

Should definitions be revised?

- Pricing and sales restrictions imposed on agents fall outside of Article 101 TFEU
- Agents defined based on whether they bear risk in the transaction
- Bundeskartellamt in *HSR* suggests narrow definition of agent, limited to situations where agent is dependent on supplier (quasi employee)
- But question is whether agency definition should rather be broadened. Does binary distinction between agent and distributor still fit?
- While distributor may ostensibly bear risk, risk may be shared by supplier
 - Marketing and promotion contributions
 - Training
 - Return policies
- Should it not be permissible for supplier to implement more far-reaching restrictions if it bears part of the downstream risk or investment?

Category Management

Is more clarity needed?

- Discussion in 2010 Guidelines is fairly vague and ambiguous
- Greater clarity might be obtained indirectly by clarifying more general points that are also relevant to category management
 - Dividing line to RPM
 - Data collection and data sharing
 - Hub-and-spoke type issues

Restrictions Of Territory And Customers

Active sales restrictions

- Treated as hardcore restriction under Article 4 VBER if territories are not exclusively allocated
- Makes little sense because a non-exclusive system is less restrictive than an exclusive system
- Court case law indicates that active sales restrictions might fall outside Article 101(1) entirely
- There are no known cases where an active sales prohibition would have raised concerns
- There are eminently legitimate reasons for active sales restrictions to focus dealers promotion efforts and increase inter brand competition

Dual pricing

- Geographic dual pricing traditionally treated as hardcore, parallel trade restriction (*Opel Netherlands, BMW*)
- Dual pricing for physical vs. online sales now also treated as hardcore
- But in *GSK Spain*, Courts recognized possibility to exempt territorial dual pricing in the context of the pharma industry
- Query whether there should not be a more general openness to dual pricing practices:
 - Dealer margin is “payment” for service rendered to supplier
 - The dealer’s service is to promote sales in its territory
 - If dealer takes margin to make “easy” sale outside territory it receives payment without rendering service
 - At the same time, it undermines ability of dealers in the local territory to perform their services



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