



Vertical restraints

Professor dr. juris Erling Hjelmeng



Vertical restraints – a legal definition

- Relation: Different levels in the distribution chain
- Implementation: Agreement/concerted practice
- Object: Limits at least one party's ability to purchase/sell goods and/or services

- Other forms of "vertical challenge":
 - Abuse of dominance
 - May overlap, as it may constitute an abuse to force a vertical restriction on a contract party (in particular single branding: The goal of most)
 - Incentives a substitute for agreements
 - Vertical integration



The law

- Article 81
- Article 82

- Focus: Article 81
 - When are vertical restraints anti-competitive?
 - Conditions for exemption
 - Guidelines on vertical restraints
- Review spring 2010: Minor changes + adaption of rules to internet trade

http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html



Some basic concepts

- Intra brand vs inter brand competition
- Restrictions vs. Justification
- Article 81(1) vs Article 81 (3)
 - Article 81(3) "efficiency defence"
 - Reverse burden of proof
 - Directly applicable since 1 May 2004
 - Block exemption regulation = safe harbour, but
 - no presumption of illegality outside BER
- Per se vs Rule of Reason



Implementation: Agreement/concerted practice

- Agreed terms within the scope of Article 81
 - Oral, written, concept of an agreement
- Case C-74/04 VW, para 37:

”in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive.”
- Case T-41/96 Bayer para 71:

”case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article [81](1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.”
- Two alternatives:
 - Measure ”accepted” (by behaviour) by the dealer, cf. ”acting on complaints”
 - Framework agreement



Agency

- A genuine agent is regarded as "part of" the principal's business
- Same economic unit
- Article 81 not applicable
- CEPSA I & II, Case C-217/05 (14. Dec. 2006) and Case C-279/06 (11 Sept 2008)
- Risk & Integration
- If exclusive agent – risk is decisive



Development: The final victory of economics?

- US Antitrust policy
 - Dr. Miles (1911) price restraints per se prohibited
 - Schwinn (1967) non-price restraints per se prohibited
 - Albrecht (1968) RPM max per se prohibited
 - Sylvania (1977) Non price restraints rule-of-reason
 - Khan v. State Oil (1997) RPM max rule-of-reason
 - Leegin (2007) RPM min rule-of-reason
- EU:
 - The first years: Grundig, STM, De Haecht
 - 1997: Green paper on vertical restraints
 - 1999: Block exemption (Regulation 2790/99)
 - 2000: Guidelines vertical restraints
 - 2004: Guidelines 81(3) – genuine efficiency defence
- Only RPM min and absolute territorial protection generally outlawed, but
- Never per se prohibition under Article 81, cf. Article 81(3)



Leegin summarized

”In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, [220 U. S. 373](#) (1911), the Court established the rule that it is *per se* illegal under §1 of the Sherman Act, 15 U. S. C. §1, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of §1. The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.”



Hard-core / soft-core distinction

- RPM minimum
- Absolute territorial protection
- Why???
- The Commission's approach (price/non-price)
 - Single branding
 - Limited distribution
 - Exclusive
 - Selective
 - Exclusive sale
 - RPM
 - Tying (full-line forcing)



In practice: The analysis

- Definition of relevant market
 - Is the block exemption applicable?
 - If no: Does Article 81(1) apply?
 - If yes: Does Article 81(3) apply?
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- Dominance?
 - An abuse is not exempted under Article 81(3)



Market share thresholds

- $> 50\%$ Presumption of dominance
- $> 40\%$ (appx) Dominance if other factors
- $< 30\%$ Trigger block exemption
- $< 15\%$ De minimis (minor importance)
(De minimis notice)



A closer look at the block exemption

- The system & structure
- Art 2: Exemption
- Art 3: Market share threshold
- Art 4: Hardcore exception
- Art 5: Duration & limitations



Analysis: Introduction

- Case by case analysis required outside block exemption
 - Duration
 - "Hard-core"
 - Market share exceeding threshold
- Article 81(3)
- Guidelines
 - Vertical restraints
 - Article 81(3)
- Article 81(1) vs 81(3): What is relevant where?



Analysis: Negative implications

- Foreclosure of other suppliers/buyers
- Reduction of inter-brand competition e.g. facilitation of collusion (explicit *and* tacit)
- Reduction of intra-brand competition
- Obstacles to market integration



Analysis: Positive implications

- Solve a free-rider problem
- Entering a new market
- "Certification" free-rider (eliminating free-riding on other dealers' reputation)
- Solve a hold-up problem (Asymmetric, relation-specific and sunk costs will prevent investments being made unless protection by means of a vertical restraint)
- Solve specific hold-up problems related to the transfer of know-how
- Economies of scale in distribution
- Facilitating loans / investments due to capital market imperfections
- Creating a brand image. e.g. by quality standardisation



Analysis: The parameters

- Supplier's market position
- Competitors' market position
- Buyer's market position
- Entry barriers
- Maturity of the market
- Level of trade (upstream/downstream)
- Nature of the product
- Other (cumulative effect)



Analysis: "Rules of thumb" I

- Normally no competition concerns when sufficient inter-brand competition
- Restrictions of inter-brand competition generally more harmful than restrictions of intra-brand competition
- Limited distribution particularly harmful when more efficient distributors are foreclosed
- Exclusive arrangements are generally more harmful than non-exclusive ones



Analysis: "Rules of thumb" II

- Restraints for non-branded goods are less harmful than for branded goods (more substitutes)
- A combination of restraints aggravates their effect
- Negative effects may be reinforced by cumulative effects
- The more a restraint is linked to transfer of know-how, the more likely are positive effects
- The same goes for investments
- New product = Less harmful



Analysis: Single Branding

- Suppliers' market power
- Duration
- Competitors' market position
- Barriers to entry (Alternative outlets)
- Counterwailing power
- Market level
- English clause
- Network effect/cumulative effects



Analyse: Exclusive dealership

- Suppliers' market power
- Competitors' market position
- Barriers to entry (Less significant)
- Buyer power
- Maturity