

Has modernization delivered? An economist's perspective

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Green paper on Vertical Restraints (1997)

Importance of inter-brand rather intra-brand competition

- *“Whilst this policy has been successful in over 30 years of application a review is necessary because (...) current economic thinking suggests the importance of market structure in determining the impact of vertical restraints. The fiercer is inter-brand competition, the more likely are the pro-competitive and efficiency effects to outweigh any anti-competitive effects of vertical restraints.” (Luc Peeperkorn, January 1997).*
- *“Anti-competitive effects of vertical restraints are likely to be insignificant in competitive markets. Rather their efficiency enhancing effect and benefit to consumers is likely to dominate. **Anti-competitive effects are only likely where interbrand competition is weak and there are barriers to entry.**” (Green paper, para. 85)*
- *“Individual clauses or different types of vertical restraints cannot be considered per se as having a negative or positive effect on competition or integration.” (Green paper, para. 85)*
- *“**Analysis should concentrate on the impact on the market, rather than the form of the agreements.**” (Green paper, para. 85).*

Modernization and effects-based approach

New regulations (2790/1999 and 310/2010) broadly consistent with economic consensus

- Less formalistic, more emphasis on the economic impact of agreements rather than on their form.
- New market share thresholds (but upstream and downstream).
- *“The issuing of the BER, and of the Guidelines on Vertical Restraints (henceforth, Guidelines) which accompanied it, was rightly heralded as the introduction of an effects-based approach into EC competition law on agreements. (...) **We believe that the fundamental approach of the BER – namely allowing firms with small market share to use the vertical agreements as they prefer - is the correct one**”* (EAGCP Vertical Restraints subgroup, 2009).

But economists still disagree with the rigid “hardcore restrictions” approach

- *“However, we believe that it is worth considering the possibility to change the EC policy on the so-called hardcore restrictions.”* (EAGCP Vertical Restraints subgroup, 2009).

Hardcore restrictions vs. Effects-based approach

Resale Price Maintenance

- Economic theory suggests that RPM may have anticompetitive effects when either the supplier has significant market power (*commitment problem*) or when, even in the presence of inter-brand competition, RPM is generalized within the industry (*interlocking relationships, facilitating practice*).
- “[I]t does not seem that by allowing firms with small market shares to engage in RPM one would incur significant competitive risks.” (EAGCP Vertical Restraints subgroup, 2009).

Same arguments apply to “territorial restrictions” (including restrictions on online sales)

- Price discrimination by firms with limited market power can only have a limited impact.
- “From an economic perspective, it is not clear to us why active and passive sales should be treated in different ways, as both have the same effect (...) The distinction between active and passive sales is also increasingly fuzzier given that online sales become more important” (EAGCP Vertical Restraints subgroup, 2009).

Focus on hardcore restrictions

Decisions on vertical agreements at the Autorité de la concurrence

- **RPM**
 - Fertilizers (2019), Obut (2017, abuse of dominance), L'Atelier du Vin (2017)
 - Many others cases in the past (in relation to “no resale below cost” laws in France, “Loi Galland”).
- **Ban on online sales**
 - Trek (2019), Stihl (2018)
 - Again many older cases prior to the 2010 Guidelines for instance: Pierre Fabre (+ other manufacturers), Festina, Bang & Olufsen.
- **Other cases?**
 - **Platform price parity clauses (Booking commitments, 2015)**
 - Exclusivity clauses (for imports in the overseas territories: legal ban under French law).
 - Commitment cases linked to potential abuses related to exclusivity clauses or refusal to deal.
- **Where are the effects-based cases?**

Focus on hardcore restrictions

Many cases on RPM or Online sales (or both)

- **UK CMA**
 - Fender Europe (last week), Casio (musical instruments, 2019), light fittings (2016), bathroom fittings (2016), commercial refrigeration (2016).
 - Other on-going investigations (musical instruments).
- **Bundeskartellamt**
 - Furniture manufactures (2017), Food retail sector (27 companies involved, 2016), LEGO (2016).
 - Coty, ASICS, etc.
- **European Commission**
 - Asus (2018), Denon & Marantz (2018), Philipps (2018), Pioneer (2018)
- **Once again few effects-based cases**
 - **Platform price parity clauses.**

Recent EU RPM decisions

4 simultaneous decisions in July 2018

- **Asus, Denon & Marantz, Philipps, Pioneer**
- **The term “market share” appear only once in each decision**

“In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the market shares of the undertaking concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.”
- **Extent of inter-brand competition is never discussed.**

Are the guidelines “business model neutral”?

Wholesale vs. Agency model

- **Rey and Vergé (2016)**
 - Suppose that there is more competition between brands (inter-brand) than between stores (intra-brand).
 - In that case, the equilibrium retail price will be higher under the agency distribution model than the wholesale distribution model.
 - This is also the case under which maximum RPM may lead to higher prices (under the wholesale model) and minimum RPM proves ineffective.
- **See also Foros, Kind and Shaffer (2017).**
- **In some cases, firms may thus be driven to favour the agency model (in which suppliers keep control of the prices without legal risks!). May harm consumers if platforms have significant market power.**
- **Question: what is a genuine agent? Is Amazon a genuine agent?**

Selective distribution

- Looking at price dispersion does not help much: whether the theory predicts positive or negative effects of PPCs, one would expect (weakly) more dispersion under PPCs (and more dispersions under wide than narrow PPCs).

Digital markets / Hybrid retailing

Selective distribution

- Could it make sense to allow quantitative restrictions in selective distribution systems? Is the “one physical” store requirement making sense?
- But it may also seem to easy to use a selective distribution system for “standard” products.

Active vs. Passive sales

- Online sales always considered as passive sales.
- Regulation biased in favour of online retailers vs. traditional brick-and-mortar retailers?

Hybrid systems - Platforms

- Should be very attentive to contractual relationships between hybrid actors that are simultaneously online retailers and marketplace for competitors?
- But are the potential anti-competitive effects due to vertical relationships or to horizontal agreements between competitors?

Conclusions

Modernization was necessary and the effects-based approach is a great improvement.

- Much more flexible approach focusing on the economic impact of vertical restraints rather than purely formalistic approach.
- Move towards a more unified approach by reducing the number of sectoral exceptions.

But nothing is perfect and regulations / guidelines are by nature based on a retrospective analysis more than anticipating future difficulties.

- May have generated an enforcement bias towards hardcore restrictions (same “object vs. effect” than with horizontal agreements).
- May have unanticipated (and possibly adverse) effects on business-model choice.
 - **Remember: firms react to incentives!**
- Guidelines have not necessarily helped dealing with new types of restraints observed in digital / platform markets.