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ACM’s strategy and enforcement priorities with regard to vertical agreements

The art of balancing the pros and cons case by case

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1. What is the EU legal framework?
2. What is the economic context?
3. What vertical restraints are typical?
4. ACM's strategy & prioritization

Outline of presentation

1. What is the EU legal framework?
2. What is the economic context?
3. What vertical restraints are typical?
4. ACM’s strategy & prioritization

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General EU Legal Framework

- Article 101.1 Treaty of the Functioning of the EU
  - agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the internal market

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- Article 101.3 allows for exemptions:
  - efficiency gains;
  - fair share for consumers;
  - indispensability of the restrictions;
  - no elimination of competition.

Vertical agreements specific framework:

- Vertical agreements can improve economic efficiency. In particular reductions in the transaction and distribution costs.
- Block Exemption Regulation (BER) No 330/2010
- Safe harbour for agreements for which conditions of Article 101(3) are assumed to be met :
  - Market shares < 30%
  - No “**hard core”** restriction
- If these criteria are not met:
  - Not assumed illegal, but:
  - Individual assessment required
  - European Commission Guidelines for this assessment

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“Hard core” restrictions

- Hard core restrictions do not benefit from Safe Harbor
- Assumed unlikely that efficiency gains (if any) are passed on to consumers
- Examples:

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1. Resale price maintenance: suppliers are not allowed to fix the (minimum) price at which distributors can resell their products.
2. Restrict territory into which or customers to whom distributor may sell
3. No restriction of passive sales within selective distribution network (banning online sales, dual pricing)

This is rebuttable, but ….

- Burden of proof on undertaking (efficiency defence)

Case law:

- Pierre Fabre (2011 ECJ):

A complete ban on online sales is not allowed and considered an infringement by object (passive sales)

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But…

- Leegin (2007 US Supreme Court):
  - RPM not per se illegal;
  - rule of reason test (case by case) instead

Economic context: what are the positive effects?

- Vertical agreements can lead to efficiency gains in distribution chains, to the benefit of consumers
  - *For example*: A retailer cuts down on service to save costs. As a consequence, consumers value a product less, leading to less sales for supplier and retailer.
- Agreements can stimulate retailers to invest in service:
  - Contractual obligation
  - Incentive to provide service by providing a margin for retailer;
  - e.g. dual-pricing, flat fee or resale price maintenance
- Hold up problems, preventing free riding …..
- Normally, a producer would not give away “margin” without getting something in return …

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Economic context: what are the risks?

- Theories of harm fall in three broad categories:
  - Facilitation of collusion
  - Softening interbrand competition
  - Softening intrabrand competition
- Examples:
  - If a vertical restriction is “forced upon” the producer by retailer(s): reduces retail-competition, not to benefit of consumer or producer
  - Vertical agreements used to mask a retail cartel
  - RPM can facilitate a producer cartel
- Economic fundamentals apply offline and online; Impact of fundamentals might differ online though as a result of network effects

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What are the implications for enforcement?

- Only agreements that are not covered by BER
- Limited empirical economic evidence: Vertical agreements often generate efficiencies that benefit consumers. Not always though…
    - A case by case approach allows us to weigh pros and cons.
- Large degree of substitutability of vertical restrictions:
    - Distinction of hardcore and non-hardcore is less relevant in prioritization by ACM

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ACM’s general strategy

- ACM’s general strategy:

  Consumer harm is the leading principle

- Prioritization:
  1. Effects on consumer welfare
  2. Public interests
  3. Efficient and effective enforcement
- Case by case approach to vertical agreements:
  - “Initial substantive investigation”: is a plausible theory of harm applicable? → higher priority

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ACM’s strategy & prioritization

- Clarity on most important criteria for prioritization
- Scenarios to illustrate the priority setting
- Information chart to give further guidance to (SME) businesses

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Which criteria primarily determine prioritization?

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- Level of market power in the case of a vertical agreement in a single distribution chain
- Interbrand competition (# of distribution chains, market shares, distinctive product features, brand name recognition, customer retention, switching barriers, barriers to entry etcetera)
- Broad (or market-wide) application of similar vertical agreements
- Vertical agreements imposed by retailers
- Possible efficiency improvements

Which vertical restraints are typical?

Typical agreements encoutered in hybrid online/offline environments:

- Selective Distribution
- Resale Price Maintenance
- Dual Pricing
- Minimum advertised price agreements
- Restrictions on online sales (price comparison websites)
- Most favoured Nation clauses (MFN) or Accross Platform Parity Agreements (APPA)

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Scenarios: balancing the pros and cons case by case

- ACM describes five scenarios in order to give more insight into the facts and circumstances that indicate the expected effects of a vertical agreement on consumer welfare.

For example: Bicycle retailers urge bicycle manufacturer not to supply a competing retailer

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Theories of harm:

(1) by excluding the online retailer, consumers cannot benefit from the lower price that this bicycle retailer offers;

(2) exclusion of the online retailer possibly restricts innovation on the bicycle retail market regarding the way in which online retailers offer valuable service to the consumer;

(3) exclusion of the online retailer could lead to reduced price transparency for bicycles, and thus raise the search costs for consumers.

Possible efficiency improvement:

Protecting offline retailers can lead to better service for consumers prior to the sale.

Other scenarios:

- "RPM" used as incentive for retailers to provide service; strong interbrand competition:

- "RPM" used as incentive for retailers to provide service; limited interbrand competition

- Across Platform Parity Agreements

- Market wide application of RPM

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How ACM helps business owners with the self-assessment of vertical agreements

- In addition to the document, ACM published an 'information chart' for business owners.

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  - Business owners will have to test the agreements they've made with buyers and suppliers against antitrust legislation.
  - By answering questions about the nature, the scope, and the effects of the agreements to which the business owners are a party, they will be able to assess whether they are making or have made agreements that may have negative effects for consumers.
  - These are also the types of agreements that ACM would investigate.

Conclusion

- Economics teach us that vertical restrictions are generally pro-competitive, benefitting consumers & markets.
- Not always though; legal framework allows for priority setting to enforce most harmful situations
- Why undertakings use a certain restriction is a relevant question
- ACM will prioritise cases where consumers harm is likely

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Thank you for your attention!