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 ≤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 ≤30% \textbf{and} buyer’s MS ≤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
  - $\leq 2$ 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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