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9. VUOSIKERTA

ÅRGÅNG 9

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2.5.1 REVISED EU COMPETITION RULES FOR SUPPLY AND DISTRIBUTION AGREEMENTS

Introduction

On 20 April 2010 the Commission adopted a new Block Exemption Regulation applicable to vertical agreements² (“the Regulation”). At the same time it adopted the contents of accompanying Guidelines on Vertical Restraints (“the Guidelines”), which were subsequently formally adopted in all official languages of the Union by Vice-President Almunia on behalf of the Commission on 10 May 2010.³ Both are applicable since 1 June 2010.

The competition rules embodied in these instruments are particularly important in view of the pervasiveness of vertical agreements. Vertical agreements are agreements between firms operating at different levels of the production or distribution chain for the sale and purchase of intermediate products and the purchase and resale of final products. Typical examples of vertical agreements are distribution agreements between manufacturers and distributors, or supply agreements between a manufacturer of a component and a producer of a product using that component. Because each firm has to purchase certain inputs and most firms need to sell their

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² Commission Regulation (EU) No. 330/210 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1

³ Guidelines on Vertical Restraints, OJ C 130, 19.05.2010, p. 1

products to producers further downstream or to distributors, most companies are concerned by these rules.

Vertical restraints are restrictions of competition included in vertical agreements which may foreclose and/or segment markets, soften competition and facilitate collusion. For instance, vertical agreements which have as their main element that the manufacturer sells to only one or a limited number of buyers (exclusive supply, exclusive distribution or selective distribution) may lead to foreclosure of other buyers and/or to collusion between buyers and segmentation of markets. Similarly, non-compete obligations which prohibit distributors to purchase and resell competing products may foreclose new manufacturers and rigidify the market positions of incumbent manufacturers.

These rules play an important role in ensuring, within the EU, a consistent approach to vertical restraints under Article 101 of the Treaty on the Functioning of the European Union (“Article 101”). This is important as enforcement, since the 2004 decentralisation, is mostly taking place at the national level, by the national competition authorities and national courts.

This article does not treat all the aspects of the Regulation and Guidelines, but rather focuses on the main novelties and clarifications brought by these recently adopted texts.

Background

The Commission published in 1997 a Green Paper on Vertical Restraints in EC Competition Policy, presenting a number of options to improve its policy towards supply and distribution agreements.⁴ At the end of the nineties it was clear that the EU was in need of a new competition policy towards supply and distribution agreements. There was a large measure of agreement at the time that the old form-based block exemption regulations adopted in the seventies and eighties - with their long lists of white, grey and black clauses – in combination with the notification procedure of the old Regulation 17, had a straitjacket effect on firms, unnecessarily limiting the latter in their choice between the different commercial options open to them to distribute their products. At the same time, the form-based approach also carried the risk that situations that did not merit to be block exempted, in particular agreements concluded by firms with significant market power, were covered by the old block exemption regulations. In today’s jargon, the form-based approach led at the same time to false positives and false negatives.

The wide ranging public debate that followed the publication of the Green Paper underlined the need to move away from the form-based approach. The Commission subsequently in 1998 outlined the new effects-based approach it favoured in a follow-up to the Green Paper, the Communication on the Application of the EC Competition Rules to Vertical Restraints.⁵ In this Communication the Commission

⁴ COM(96) 721 final.

⁵ COM(98) 544 final.

recommended “a shift from the current policy relying on form-based requirements with sector-specific rules to a system based on economic effects covering virtually all sectors of distribution. ... It proposes to achieve this by means of one wide-ranging block exemption regulation that covers all vertical restraints concerning intermediate and final goods and services except for a limited number of hardcore restraints. It is based mainly on a ‘black list’ approach, i.e. defining what is not exempt under the block exemption instead of defining what is exempt. This removes the straitjacket effect, a structural flaw inherent in any system which attempts to identify the clauses which are exempt. ... The principal objective of such a wide-ranging and flexible block exemption regulation is to grant companies which lack market power, and most do, a safe harbour within which it is no longer necessary for them to assess the validity of their agreements in the light of the EC competition rules. In order to preserve competition and to limit the benefit of this exemption to companies which do not have significant market power, the future block exemption regulation will make use of market share caps to link the exemption to market power. ... Companies with market shares above the thresholds of the block exemption will not be covered by the safe harbour. It must, however, be stressed that, even in such circumstances, their vertical agreements will not be subject to any presumption of illegality. The market share threshold will serve only to distinguish those agreements which are presumed to be legal from those that may require individual examination.”⁶

Along the lines of the Communication the Commission subsequently adopted in 1999 its first broad umbrella block exemption regulation for vertical restraints (“the 1999 Regulation”)⁷ and a few months later in 2000 its first general guidelines on vertical restraints (“the 2000 Guidelines”)⁸ to accompany the 1999 Regulation.

This marked the start of a dramatic change in the competition policy landscape in the EU. The 1999 Regulation and 2000 Guidelines were the first step in what is now recognised as the introduction of an effects-based approach in EU antitrust policy under Articles 101 and 102. Subsequent steps to introduce an effects-based approach were made with similarly structured block exemption regulations and guidelines for horizontal cooperation agreements and for technology transfer agreements, with an adapted de-minimis Notice and with the Article 81(3) Notice. The adoption of Regulation 1/2003 ended the notification system and allowed an effective decentralisation of enforcement to increasingly competent national competition authorities (NCAs), working together with the Commission in the European Competition Network (ECN).⁹ More recently, both in the Commission’s decisional practice and as set out in the Guidance on Article 82 (now Article 102), the Commission is also promoting a more effects-based approach under Article 102.¹⁰

⁶ XXVIIIth Report on Competition Policy 1998 – SEC (99) 743 final, paragraphs 36–38.

⁷ Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, pp. 21–25.

⁸ Commission notice – Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, pp. 1–44.

⁹ See the various regulations and guidelines at: <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

¹⁰ See at: <http://ec.europa.eu/competition/antitrust/art82/index.html>.

Where it thus was clear at the end of the nineties that the EU was in need of a new competition policy towards supply and distribution agreements, such need for radical change was not obvious for the latest review. This review process was launched in the spring of 2008 in view of the expiry on 31 May 2010 of the 1999 Regulation. The Commission services took stock of enforcement with the national competition authorities within the ECN and a consensus quickly arose that the architecture put in place in 1999 had worked well and only needed some up-dating and clarifications. Experience indicated that overall the rules had enabled the Commission and the NCAs to develop a flexible and meaningful enforcement policy, around the relevant effects of likely foreclosure and softening of competition while taking account of possible efficiencies. At the same time the 1999 Regulation and 2000 Guidelines were considered to have provided, important in this era of required self assessment, a clear analytical framework for companies which contributed to legal certainty. It was thus considered not necessary to have an upheaval of policy as was the case with the introduction of the effects-based approach but only to refine where necessary the effects-based approach to assess vertical restraints. This was subsequently confirmed by a public consultation that prompted a high response rate. Comments confirmed the general preference ‘not to fix what is not broken’, i.e. to make changes to the regime only where a need to change could be convincingly argued, also in view of the costs to industry of changing the rules.¹¹

While it was decided to maintain the architecture and in particular the effects-based approach put in place in 1999, it was considered necessary to adapt and update it in the light of two major developments since 1999, namely a considerable increase in online sales, and enforcers’ increased attention to and experience with the possible anticompetitive effects of buyers’ market power. While the new rules are thus characterised by a large measure of continuity, the remainder of this article focuses on the main novelties and clarifications in the recently adopted Regulation and Guidelines.

Scope of the Regulation

Extension of the 30 % Market Share Threshold to Buyers

Introducing a market share threshold to cap the benefit of a block exemption regulation was widely considered by legal commentators at the end of the nineties to be the gateway to hell, a sure way to unsustainable legal uncertainty. The introduction of the 30 % market share threshold in the 1999 Regulation was the focal point of opposition to the new approach and many commented that its introduction would fatally undermine the workability of the regulation. With hindsight it can be safely concluded that this opposition was mistaken. The market share cap allowed the Commission to introduce its effects-based approach while at the same time creating

¹¹ For an overview of the comments received during the public consultation: http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

a broad safe harbour with the umbrella type block exemption regulation. The use of a market share threshold to cap the benefit of a block exemption seems therefore no longer disputed. Also its level of 30 % seems to have been chosen pretty well at the time.

An obvious point of the 1999 Regulation to be improved was to make the benefit of the block exemption dependent on the market share of both supplier and buyer which are party to the agreement and not either the supplier's or the buyer's market share as was the case under that Regulation. The choice to make the benefit of the block exemption dependent on the supplier's market share only and, in the exceptional case of exclusive supply, on the buyer's market share only, was adopted at the time in the light of the vehement opposition to the introduction of a market share threshold and its supposed practical problems.¹² Since then the Commission, for instance in 2002 in the *de minimis* Notice and in 2004 in the transfer of technology block exemption regulation (TTBER), has adopted the approach that the market share of all parties to an agreement between non-competitors must respect the relevant market share threshold, which in the case of the TTBER has also been set at 30 %. It could thus hardly have come as a surprise to those who followed the developments in EC competition policy in the last 10 years, that the Commission proposed to introduce a market share threshold also on the buyer's side when the 1999 Regulation came up for revision.

Extension of the 30 % market share threshold to buyers reflects increased recognition and evidence that vertical restraints need not generally be supplier-led: also buyers can have market power that may be used to impose anticompetitive vertical restraints. For instance, an exclusive supply obligation or similar obligation imposed by a powerful buyer (i.e., with a market share above 30 %) on small suppliers (i.e., with a market share below 30 %) may lead to anticompetitive foreclosure of other buyers, and may therefore harm consumers. The assessment of such an agreement by the relevant national competition authority or national court should not be made more difficult or even impossible¹³ because the agreements are benefiting from the block exemption regulation.

It was argued by some that the application of a buyer's market share threshold could and should be limited to certain types of agreements such as exclusive supply agreements, as had been the case under the 1999 Regulation. Under that Regulation the buyer's market share became decisive for the application of the safe harbour in case there was an obligation causing the supplier to sell the contract products to only one buyer inside the Community.¹⁴ However, that solution was obviously flawed as foreclosure and other competition problems on the downstream market can arise not just in case of this extreme scenario of only one buyer for the whole EU, but

¹² See the 2000 Guidelines, § 21-22.

¹³ National courts cannot withdraw the benefit of a Commission block exemption regulation. National competition authorities can withdraw the benefit where the agreement has effects which are incompatible with Article 101(3) in their territory or a part thereof and where this territory has all the characteristics of a distinct geographic market (see recital 14 of the Regulation).

¹⁴ See articles 1(c) and 3(2) of the 1999 Regulation.

also, for instance, in case of exclusive distribution with large (national) territories, minimum supply obligations, most favoured customer clauses and most favoured customer plus clauses.¹⁵ Trying to define all such types of agreements would not only reintroduce a form-based approach, it would also be open to circumvention. For instance, under the 1999 Regulation, if an agreement would effectively oblige the supplier to sell to only one buyer in the whole EU, the loss of the benefit of the safe harbour was easily circumvented by appointing one additional very small buyer in, for instance, Malta.

As a result, the main change with regard to the scope of the Regulation is that for all agreements the benefit of the block exemption no longer depends only on the supplier's market share not exceeding 30 %, but also on the market share of the buyer not exceeding the same threshold.

In the draft Regulation that was submitted to public consultation the Commission proposed that the market share of the buyer, like that of the supplier, should be assessed in the downstream market(s) in which it (re)sells the products/services as it is in these markets that negative effects on customers are felt. However, many stakeholders voiced concerns about the increased compliance costs for companies, resulting mainly from having to assess the buyer's position on possibly many local downstream markets on which the supplier itself is not present. Others argued that where an intermediate product, such as steel, has multiple uses, the position of the buyer on the upstream market may be more relevant than its position in the downstream market, because it is difficult to see how a buyer with a strong position in a particular downstream market, such as cars, but having only a limited position as purchaser on the steel market, can use its purchasing agreements to foreclose other car manufacturers from having access to the steel market. Making the block exemption dependent on the downstream market share of the buyer would in such cases deny the benefit of the safe harbour where that is not necessary.

To remedy these concerns, the market share of the buyer in the Regulation is assessed on the upstream market where it procures the products/services from the supplier. This market is generally wider than the downstream market (in most cases it will be at least national in scope), it is only one market as opposed to several possible downstream markets, and suppliers will know or be able to reasonably estimate the position of their buyers on this market.

In most cases the position of the buyer on the upstream market is a good proxy for the buyer's market power in the downstream market and this ensures that the choice for the upstream market share to limit the application of the block exemption is not extending the safe harbour too widely. However, where in an individual case the buyer has only a modest market share on the upstream purchase market, for instance because it is international in scope, while it has a high market share on the (national) market where it (re)sells the contract product, the Commission or NCA may have to withdraw the benefit of the block exemption in case the supply

¹⁵ Most favoured customer plus clauses are clauses requiring the supplier to offer the buyer not just equally favourable terms as offered to other buyers, but to offer better terms which the supplier is not allowed to offer to other buyers.

agreement leads to negative effects for consumers and does not fulfil the conditions of Article 101(3).

Agency Agreements

There is no fundamental change in policy with regard to agency agreements.¹⁶ Intra-brand restrictions, including prices and conditions at which the agent must sell or purchase the goods or services on behalf of the principal, fall outside Article 101(1) if the agent does not bear any contract specific risks, such as financing of stocks, or costs for market specific investments, such as the petrol storage tank of a service station.

The Guidelines however bring the additional clarification that for an agreement to be considered a genuine agency agreement under the EU competition rules (and thus for any intra-brand restrictions to fall outside Article 101(1)), the principal must in addition bear the costs and risks related to other activities it requires the agent to undertake within the same product market where also the agency activity takes place. This change of the Guidelines reflects the Commission's interpretation of the judgment of the General Court in the *Daimler Chrysler* case.¹⁷ In that judgment the General Court confirmed that the general principle to determine whether an agreement is a genuine agency agreement under the EU competition rules, is whether the costs and risks related to the agency activity are borne by the principal and not by the agent. In that case however there were not only the costs for the sale of new cars, for which the dealers in question operated as agents, but also the costs related to repair activities which the same dealers had to undertake outside their agency contract. The General Court indicated that for the assessment of the agency activity of selling new cars in that case, the costs of the independent repair activity were not relevant. While it is not very clear in the judgment whether this was based mainly on the insignificance of these costs in this case or on the fact that they were made for an activity in another product market, the Guidelines clarify that such costs and risks, if made for an activity on another product market, are not relevant for the assessment of the agency activity.

The reason for taking costs incurred for an independent activity on the same product market into account when assessing an agency agreement, is that the conditions imposed on the agent for its agency activity, such as the price at which it has to sell products on behalf of the principal in that product market, will generally influence its incentives and limit its possibilities when selling on the same product market the products that are part of the independent activity. It can be expected that the fixed price imposed for its agency activity products will influence and limit its price setting for the competing products sold as an independent. In that context it is good policy for the purposes of applying Article 101(1) to qualify the agreement not as an agency agreement, but to assess the conditions under Article 101(1), in this case as resale price maintenance. However, it is also obvious that such 'spill-over'

¹⁶ See paragraphs 12-21 of the Guidelines.

¹⁷ Judgment of the Court of First Instance (now General Court) in Case T-325/01 *Daimler Chrysler v Commission* [2005] ECR II-3319.

of influencing incentives and limiting possibilities will in general not occur where the independent activity takes place on another product market.

Therefore, as an example, a service station operator can be an independent distributor of shop goods or an independent provider of car wash services without this affecting its agency status with regard to petrol retailing. However, to prevent any spill-over effects of intra-brand restrictions (for instance price fixing) between the agency activity and the independent activity, the service station operator cannot be, for the purposes of applying Article 101(1), a genuine agent for one type of petrol and at the same time be an independent distributor for another type of petrol in the same product market.

Vertical Agreements between Competitors

As a general rule, neither the 1999 Regulation nor the new Regulation cover vertical agreements entered into between competitors. Agreements between competitors, also for the distribution of each others' products, are first and foremost assessed as horizontal agreements.¹⁸ The 1999 Regulation however covered a limited number of situations of non-reciprocal vertical agreements between competitors. There are two changes in the Regulation with regard to the coverage of vertical agreements between competitors, both limiting the scope of the Regulation compared to the 1999 Regulation.¹⁹

Firstly, the 1999 Regulation covered situations in which a producer sold its products to a competing producer that distributed them, providing that the turnover of the latter did not exceed €100 million. This exception to the general rule not to cover agreements between competitors has now been removed, because experience shows that in certain markets a €100 million company can be the main local or national producer and thus an important competitor. In such a case the first concern of a competition authority should be the possible loss of competition between the two parties to the agreement, i.e. a horizontal concern. As a result of this change, such agreements fall outside the scope of the Regulation and will accordingly have to be assessed as horizontal agreements.

Secondly, not only for goods but also for services the coverage by the Regulation of vertical agreements between competitors is now limited to situations of dual distribution, i.e. where the supplier is active at the production and distribution level but the buyer is only active at the distribution level.²⁰ Under the 1999 Regulation the requirement that the buyer is only active at the distribution level did not apply to services.²¹ This meant that the 1999 Regulation also covered non-reciprocal agreements concerning the sale of services between competitors active at intermediate levels, for instance between two software developers, where the first concern of a competition authority should be the possible loss of competition between the two

¹⁸ See the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, pp. 1–72.

¹⁹ See article 2(4) of the 1999 Regulation compared with article 2(4) of the new Regulation.

²⁰ See article 2(4)(a) and (b) of the Regulation.

²¹ See article 2(4)(c) of the 1999 Regulation.

parties to the agreement. By limiting the coverage to non-reciprocal dual distribution agreements, it is expected that the possible competition concerns are limited to vertical concerns such as foreclosure and not a possible loss of competition between the parties. The same is expressed somewhat more cautiously in the Guidelines: *“In case of dual distribution it is considered that in general any potential impact on the competitive relationship between the manufacturer and the retailer at the retail level is of lesser importance than the potential impact of the vertical supply agreement on competition in general at the manufacturing or retail level.”*²² For instance, a brewer’s agreements to supply beer to independent pubs fall within the scope of the Regulation, also if that brewer at the same time operates its own pubs in the same market. It is considered that the main competition concern, if any, is not the possible loss of competition between the brewer’s pubs and the independent pubs supplied by this brewer, but is the possible foreclosure effects at the brewers’ level or pubs’ level and resulting loss of competition on those markets. The same applies to a franchisor’s agreements providing services to its franchisees while also operating its own shops.

Hardcore Restrictions

General Approach to Hardcore Restrictions

Article 4 of the Regulation contains a list of hardcore restrictions, in particular restraints on the buyer’s ability to determine its sale price and certain types of (re) sale restrictions. This list has changed very little compared to the 1999 Regulation. Hardcore restrictions are considered serious restrictions of competition that should in most cases be prohibited because of their harm to consumers. The consequence of including such a hardcore restriction in an agreement is that the whole vertical agreement is excluded from the scope of application of the Regulation. In addition, in these cases there is a double presumption, namely that the agreement will have actual or likely negative effects and therefore fall within Article 101(1) and that it will not have positive effects in fulfilment of Article 101(3).²³

Compared to the 2000 Guidelines the new Guidelines make it clear(er) that the presumption that an agreement containing one or more hardcore restrictions will not fulfil the conditions of Article 101(3) is rebuttable: in individual cases the parties can bring forward evidence under Article 101(3) that their agreement brings, or is likely to bring efficiencies that outweigh the negative effects.²⁴ Where this is the case, the Commission is required to effectively assess (rather than just presume) the likely negative impact on competition before making an ultimate assessment

²² See paragraph 28 of the Guidelines.

²³ See article 4 of the Regulation in combination with paragraph 47 of the Guidelines.

²⁴ See again paragraph 47 of the Guidelines. See also in particular paragraphs 63 and 64 of the Guidelines that provide some examples of a possible efficiency defence for hardcore (re)sales restrictions, paragraphs 106 to 109 that describe in general possible efficiencies related to vertical restraints and Section VI.2.10 on resale price restrictions. For general guidance on this see the Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

of whether the conditions of Article 101(3) are fulfilled. In effect this means that the usual order of bringing forward evidence is inverted in the case of a hardcore restriction.²⁵ However, the Commission nuances this inversion by adding in a footnote that *“although, in legal terms, these are two distinct steps, they may in practice be an iterative process where the parties and Commission in several steps enhance and improve their respective arguments.”*²⁶

Resale Price Maintenance

Resale price maintenance (RPM), that is, agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as hardcore restrictions.²⁷ However, the practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price are not considered hardcore restrictions, provided that such maximum or recommended prices do not amount to a fixed or minimum price as a result of pressure from, or incentives offered by, any of the parties.²⁸ This has not changed compared to the 1999 Regulation.

The section of the Guidelines that deals with RPM provides a good illustration of the above-mentioned clarification of the general approach to hardcore restrictions, because it explains in detail the various ways in which RPM may restrict competition²⁹ but also that RPM may, in particular where it is supplier driven, lead to efficiencies which must be assessed under Article 101(3).³⁰

The Guidelines provide a long list of possible negative effects of RPM. Among the negative effects, RPM may facilitate collusion both between suppliers (by enhancing price transparency on the market) and buyers (by eliminating intra-brand price competition) and more generally soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them. It is also recalled that the immediate effect of RPM is that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase. Other negative effects include a reduction of dynamism and innovation at the distribution level since by eliminating price competition between different distributors, RPM may prevent more efficient retailers or distribution formats from entering the market or acquiring sufficient scale with low prices.

The Guidelines contain three possible positive effects of RPM. Firstly, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account

²⁵ This was recently again confirmed by the Court in Joined Cases C-501/06 P et al, *GlaxoSmithKline*, [2009] ECR I not yet reported, in particular paragraphs 55 and 93 to 95.

²⁶ Footnote to paragraph 47 of the Guidelines.

²⁷ See article 4(a) of the Regulation and paragraphs 48 and 49 of the Guidelines.

²⁸ See article 4(a) of the Regulation.

²⁹ See paragraph 224 of the Guidelines.

³⁰ See paragraph 225 of the Guidelines.

the manufacturer's interest to promote the product. Indeed, RPM may provide the distributors with the means to increase sales efforts. If the distributors on this market are under competitive pressure, this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. Secondly, fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system, or similar distribution system applying a uniform distribution format, a coordinated short term low price campaign (2 to 6 weeks in most cases) to the benefit of consumers. Thirdly, in some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sales services, in particular in case of experience or complex products. In such a situation, RPM may prevent free-riding and the consequences thereof: indeed, if customers take advantage of these services but then purchase the product at a lower price with retailers that do not provide such services, high-service retailers may reduce or stop providing these services. However, such free riding argument will not be accepted lightly: *"The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled."*³¹

As explained in the section *"General Approach to Hardcore Restrictions"*, the hardcore approach means that there is a double presumption: it is presumed that the agreement will have actual or likely negative effects and therefore falls within Article 101(1) and it is presumed that it will not have positive effects in fulfilment of Article 101(3). To overcome this second presumption the parties will have to substantiate that all the conditions of Article 101(3) are fulfilled in case they want the exception to apply to their individual agreement. The parties will have to show in particular that in their situation (1) RPM is likely to induce the distributors to provide extra sales efforts and services, (2) that these extra efforts and services will be beneficial for consumers and (3) that RPM is indispensable to produce the efficiencies.

To start with the third issue, it will be necessary at least to explain why the producer cannot directly contract the extra sales efforts and services. If directly obliging the distributors to provide specified efforts and services to their customers is a feasible alternative, then RPM is clearly not indispensable. On the first issue, showing that RPM will likely lead to extra sales efforts and services requires answering the question how efficient, in the market context at hand, the use of RPM is to obtain these efforts and services: is RPM only providing a financial margin to the distributors or is it also providing the incentive to spend this extra margin on the required services? How will RPM overcome the free riding incentive?³² Is there a free riding problem

³¹ See paragraph 225 of the Guidelines.

³² In two previous articles I explained my doubts about the effectiveness of RPM as a tool to overcome free riding problems. See *Resale Price Maintenance and its Alleged Efficiencies*, European Competition Journal, Volume 4, Number 1, June 2008, pages 201–212, and *A New (European) Policy in the Field of Verticals*, in *Current Developments in European and International Competition Law*, Carl Baudenbacher (editor), 16th St. Gallen International Competition Law Forum, Basel, 2009.

in relation to the services in question? Lastly, on the second issue, to show that the extra promotion and services will be beneficial for consumers implies answering the question whether many consumers value the extra efforts. In case of new products or complex products this may be more likely, at least for the introduction period, while in case of more mature and simple products and in case of repeat purchases it is probably more likely that most consumers will not benefit from the extra promotion and services and will only suffer as a result of the increased price level.³³

This approach towards RPM was characterised by some in the public consultation as overly cautious, at least when compared to the current situation in the US. A major shift of policy occurred in the US in 2007, when in the *Leegin* case the US Supreme Court overturned a century-long policy of treating RPM as a *per se* illegal restraint.³⁴

Prior to *Leegin*, RPM was *per se* illegal in the US: the only relevant question that a court or authority had to resolve was whether the agreement, by its form, concerned RPM. As soon as this question was answered positively, the assessment was completed and no further analysis was required. That is also why, in the *Leegin* case, the lower courts could not take into account potentially interesting evidence concerning efficiencies submitted by *Leegin*.

This *per se* approach differs from the EU hardcore approach. With its double presumption, the EU hardcore approach remains an effects-based approach: companies may bring forward evidence that their agreement brings or is likely to bring efficiencies that outweigh the negative effects and therefore meets the conditions set out in Article 101(3). Each agreement that fulfils the conditions of Article 101(3) is exempted from the prohibition laid down in Article 101(1) and a blank refusal to take into account such evidence would not be possible under the EU approach.

In the US it is not yet clear what the new (“post-*Leegin*”) approach will be. The Supreme Court left it to the lower courts to decide whether a “pure” rule of reason analysis or an analysis circumscribed by presumptions should be applied. Both Assistant Attorney General Varney (US Department of Justice) and Chairman Leibowitz (US Federal Trade Commission) have made public statements, in speeches and US Senate Judiciary Committee Hearings, that they find the opinion of the dissenting judges in the *Leegin* case (the *per se* rule was overturned with only a 5 – 4 majority) more persuasive than that of the majority.³⁵ Chairman Leibowitz also indicated that

³³ This issue is described by economists as the different interest of the marginal versus the infra-marginal consumers: it may be only the marginal (new) consumers which benefit from the extra promotion, but not the possibly larger group of infra-marginal (experienced) consumers which already know what they prefer and which do not benefit from the extra promotion and for whom the extra outlays and the RPM only result in a price increase. The proportion of new consumers may be large where it concerns a new product, but will often be much smaller where it concerns an established product or brand.

³⁴ *Leegin Creative Products, Inc. v. PSKS, Inc.*, Supreme Court of the United States, 28 June 2007. Of interest is not only the opinion of the court, but also the strong dissenting opinion (the ban on RPM was overturned with a narrow majority of 5 against 4 judges), the arguments brought forward by the various *amici curiae* and the wider discussion that ensued on the appropriate treatment of RPM, including efforts to restore the *per se* ban.

³⁵ Chairman Leibowitz and AAG Varney answering questions on RPM asked by Senator Kohl during

he supports overturning the Leegin decision. In 2007 in the US Congress senators Kohl, Clinton (now US Secretary of State) and Biden (now US Vice President), introduced a Leegin repealer bill, arguing that abandoning the per se rule against RPM likely leads to higher prices and substantially harms the ability of discount retail stores to compete. This repealer bill, which if adopted would reintroduce the per se approach, passed the Judiciary Committee in both House and Senate, but it is not clear whether it will have sufficient support to be adopted (soon) in view of the sizable opposition. At the state level, a large number of AAGs have declared that they are still in favour of a per se approach and will continue to apply state antitrust laws accordingly. In the public debate in the US some plead for introducing certain negative presumptions to circumscribe the competition analysis while others, in particular economists, plead for the application of a pure rule of reason approach. In view of these divergent opinions, the EU hardcore approach to resale price maintenance could be suggested as a suitable compromise solution.

The EU presumption-based approach, which is supported by consistent case law, is based on case handling experience at EU Member States and Commission level. A good example is the ending of RPM for books in the UK in 1997. Studies on the UK book sector show that the most significant development after the sector specific RPM laws allowing RPM for books were abolished, has been the accelerated entry and rapid growth of low price internet sellers (notably Amazon) and one-stop grocery supermarket chains (especially Tesco, Asda and Sainsbury) on the book retail market. Initially it was feared that abolition of RPM would make the publishers bring out less titles and would lead to more demand uncertainty and reluctance by retailers to hold stocks. The results do not suggest that this happened. Instead the number of titles grew more than in comparable markets with RPM.³⁶

As explained in the section “*Background*”, the Commission services together with the NCAs took stock of enforcement as part of the review process which led to the adoption of the Regulation and Guidelines. The discussion within the ECN on the many RPM cases dealt with since 2000, mainly handled by the NCAs, pointed to the pertinence of a cautious approach towards RPM. In general, companies have been unsuccessful in their attempts to show efficiencies and justify RPM. It is considered that extensive recourse to RPM across the EU Member States, many of which have small and concentrated markets, would result in more harm than benefit for the European consumers as a whole.

While economy wide empirical data on RPM are scarce, we have recently witnessed an unwanted natural experiment with RPM in France. The Loi Galland, trying to prevent (large) retailers to sell below cost, effectively allowed since 1997

a hearing of the Antitrust, Competition Policy and Consumer Rights Subcommittee of the Senate Judiciary Committee, 9th of June 2010. See also the speech of AAG Varney before the National Association of Attorneys General, 7th October 2009, to be found at <http://www.justice.gov/atr/public/speeches/250635.pdf>.

³⁶ *An evaluation of the impact upon productivity of ending the resale price maintenance on books*, report prepared for the UK Office of Fair Trading by the Centre for Competition Policy at University of East Anglia, February 2008, found at: <http://www.offt.gov.uk/OFTwork/publications/publication-categories/reports/Evaluating/>.

manufacturers and retailers to enforce RPM. By making pricing below the invoice price illegal, manufacturers and retailers quickly grasped the opportunity to legally agree and enforce RPM: manufacturers charged a high invoice price to retailers and in return gave retailers an end of year discount which, according to the law, could not be used to lower the retail price. This led to an industry wide use of RPM in the retailing sector in France. Empirical studies show that there is strong evidence that the RPM effectively led to the elimination of (or at least an important reduction in) intra-brand competition and led to a softening of inter-brand competition. This is said, at least partially, to explain the sharp increase in prices of groceries that occurred after 1997. Price increases in France were 10% higher than in Germany and 5% higher than in the Euro zone in general. Moreover, prices in France became higher than in neighbouring countries such as Germany, Italy, Belgium and Spain.³⁷ At the same time, service levels did not seem to have improved in French retailing. The negative effects spurred the French NCA to take two prohibition decisions in RPM cases, one concerning school calculators and the other concerning toys, and subsequently led to two amendments of the law, in 2005 and 2008, to end the unwanted experiment.³⁸ According to the Centre de documentation Économie – Finances, part of the French Ministry of Economics, Industry and Employment, prices of branded products dropped by 4% after the 2005 amendment.³⁹

Resale Restrictions

Hardcore Resale Restrictions

The hardcore resale restrictions relate to market partitioning by territory or by customer group. In general, the Regulation does not cover agreements that restrict sales by a buyer party to the agreement in as far as those restrictions relate to the territory into which or the customers to whom the buyer may sell the contract goods or services. This holds both for restrictions of active sales and for restrictions of passive sales.⁴⁰ There are however a series of exceptions to this general hardcore restriction, which are designed to allow suppliers to sell their products efficiently while preventing the risk of harming consumers by partitioning the internal market.

A first and novel exception concerns the buyer's place of establishment, one element of active sales. The Regulation now provides for the possibility for a supplier

³⁷ Patrick Rey, *Price Control in Vertical Relations*, in *The Pros and Cons of Vertical Restraints*, Konkursverket, 2008; Canivet, G. (2004), *Restaurer la concurrence par les prix – Les produits de grande consommation et les relations entre industrie et commerce*, report supervised by Documentation française. Older surveys for the US, comparing data of before and after 1975 when legislation allowing RPM in certain US states was repealed, provide a similar picture. In his dissenting opinion in the Leegin case Justice Breyer refers to the DoJ reporting at the time that prices as a result of RPM had risen by 19% to 27% and the FTC staff concluding, after having studied numerous price surveys, that collectively these surveys indicated that RPM in most cases increased the prices of products sold with RPM.

³⁸ Conseil de la Concurrence, decision 03-D-45 of 25 September 2003 (school calculators) and decision 07-D-50 of 20 December 2007 (toys), both upheld by the Cour d'appel de Paris.

³⁹ http://www.finances.gouv.fr/directions_services/ccdef/synthese/loi_galland/synthese.htm.

⁴⁰ Active and passive sales are described in paragraph 51 of the Guidelines.

to restrict a distributor's place of establishment whatever the type of distribution system opted for.⁴¹ It can be agreed that the distributor will restrict its outlet(s) and warehouse(s) to a particular address, place or territory. This is designed to facilitate the parallel use of different types of distribution systems in the internal market by providing a possibility of protecting the investments of other than exclusive distributors.

Another exception, that was already contained in the 1999 Regulation, is that it is permissible under the Regulation to prohibit a wholesaler to sell to end users, which allows a supplier to keep the wholesale and retail level of trade separate. Thus, a supplier can require the buyers of its products to "specialise" in the wholesale or retail activity. The novelty here is that it is specified in the Guidelines that this does not exclude the possibility that a "specialised" wholesaler can still sell to certain end users, such as bigger end users, while not allowing sales to (all) other end users.⁴²

Another exception already contained in the 1999 Regulation, concerns the restriction of active sales in case of exclusive distribution. Indeed, the Regulation allows a supplier to protect an exclusive distributor from active sales by other distributors in order to encourage that distributor to invest in the exclusively allocated territory or customer group. This is possible, under the block exemption, when the supplier agrees to sell its products only to one distributor for distribution in a particular territory or to a particular customer group and that exclusive distributor is protected against active selling into its territory or to its customer group by all the other distributors.⁴³ The Guidelines now clarify that the protection against active sales enjoyed by the exclusive distributor does not need to extend to the sales by the supplier itself. This means that exclusive distribution is covered by the Regulation also if the supplier sells directly to customers otherwise exclusively allocated to a particular distributor, i.e. if the exclusivity is shared between the distributor and the supplier.⁴⁴ Moreover, and this is again a change compared to the previous regulation, in an exclusive distribution system a supplier can restrict active sales at more than one level of trade. For instance, a supplier can restrict active sales, into a territory or to a customer group exclusively allocated to a wholesaler, by all other wholesalers and retailers who are parties to an agreement with that supplier.⁴⁵ However, to prevent market partitioning a supplier cannot restrict its distributors from making passive sales, which is responding to unsolicited requests from customers and selling to those customers throughout the internal market. Any such restriction of passive sales would be a hardcore restriction of competition.

Selective distribution is another important exception that was already contained in the 1999 Regulation. Under the block exemption, suppliers can implement a selec-

⁴¹ See article 4(b) of the Regulation: "... without prejudice to a restriction on its place of establishment ..." Such a restriction benefitted from the 1999 Regulation only if applied to protect an exclusive distributor or if applied inside a selective distribution system.

⁴² See paragraph 55 of the Guidelines.

⁴³ See article 4(b)(i) of the Regulation in combination with paragraphs 50 to 54 of the Guidelines.

⁴⁴ See paragraph 51 of the Guidelines: "... irrespective of sales by the supplier."

⁴⁵ See article 4(b)(i) in combination with article 1(1)(i) of the Regulation, which make it clear that all buyers party to the agreement can be restricted in their active sales.

tive distribution system which allows them to choose their distributors on the basis of specified criteria and to prohibit any of their sales, both actively and passively, to unauthorised distributors.⁴⁶ As the Guidelines now make clear, the Regulation exempts selective distribution regardless of the nature of the product and the nature of the selection criteria.⁴⁷ The Regulation covers the prohibition of sales to unauthorised distributors in the territory reserved by the supplier to operate selective distribution. A supplier can restrict an appointed distributor from selling, at any level of trade, to unauthorised distributors located in any territory where selective distribution is currently operated or, as is now clarified in the Guidelines, where the supplier does not yet sell the contract products.⁴⁸ Other restrictions of the authorised distributors' freedom regarding where and to whom they may sell are generally considered hardcore restrictions. Thus, an authorised distributor should be free to sell to any final consumer and to supply and/or get supplies from any other authorised distributors.⁴⁹ The reason for protecting this freedom of authorised distributors to sell to other authorised distributors (freedom of cross supplies) and to end users is that selective distribution would otherwise involve a high risk of market partitioning because, as explained above, in that system a supplier is allowed to restrict active and passive sales to unauthorised distributors, thereby preventing in particular arbitrage by parallel traders.

What this leads to if a supplier wants to combine selective distribution in one part of the EU with other forms of distribution elsewhere in the EU is made clear with the following example. Assume a supplier, currently active in two countries A and B, wants to use, because of differences in the available infrastructure and/or consumer preferences for services, a selective distribution network in country A and an exclusive distribution network in country B. In both territories distributors may have to undertake important investments which are worth protecting against 'free riding'. The exclusive distributors in country B can and – in order to benefit from the block exemption – have to be protected against active sales by the other exclusive distributors in country B and by the distributors in country A. On the other hand, the exclusive distributors in country B can be prohibited to open a shop in country A, to avoid free riding on the shop and services of authorised distributors in country A. However, any other restrictions on the distributors' active sales from country B into country A, including active sales over the internet, continue to be treated as hardcore restrictions.

The example shows that it remains difficult to operate a closed selective distribution system in one part of the EU while selling through other formats elsewhere in the EU, at least if transport costs are low compared to the price difference between areas. In order to benefit from the block exemption, the distributors else-

⁴⁶ See article 1(1)(e) in combination with article 4(b)(iii) of the Regulation. See also paragraph 55 of the Guidelines.

⁴⁷ See paragraph 176 of the Guidelines. However, the nature of the product and selection criteria will of course play a role in case an individual assessment under Article 101 is made; see in particular paragraphs 175 and 176 of the Guidelines.

⁴⁸ See paragraph 55 of the Guidelines.

⁴⁹ See article 4(c) and (d) of the Regulation.

where should remain free to sell passively and, except for the location clause, also actively in the part where selective distribution is applied, both to end users and unauthorised distributors. At the same time the authorised distributors from the part where selective distribution is applied should remain free to sell passively and, if no exclusive distribution is used in the other part of the EU, also actively to end users and distributors in this other part. The example indicates that the Commission is (still) very concerned about the negative effects of market partitioning and price discrimination.⁵⁰

Restrictions on the Use of the Internet

The general rules explained in the previous section apply to offline and online sales. Since the internet allows distributors to reach different customers and different territories, restrictions of the distributors' use of the internet and sales over the internet are generally considered to be hardcore resale restrictions. That is why both the previous and the new Guidelines state that, in principle, every distributor must be allowed to use the internet to sell products⁵¹, but the new Guidelines provide a more detailed description of the policy towards online sales.

As in the offline world, under the block exemption, a supplier can restrict active sales into exclusively allocated territories or customer groups while passive sales should remain free. The Guidelines contain a careful delineation of active and passive sales, aimed at allowing the internet to continue contributing to cross-border trade in the internal market while preserving the efficiency of exclusive distribution.⁵² The general principle is that if the distributor has a website and a customer visits the web site and contacts the distributor (without being solicited) and if such contact leads to a sale, including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. The Guidelines also clarify that any obligations on distributors to automatically reroute customers located outside their territory, or to terminate consumers' transactions over the internet if their credit card data reveal an address that is not within the distributor's territory, are hardcore restrictions of passive selling. Similarly, any obligation that dissuades distributors from using the internet, such as a limit on the proportion of overall sales which a distributor can make over the internet, or the requirement that a distributor pays a higher purchase price for units sold online than for those sold offline ("dual pricing"), is also considered a hardcore restriction of passive selling.⁵³

⁵⁰ It can of course be argued that a supplier can avoid most of these problems by applying a (more or less) uniform price across the EU. For an assessment of the effects of price discrimination, see Luc Peepkorn, *Price Discrimination and Exploitation*, in *International Antitrust Law & Policy*, Barry E. Hawk (editor), Annual Proceedings of the Fordham Competition Law Institute, 2009. A more technical analysis, but reaching similar conclusions, can be found in *Monopoly Price Discrimination and Demand Curvature*, Iñaki Aguirre, Simon Cowan and John Vickers, *American Economic Review* 100, September 2010.

⁵¹ See paragraph 51 of the 2000 Guidelines and paragraph 52 of the (new) Guidelines.

⁵² See in particular paragraphs 51-53 of the Guidelines.

⁵³ Dual pricing should not be confused with price discrimination. In case of dual pricing, the same dis-

In contrast, any efforts by distributors to be found specifically in a certain territory or by a certain customer group are active selling into that territory or to that customer group. For example, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory. Territory-based banners on third party websites are also a form of active sales into the territory where these banners are shown. However, offering different language options on the website does not, of itself, change the passive character of such selling.⁵⁴

Since suppliers can appoint the exclusive distributor of their choice or implement a selective distribution system which allows them to freely choose their distributors on the basis of specified criteria and to prohibit any of their sales to unauthorised distributors, the block exemption covers a requirement by the supplier that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system.⁵⁵ In other words, under the Regulation the supplier may choose not to sell its product to internet-only distributors. To ensure an efficient operation of the brick and mortar shops, a supplier can also require from a distributor that it sells at least a certain absolute amount (in value or volume) of the products offline. This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location. A supplier can also pay a fixed fee to its distributor to support the latter's offline sales efforts.⁵⁶ However, as explained earlier, under the Regulation a supplier cannot restrict in general the online sales of its appointed distributors – for instance by dual pricing or limiting the proportion of overall sales that can be made over the internet – since such is a hardcore sales restriction. Similarly, a supplier cannot use the brick and mortar requirement to “punish” a distributor for selling successfully over the internet (in particular in the territories where the supplier/other distributors charge higher prices).⁵⁷

More in general, under the block exemption, the supplier may require quality standards for its distributors' online sales, just as the supplier may require quality standards for offline sales. However, agreeing criteria for online sales which are not overall equivalent to the criteria agreed for the sales from the brick and mortar shop(s) and which dissuade distributors from using the internet, is a hardcore restriction.⁵⁸ This does not mean that the criteria agreed for online sales must be identical to those agreed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the

tributor is charged a different price depending on how or to whom it resells the supplier's product. In case of price discrimination, the supplier charges different prices to different distributors.

⁵⁴ See in particular paragraphs 51-53 of the Guidelines.

⁵⁵ See in particular paragraph 54 of the Guidelines.

⁵⁶ See paragraph 52 of the Guidelines.

⁵⁷ See paragraph 54 of the Guidelines, in which it is clarified that the requirement to have one or more brick and mortar shops can be applied flexibly and may change over time, but not if these changes “have as their object to directly or indirectly limit the online sales by the distributors.”

⁵⁸ See paragraph 56 of the Guidelines.

criteria must be justified by the different nature of these two distribution modes.⁵⁹ Similarly, if a distributor wants to distribute contract products via third party platforms, a supplier may require that its distributor uses third party platforms only in accordance with the standards and conditions agreed between the supplier and its distributor for the distributor's use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.⁶⁰

Individual Justifications of Hardcore Resale Restrictions

As for RPM, the parties can bring forward evidence in an individual case that their agreement containing hardcore resale restrictions may fall outside the scope of Article 101(1) or may fulfil the conditions of Article 101(3). The Guidelines contain a number of concrete examples of such individual justifications of hardcore resale restrictions, some of which were not in the 2000 Guidelines.⁶¹

Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature⁶² and therefore fall outside Article 101(1). However, such a defence based on objective necessity of the restriction will only be valid in rare circumstances. For example, although a hardcore restriction could be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of safety or health is respected, it is normally the task of public authorities to set and enforce public health and safety standards.⁶³

Where substantial investments by a distributor to start up and/or develop a new market are required, restrictions of (active and) passive sales by other distributors into such a territory or to such a customer group, if necessary for the distributor to recoup those investments, generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or to that customer group. This justification relates to a genuine entry of the supplier on the relevant market, where there was previously no demand for that type of product in general or for that type of product from that supplier.⁶⁴ In case of such genuine entry the Guidelines do not acknowledge a general need for resale restrictions beyond the first two years, but in an individual case such a need for a longer period can, depending on the specific situation, be argued under Article 101(3).

In the case of genuine testing of a new product in a limited territory or with a limited customer group and in the case of a staggered introduction of a new product,

⁵⁹ Paragraph 56 of the Guidelines provides some examples of quality standards for online/offline sales which are not identical, but which are overall equivalent.

⁶⁰ See paragraph 54 of the Guidelines.

⁶¹ See paragraph 60-64 of the Guidelines.

⁶² See paragraph 18 of the Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

⁶³ See, for instance, Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 118-119; Case T-83/91 Tetra Pak International v Commission (Tetra Pak II) [1994] ECR II-755, paragraphs 83, 84 and 138.

⁶⁴ See paragraph 61 of the Guidelines.

the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced. This restriction falls outside the scope of Article 101(1) for the period necessary for the testing or introduction of the product.⁶⁵

A restriction of active sales imposed on wholesalers within a selective distribution system may be necessary to solve a possible “free riding” problem and therefore may fulfil the conditions of Article 101(3) in an individual case, that is when wholesalers are obliged to invest in promotional activities in “their” territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities.⁶⁶ Similarly, in some specific circumstances, an agreed dual pricing policy may fulfil the conditions of Article 101(3), that is when online selling by distributors leads to substantially higher costs for the supplier than their offline sales and when a dual pricing policy allows the supplier to recover those additional costs. For example, where offline sales include home installation of a technical product by the distributor but online sales do not, the latter may actually lead to more customer complaints and warranty claims for the manufacturer.⁶⁷

Upfront access payments and category management agreements

As explained in the section “*Extension of the 30 % Market Share Threshold to Buyers*,” one of the main criticisms on the previous vertical regime in general and the 2000 Guidelines in particular was that they did not pay enough attention to buyer power issues and restraints which are mainly buyer driven. This has led not only to the extension of the 30 % market share threshold to buyers and to changes in the analysis of specific vertical restraints already described in the 2000 Guidelines, but also to new sections in the Guidelines analysing practices which have become more and more common in retailing: upfront access payments and category management agreements. The Commission acknowledges in the Guidelines that these agreements in many if not most cases will not have anticompetitive effects, but considered it useful to provide a brief analysis of potential anti- and pro-competitive effects.

Upfront access payments are fixed fees that suppliers pay to distributors in the framework of a vertical relationship in order to get access to their distribution network. This category includes various practices such as slotting allowances⁶⁸, the so called pay-to-stay fees⁶⁹ and payments to have access to a distributor’s promotion campaigns.

The more important the market position, both upstream and downstream, of the distributor in question, the greater the risk that upfront access payments may result in anticompetitive foreclosure of other distributors. A high fee may make

⁶⁵ See paragraph 62 of the Guidelines.

⁶⁶ See paragraph 63 of the Guidelines.

⁶⁷ See paragraph 64 of the Guidelines.

⁶⁸ Fixed fees that manufacturers pay to retailers in order to get access to their shelf space.

⁶⁹ Lump sum payments made to ensure the continued presence of an existing product on the shelf for some further period.

that a supplier paying such a fee may want to channel a substantial volume of its sales through this distributor in order to cover the costs of the fee, which may have the same downstream foreclosure effect as an exclusive supply type obligation.⁷⁰

The cumulative use of upfront access payments in highly concentrated markets may soften competition between distributors. The upfront access payments are likely to increase the per unit prices charged by the suppliers in order to cover the fees paid and this may reduce price competition between the distributors on the downstream market, while the distributors' profits are increased as a result of the access payments.⁷¹

However, in many cases the use of upfront access payments may also contribute to an efficient allocation of shelf space for new products. Distributors may have less information than suppliers on the potential for success of new products to be introduced on the market and, as a result, the amount of products to be stocked may be sub-optimal, either too low if distributors overestimate the risk or too high if they underestimate the risk of new product introductions. Upfront access payments may be used to reduce this asymmetry in information between suppliers and distributors by explicitly allowing suppliers to compete for shelf space. The distributor may thus receive a signal of which products are most likely to be successful since a manufacturer would normally agree to pay an upfront access fee if it estimates a low probability of failure of the product introduction. The use of upfront access payments also shifts the risk of product failure back to the manufacturer.⁷²

Category management agreements are agreements by which a distributor entrusts a particular supplier (the "category captain") with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors.

Category management agreements may facilitate collusion between distributors when a supplier, who serves as a category captain for all or most of the competing distributors in a market, provides distributors with a common point of reference for their marketing decisions.⁷³

Category management agreements may also distort competition between suppliers, either facilitating collusion by serving as a mechanism for the exchange of sensitive market information, or having an anticompetitive foreclosure effect, in particular when the category captain is able, due to its influence over the marketing decisions of the distributor, to limit or disadvantage the distribution of products of competing suppliers.⁷⁴

The use of category management agreements may also lead to efficiencies. Category management agreements may help retailers to ensure that the optimal quantity of products is presented timely and directly on the shelves, thereby better meeting consumer demand.⁷⁵

⁷⁰ See paragraph 204 of the Guidelines.

⁷¹ See paragraph 206 of the Guidelines.

⁷² See paragraphs 207–208 of the Guidelines.

⁷³ See paragraph 211 of the Guidelines.

⁷⁴ See paragraphs 210 and 212 of the Guidelines.

⁷⁵ See paragraph 213 of the Guidelines.

Conclusion

The newly adopted rules mark an evolution and refinement of the effects-based approach the Commission introduced in 1999/2000. While the rules are adapted to recent market developments, they are based on the same effects-based philosophy. There is thus a large measure of continuity in the approach embodied in the Regulation and Guidelines, but they give more attention to buyer power issues and online resale restrictions.

This effects-based approach means, that the assessment of whether a vertical agreement has the effect of restricting competition will be made by comparing the actual or likely future situation in the relevant market with the vertical restraints in place with the situation that would prevail in the absence of the vertical restraints in the agreement. Appreciable anticompetitive effects are likely to occur when at least one of the parties has or obtains some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.⁷⁶

The rules do not aim to impose or favour certain distribution formats. Instead of forcing manufacturers and distributors to offer all or certain distribution models, the rules allow a large measure of freedom for manufacturers to agree with distributors how they want their products to be distributed. Consumers can then make their choice based on these offers, thereby rewarding the best available options and stimulating business to adapt to what consumers want and ensure that European supply and distribution remain globally competitive.

⁷⁶ See section VI.1 and in particular paragraph 97 of the Guidelines.