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Antitrust Policy of DG COMP
Vertical restrictions: Article 101 / 102 TFEU

EU – China Trade Project

Chengdu, China, 24 October 2014

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Outline

1. Article 101 TFEU
2. Regulation 330/2010/EC and Commission Guidelines on Verticals
3. Article 102 TFEU

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1. Article 101 TFEU

2. Regulation 330/2010/EC and
   Commission Guidelines on Verticals

3. Article 102 TFEU

Article 101 (1) TFEU

Article 101 (1) TFEU prohibits all **agreements** between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and **which have as their object or effect the prevention, restriction or distortion of competition** within the internal market.

Article 101 (3) TFEU

Article 101 (3) TFEU: this prohibition can be declared **not applicable** where the restrictive agreement **contributes to improving the production or distribution of goods** or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and where it does not:

a) impose restrictions which are not indispensable; or

b) eliminate competition in respect of a substantial part of the products or services

DG COMP practice re: Article 101 TFEU

- Before 2000: form-based approach
- Criticism: DG COMP creates "strait jacket" for distribution of goods and services
- Since 2000: effects-based approach
  - ❑Vertical Restraints Block Exemption Regulation (VRBER) and
  - ❑Vertical Restraints Guidelines (VRGL)

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1. Article 101 TFEU
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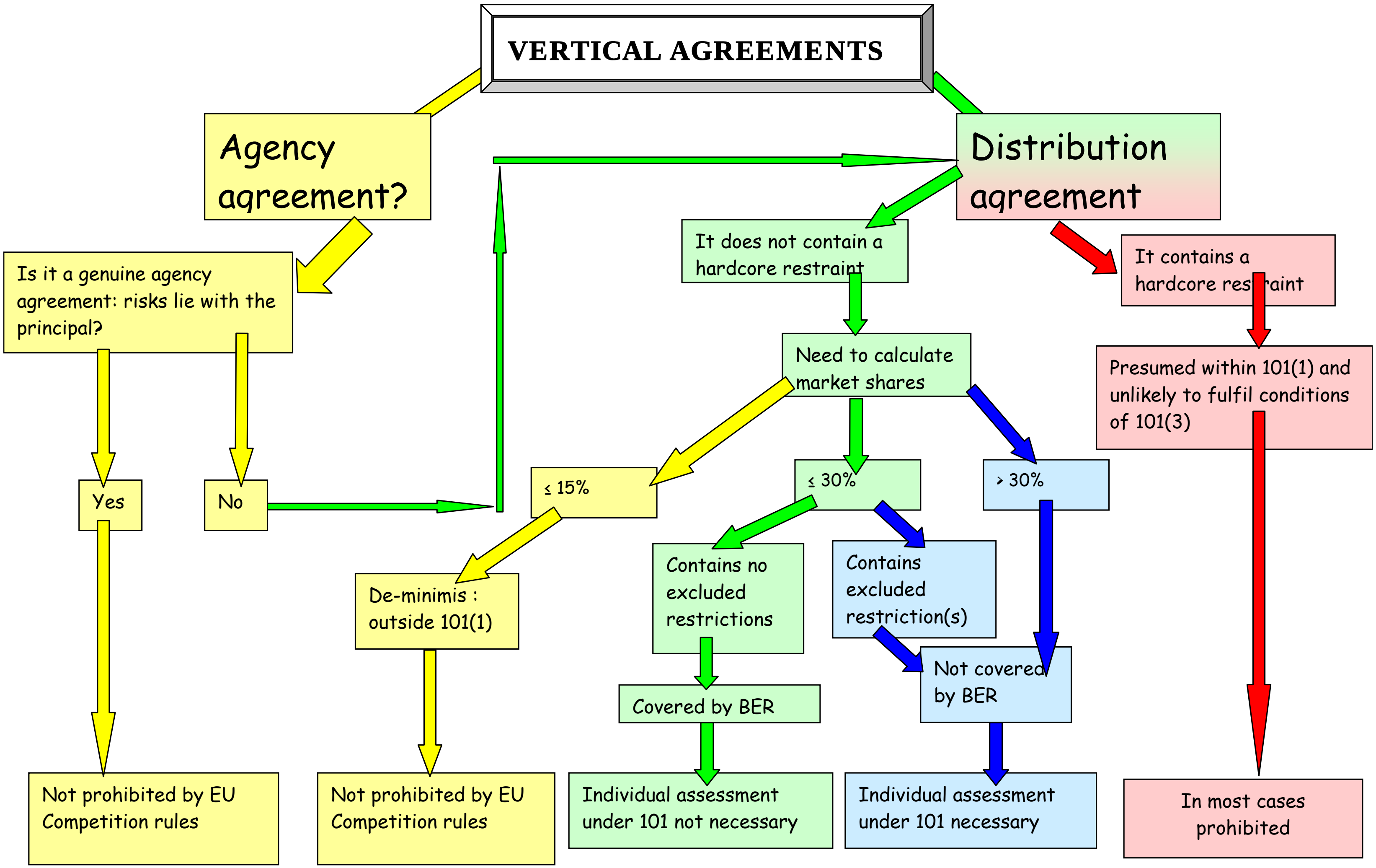
   Commission Guidelines on Verticals
3. Article 102 TFEU

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 : vertical relationships

- 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 "by object" (hardcore) restrictions


VERTICAL AGREEMENTS
Agency agreement?
Distribution agreement
Is it a genuine agency agreement: risks lie with the principal?
Yes
No
Not prohibited by EU Competition rules
It does not contain a hardcore restraint
It contains a hardcore restraint
Need to calculate market shares
Presumed within 101(1) and unlikely to fulfil conditions of 101(3)
≤ 15%
≤ 30%
› 30%
De-minimis : outside 101(1)
Not prohibited by EU Competition rules
Contains no excluded restrictions
Contains excluded restriction(s)
Covered by BER
Not covered by BER
Individual assessment under 101 not necessary
Individual assessment under 101 necessary
In most cases prohibited

A. Agency Agreements

- The reseller fully depends from the producer => both are legally treated like one economic entity => restrictions on the resellers behaviour are normally not problematic

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Agency agreements

- VRGL § 12-21: For the purposes of applying Article 101(1) the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, contract specific risks directly related to the contracts concluded and/or negotiated on behalf of the principal, risks related to market-specific investments for that field of activity, and risks related to other activities required by the principal to be undertaken in the same product market.
- Genuine agency agreement: obligations on the agent in relation to the concluded/negotiated contracts fall outside Art 101(1)
- Be aware: provisions concerning the relationship between agent and principal may still fall within Article 101(1)
- Be aware: if not genuine agency certain obligations may be hardcore restrictions

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B. Distribution Agreements

- A supplier or distributor is economically independent => if producer imposes constraints on the suppliers/distributor's commercial activity, consumers can potentially be harmed => assessment must be more thorough.

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1. Hardcore restrictions

- Art. 4 VBER: serious restrictions of competition which exclude the benefit of the block exemption for the whole agreement

⇒ Resale Price Maintenance

⇒ Passive Sales Bans

⇒ Others

Resale Price Maintenance

- RPM: agreeing fixed or minimum resale price is a hardcore restriction, but not if recommended or maximum resale price
- VRGL section VI.2.10 describes the numerous possible negative effects of RPM, but also 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
- Approach supported by case experience of Commission and NCAs and by (scarce) empirical data
- Convergence with US after Leegin?

Hardcore Sale Restrictions

- Sale restrictions: concern is market partitioning and price discrimination: in principle buyer/distributor should be free to resell where and to whom it wants:
  - Passive sale restrictions are hardcore (main exception selective distribution)
  - Active sale restrictions are hardcore except to protect areas where there is exclusive distribution
- Passive sales: sale in response to unsolicited requests
- Active sales: sale as a result of actively approaching customers
- Promotion/advertisement that is only attractive for a distributor if it (also) reaches a particular group of customers, is active selling to these customers

Hardcore Online Sale Restrictions

- General rules on (re)sale restrictions apply to offline and online sales
- On the one hand, distributors should be free to have a website and engage in internet sales to allow consumers to benefit from the internet
- On the other hand, suppliers should be free to choose distributors/distribution format and prevent possible free riding
- VRGL clarify how the distinction between active and passive sales applies to online sales (only relevant for exclusive distribution) and what are considered passive sales restrictions

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2. The safe harbour

Market share of both supplier and buyer does not exceed 15%: case is de minimis: De minimis Notice states that Article 101(1) does not apply: no appreciable effect on competition

- Commission Notice: legally it only binds Commission
- Notice does not apply in case a hardcore restriction is contained in the agreement
- In case of cumulative effect: de minimis market share threshold is 5%

The safe harbour

Benefit of BER safe harbour depends on both the supplier's and buyer's market share not > 30%

- 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
- If in safe harbour: only withdrawal of BER possible for the future by Commission or NCA

3. Excluded restrictions

- No negative presumption: only obligation excluded from safe harbour, rest of agreement can benefit from BER

- Non-compete obligation exceeding 5 years
  - obligation causing the buyer to purchase more than 80% of its requirements on a market from that one supplier
  - for a period exceeding 5 years, including if tacitly renewable beyond five years
  - except if buyer operates from premises/land owned/leased by supplier: then covered for duration of the occupancy
  - main concern: risk of cumulative foreclosure effect

Excluded restrictions

- Post term non-compete obligations except if the obligation is indispensable to protect know how transferred by the supplier to the buyer, does not exceed 1 year and is limited to the location where the buyer was operating during the contract

- Obligations on members of a selective distribution system not to sell the brands of particular competing suppliers (to avoid cumulative boycott)

4. Individual assessment outside the VBER

- VRGL provide general framework for individual assessment: sums up possible negative and positive effects linked to vertical restraints and describes general rules and the factors relevant for an assessment under Article 101(1) and (3)

- Separate sections where this framework is applied for the most common vertical restraints: single branding/non-compete obligations, exclusive distribution and customer allocation, selective distribution, franchising, exclusive supply obligations, upfront access payment obligations, category management agreements, tying and price restrictions

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Example of non-compete obligations

- Interbrew case of 2003: commitments of Interbrew to shorten and open-up its beer supply agreements with pubs in Belgium

- Issue: foreclosure of other brewers, leading to less choice and higher prices for customers

- Relevant factors: market position of Interbrew, position of competitors, entry barriers, possibilities of pubs to switch, duration and type of agreements

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3. Article 102 TFEU

Article 102 TFEU

Article 102 TFEU prohibits any **abuse** by one or more **undertakings of a dominant position** within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

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Article 101 and/or 102

- Both articles may apply to vertical restrictions where:

  - ❑ the supplier is (solely or collectively) dominant
  - ❑ the distributor is (solely or collectively) dominant

  Case 85/76 Hoffman La Roche v Commission [1979] ECR 461 at para 116 : European Court confirmed that the Commission is at liberty to assess contractual restraints under Article 101 TFEU or under Article 102 TFEU.

- In practice, DG COMP has pursued an undogmatic approach and examples exist for 101, 101&102 and 102 only.

Pragmatic considerations

- From an administrative perspective it can be more efficient to address exclusive dealings under Article 102 TFEU where the same dominant supplier concludes many identical exclusive distribution agreements (one per territory)
- If Article 102 is used, it is less likely that small distributors are exposed to damage claims, consumers will rather sue the dominant company
- Enough evidence for dominance of the supplier?

Efficiencies

The choice of law does eventually not matter when it comes to the assessment of efficiencies : Both under Article 101 (3) and under Article 102 TFEU the dominant supplier may demonstrate that consumers are better off with the vertical restraint than absent the restraint.

Thank you