



EU competition law and supply and distribution agreements: the treatment of RPM

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EU Competition Rules for Supply and Distribution Agreements

- Before 2000: form-based/legalistic approach
- Common criticism: long lists of obligatory respectively prohibited contract clauses (1) work as a strait jacket and undermine commercial dynamism of EU economy, and (2) increase risk of under- and over-enforcement
- Since 2000: effects-based approach with Vertical Restraints Block Exemption Regulation (VRBER) and Vertical Restraints Guidelines (VRGL)

The basic features of the VRBER/VRGL

- Apply to agreements between non-competitors concerning the sale and purchase of goods and services for all sectors, both on- and offline
- VRBER creates a wide safe harbour by presuming that vertical agreements are not leading to net negative effects for consumers and are thus exempted under Article 101(3) if:
 - The market share of supplier and buyer does not exceed 30%
 - The agreement does not contain any of the so-called hardcore restrictions

The basic features of the VRBER/VRGL

- If the conditions of the VRBR are respected, competition will generally force firms to offer best quality and prices to consumers and vertical restraints can be expected to lead to efficiencies
- Commission and NCAs can still intervene by withdrawing the benefit of the VRBER and prohibit the restraints for the future if in an exceptional case consumers are harmed
- Above 30% individual assessment under Article 101

Object or hardcore restrictions

- Agreements that have as their object to restrict competition are considered serious restrictions of competition
- In case of such “hardcore” restrictions there is a presumption of negative effects under Article 101(1) + presumption it is unlikely that the conditions of Art 101(3) are fulfilled
- No benefit of the block exemption and while this does not exclude individual exemption in case of convincing evidence of likely efficiencies, such is unlikely + high risk of fines

Hardcore restrictions

- RPM: agreeing fixed or minimum resale price
Note: maximum and recommended resale prices are not a hardcore restriction
- Sale restrictions on the buyer: concern is market partitioning: in principle buyer/distributor should be free to resell where and to whom it wants
- Hardcore restrictions apply to offline and online sales
- VRGL clarify and provide examples of what are hardcore restrictions

Hardcore restrictions: RPM

- VRGL section VI.2.10 describes the numerous possible negative effects of RPM, but also some potential positive effects
- Hardcore approach motivated not only by seriousness of possible negative effects, but also by doubts about effectiveness and indispensability of RPM to obtain efficiencies

Hardcore restrictions: RPM

- Hardcore approach supported by case experience of Commission and NCAs and by (scarce) other empirical data
- Many RPM 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 in France: widespread RPM led to increased prices, also in less concentrated markets

Hardcore restrictions: RPM

Clarification of possible effects of RPM in VRGL (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 in distribution (from discounters)
- Possible positive effects:
 - Launching a new product
 - Support short term low price advertisement campaigns (2 – 6 weeks)
 - Prevent free riding on pre-sales services between distributors

Hardcore restrictions: RPM

- RPM: general questions under Article 101(3):
 - Likelihood that RPM will induce the retailers to provide the extra services/promotion?
 - Indispensability: can producer not directly contract the extra services/promotion?
 - Benefit to consumers: are the extra services / promotion benefitting most consumers of the product or only the new/marginal consumers?

Hardcore restrictions: RPM

- RPM: general questions under Article 101(1):
 - Buyer driven or supplier driven?
 - Competing vertical structures or sales through same distributors?
 - Market shares and cumulative market coverage?
 - Mature or dynamic market?

Implementation and conclusion

- The effects-based approach has worked well since 2000
- The hardcore list has given a clear signal which restraints firms should generally avoid to include in their agreements
- The safe harbour has created a sufficient degree of legal certainty, in particular for smaller firms
- The rules have shown to be flexible enough for vigorous enforcement where necessary to protect competition and consumers
- The limited number of open cases that are currently discussed inside the European Competition Network confirm this picture, also for online restraints