

Implications of the EC's guidelines on vertical agreements

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Agenda

- Introduction
- (1) Buyer power thresholds
- (2) Internet sales: passive and active selling
- (3) Pricing, territorial protection and other changes
- Implications for vertical agreements...

Introduction: the existing vertical restraints regime

- If Article 101(1) TFEU applies:
 - block exemption
 - individual exemption
- Vertical Restraints Block Exemption Regulation (Reg 2790/99)
 - buyer & supplier at levels of market
 - supplier's MS $\leq 30\%$; and
 - no hardcore restraints
 - buyer's MS only relevant in exclusive supply arrangements
 - Expires midnight 31 May 2010 (Monday), 1 year transitional period

(1) Buyer power thresholds

- New Vertical Restraints Block Exemption Regulation (VRBE) (Reg 330/2010)
 - buyer and supplier at different levels of market
 - supplier's MS $\leq 30\%$ **and buyer's MS $\leq 30\%$;**
 - no hardcore restraints
 - ~~buyer's MS only relevant in exclusive purchasing arrangements~~
- Enters force 1 June 2010 (Tuesday), 1 year transitional period

(1) Buyer power thresholds

- Controversial change introduced due to concerns of increased buyer power
- Share of which market? – “MS on the market where buyer purchases the contract goods or services”
- No more one stop shop, options:
 - individually negotiated agreements + ongoing monitoring?
 - one-size fits all agreement with loose obligations?
 - reporting obligations placed on buyers?

(2) Internet sales: passive and active selling

- General rule:
 - website is a form of passive selling
 - internet selling must be permitted
 - language options = passive
 - blanket ban only if objective justification
- Online selling - main issues:
 - brand devaluation, free riding, counterfeits.
 - guarantees, exchanges, after sales service.

(2) Internet sales: passive and active selling

- New guidance on hardcore restrictions:
 - rerouting / rejecting out-of-territory customers
 - limiting proportion of online vs offline sales
 - imposing higher prices for goods sold online vs offline
- Individual exemptions possible

(2) Internet sales: passive and active selling

- Permissible restrictions:
 - quality standards (equivalence)
 - “bricks and mortar” outlets
 - set minimum offline sales (absolute not proportion)
 - rules concerning third party hosted sites
- Areas of uncertainty
 - excessive quality standards deterring internet selling
 - re-routing for safety reasons (e.g. relevant language)
 - making website “attractive” to those outside territory

(3) Pricing and territorial protection

- Restrictions on passive sales = hardcore
- New guidelines - individual exemption where:
 - genuine new market entry (e.g. new market / new product)
 - substantial investment by distributor
 - ≤ 2 years
 - **necessary** to recoup investment

(3) Pricing, territorial protection and other changes

- Retail price maintenance (RPM) = hardcore
- New guidelines - individual exemption where:
 - expanding demand for new product / brand
 - “coordinated short term low price campaign”
 - 2 - 6 weeks
 - RPM **necessary** to overcome free riding between retailers

(3) Pricing, territorial protection and other changes

- New guidance where seller's and/or buyer's MS over 30%
 - Upfront access payments (e.g. slotting fees):
 - reduces asymmetry of info between buyer and seller
 - allows competition for shelf space
 - reduces free-riding by suppliers (cost of failure borne by supplier)
 - Category management agreements:
 - promotes access to supplier's expertise & economies of scale
 - may increase responsiveness to customer demand
 - high inter-brand competition, low switching costs = less problematic

Implications for vertical agreements

- Existing agreements
 - 1 year transitional period
 - review buyer's MS... rewrite agreements?
 - whose problem is buyer's MS?
- Future agreements
 - complexity increased
 - buyer's bargaining power increased?
 - less of tick-box approach – hardcore no more...

Thank you for your attention

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