Vertical restraints and e-commerce – recent enforcement

Fabian Kaiser
DG Competition

Oxford, 24 May 2019

The views expressed are purely personal and do not necessarily represent an official position of the European Commission.
The E-Commerce Sector Inquiry
Sector Inquiry - Key Findings (May 2017)

➢ More price transparency and price competition

➢ More price monitoring

➢ Impact on distribution strategies

   ➢ Increased presence of manufacturers at the retail level (own webshops)

   ➢ Increased recourse to selective distribution

➢ Vertical Restraints
   – Pricing restrictions (RPM)
   – Territorial restrictions
   – Online sales restrictions
Enforcement

➢ Increased **focus on vertical restrictions**

➢ **Territorial restrictions**
  - Pioneer decision (07/2018)
  - Pay-TV commitments (03/2019)
  - Video Games SOs (04/2019)
  - Guess decision (12/2018)
  - Nike / licensed merchandise decision (03/2019)

➢ **Resale price maintenance** cases (RPM)
  - Decisions in July 2018 against 4 manufacturers of consumer electronics (Philips, Pioneer, Asus, Denon & Marantz)
### Fines / Cooperation reduction

<table>
<thead>
<tr>
<th>Company</th>
<th>Code</th>
<th>Reduction for cooperation</th>
<th>Fine (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asus</td>
<td>AT.40465</td>
<td>40 %</td>
<td>63 522 000</td>
</tr>
<tr>
<td>D&amp;M</td>
<td>AT.40469</td>
<td>40 %</td>
<td>7 719 000</td>
</tr>
<tr>
<td>Philips</td>
<td>AT.40181</td>
<td>40 %</td>
<td>29 828 000</td>
</tr>
<tr>
<td>Pioneer</td>
<td>AT.40182</td>
<td>50 %</td>
<td>10 173 000</td>
</tr>
<tr>
<td>Guess</td>
<td>AT.40428</td>
<td>50 %</td>
<td>39 821 000</td>
</tr>
</tbody>
</table>
RPM cases (ASUS, D&M, Pioneer, Philips)

**Strategy:**

- establishment of retail price **monitoring system**
- serial number tracking system, regularly applied to **identify the origin of low-priced products**, followed up by intervention (sometimes coupled with parallel trade restrictions)
- **bonus systems / partnership programs** (better purchase prices to certain retailers) excluding "non-cooperating" retailers
- colour codes applied to retailers according to their "distance" (-5% / -10%) from recommended retail price, and **lists of retailers circulated internally** on a daily/weekly basis, for "action" and for retaliation

**Threats:**

- => at least **credible threat of retaliation:**
  - (threatening with) termination of contractual relationship or suspending deliveries
  - financial incentives and sanctions: (threatening with) no bonus, no partnership program
"Hallo Herr [...] ich kann absolut nicht nachvollziehen warum [Retailer A] den aktuellen Status durch unsinnige Aktionen gefährdet. Bei vorbildlich stabilem Auftreten im Markt sind sie im Q4 bei uns unter den TOP 3 e-tailern und würden bei aktueller Runrate einen Bonus von über [...] € erhalten. Möchten Sie das ab Q1 nicht mehr?"

"Bitte [...] in Hamburg wegen Vertragsbruch sperren. [...] ich schlage vor dass [...] wie [...] für die nächsten drei Monate keine Neuheiten bekommt. Bitte Neuheiten zurück holen."

"so, you're not enjoying the job?"
"no, not really, it's not account management – it's price fixing mainly - seriously, i have to call customers so they put up their prices. It's crazy!!!!!!"
Evidence (2)
Pricing algorithms: small intervention – big impact

Spiders are a software which monitors resale prices of key competitors and automatically adjust prices to match (lowest) price in the market. Getting price mavericks to adhere / raise to desired price levels has knock-on effects on multiple e-tailers.
Possible negative effects of RPM

➢ Foreclosure of other buyers:

The fixed or minimum price, possibly instigated by the incumbent buyer(s), deprives more efficient/new distributors from gaining market share by competing on price

➢ Softening of competition or facilitation of collusion between buyers

RPM may be induced by buyers as a way to facilitate collusion/soften competition; the enforcement of the obligation and the monitoring is partly executed by the supplier
Possible positive effects of RPM

➢ Solving a free-rider problem

Free-riding works both ways. Are there less intrusive means?

➢ Support entry in (new) market

For a short period of time.
Guess Decision

❖ Selective distribution system

❖ EEA-wide

❖ Wholesale level: one wholesaler per Member State (either a subsidiary of Guess Europe or an independent one)

❖ Retail level:
  • Mono-brand stores owned by Guess
  • Mono-brand stores run by third parties
  • Multi-brand stores run by third parties

❖ Guess used the same standard agreements in the EEA (except for FR, SP, PT)
Guess decision

Guess restricted authorised distributors in a selective distribution system from:

- selling to end users located outside the authorised distributors’ allocated territory - Article 4 c) VBER

- cross-selling among authorised wholesalers and retailers – Article 4 d) VBER

- determining their resale prices independently - Article 4 a) VBER

- using the Guess brand names and trademarks for the purposes of online search advertising

- selling online without first obtaining a specific authorisation which Guess had full discretion to either grant or refuse and where no quality criteria had been specified for deciding whether or not to grant an authorization
The strategy of Guess
Online search advertisement restriction
Online sales restriction

selling online without first obtaining from Guess a specific authorization which Guess had full discretion to either grant or refuse and where no quality criteria had been specified for deciding whether or not to grant an authorization
VBER Review

- VBER review launched on 3 October 2018 (expiry on 31 May 2022)

- Review is divided in two phases: Evaluation (approx. 18 months, until Q2/2020) and Impact Assessment (approx. 24 months, until expiry)

- Public consultation from 4 February to 27 May 2019 (evaluation questionnaire)

- The evaluation phase is aimed at gathering evidence on the functioning of the VBER (together with the accompanying Guidelines on Vertical Restraints)

- Dedicated stakeholder workshop planned for autumn 2019

- Close cooperation with national competition authorities (ECN)

- Context: increased importance of online sales and the emergence of new market players such as online platforms