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Are there any types of vertical restrictions that the VBER considers as hardcore (Article 4 VBER), but for which it can be assumed with sufficient certainty that they generate efficiencies in line with Article 101(3) of the Treaty?

Please explain your selection by providing examples and explain how prevalent these restrictions are in your industry:

There is a well-established tripartite selling structure used by non-EU producers of commodity products to sell in the EU. Under the tripartite structure, the non-EU producer will work with a trader with an EU base and operations. The EU trader will typically be an European member of an international group (for example, a Japanese Trading Company), able to work in a common language and business culture with the non-EU producer. The EU trader, in essence, provides a "service" to the non-EU producer, facilitating the latter's sales in the EU. The service provided by the EU trader will typically comprise the following elements:

- Acting as an intermediary and communications channel between the non-EU producer and the EU customer in terms of: spanning the language and time zone gaps; providing information to the customer on logistics, transport and timing; assisting with customs duty(s) and clearance, and inland transport and delivery;

- Assisting in the negotiation of the sales price between the non-EU supplier and the EU customer:

  – Either by a physical presence at a tripartite meeting between the non-EU producer, the EU trader and the EU customer; or

  – By pre-agreeing the sales price with the non-EU producer and conveying this to the EU customer; or

  – By agreeing a price with the EU customer subject to the approval of the non-EU producer;

- Because the EU-based trader, as a part of its "service" to the non-EU producer, usually undertakes the cash collection of the sale in the EU, the trader will take title to the goods and will, in principle, carry a credit risk. However, the extent of the credit risk carried by the trader is, in practice, usually non-material for the following reasons:

  – The great majority of EU supplies will be repeat orders of key production in-puts, where a customer's credit record and rating is well-established and where a default on payment is unlikely since it would jeopardize downstream production and sales;

  – The EU trader will, where judged necessary, take out credit risk insurance and, if this is not available, will require a parental payment guarantee in support of the EU customer's payment commitment;

- The EU trader will only acquire the goods from the non-EU producer once there is a firm purchasing commitment from the EU customer. The non-EU producer's sale to the EU trader <u>and</u> the EU trader's sale to the EU customer are entirely "<u>back-to-back</u>" and the EU trader will not incur normal commercial risks such as:

  – Title;

  – Stock;

  – Specification/conformity/warranty;

  All such elements being covered by mirrored terms and conditions under the back-to-back contracts;

- The EU trader is paid a commission for the provision of its service to the non-EU producer of below 5% of the sale price broadly as follows:

  – The non-EU producer/EU trader and EU customer establish a sales price (of say €100);

  – The EU trader is paid say 3% commission (i.e. €3);

  – The EU trader pays the non-EU producer €97 for the goods; and

  – The EU trader sells the goods to the EU customer for €100;

- The EU trader accepts virtually no commercial risk, other than title and a nominal credit risk (described above). Nevertheless, the working assumption is that the EU trader would not qualify as an "agent" and that the law and guidance in relation to a distributor would apply;

- It is in this context that the issue of resale price maintenance ("**RPM**") becomes relevant. In particular, the EU trader will agree the resale price with the supplier, not least as the vast majority of the resale price will be remitted to the supplier and the trader's commission level is low.

The use of the above tripartite sales structure in a business-to-business ("**B2B**") context where an EU trading intermediary provides a facilitating service for the EU sales of a non-EU producer is considered to be pro-competitive because:

- the goods in question (typically commodities) are produced by non-EU producers who need logistical and other sales assistance to sell in the EU;

- both the EU customer(s) and the non-EU producer(s) benefit from the intermediary "service" performed by the EU trader because they are able to span language, cultural, time zone and other commercial barriers to non-EU/EU trade. This may also apply for producers active within the EU dealing with EU traders on a similar basis, and the same pro-competitive points would apply; and

- EU customers benefit from the arrangements by having an increased choice and variety of products in the relevant EU market(s).

The tripartite (1) non-EU producer (2) EU trader (3) EU customer sales structure described above is prevalent in non-EU/EU trade being, inter alia, practised by most (if not all) of the Japanese Trading Houses. The issue is, therefore, of material market relevance and worthy of consideration at a time of review of EU distribution law.

The arrangement is <u>not</u> a classic form of RPM since, in practice, the non-EU producer (directly or indirectly) fixes the price with the EU customer and the EU trader plays only a facilitating role, designed to <u>enable</u> the non-EU sale in the EU. As noted above, the same pro-competitive points may apply as regards EU producers dealing with EU traders.

These arrangements do not raise any of the potential concerns identified in paragraph 224 of the Commission's Guidelines:

- The arrangements do not increase price transparency in the market since final selling prices will be individually negotiated with customers, often by reference to published price indices. Accordingly, there is no risk of these arrangement facilitating collusion between suppliers (the first concern identified in paragraph 224).
- Similarly, these arrangement are not being imposed on suppliers so as to facilitate a cartel amongst traders (the second concern).
- Nor are these arrangements likely to soften price competition between manufacturers or otherwise lead to higher prices (the third and fourth concerns), but instead facilitate non-EU producers selling into EU Member States, which is inherently pro-competitive.
- In addition, these arrangements do not prevent producers from agreeing different commission levels with other traders (the fifth concern).
- Similarly, these arrangement do not prevent lower cost traders from entering the market (i.e. if they are able to operate with lower commission levels) as producers can freely choose between trader (the seventh concern).
- Finally, there is no separate agreement whereby RPM is agreed to make it harder for other producers to sell across the EU (the sixth concern), even if there were to be exclusive dealing obligations on these traders. This is because there are multiple traders available for other producers to use and they may sell directly as well.

In order to reflect the efficiencies of the above type of tripartite B2B sales structure and to mitigate a hard core application of RPM, we would suggest the following amendment in the Guidance at (new) paragraph 226:

"*RPM may also generate efficiencies which will be assessed under 101(3) when, in a business-to-business ("B2B") context, a producer of a commodity type product (very often one situated outside of the EU) uses an EU trader as an intermediary performing primarily a "service" designed to facilitate its sales in the EU via services in areas such as: the processing of orders, language/translation, providing information/liaison/administration in relation to transport and other logistics of the supply chain, and undertaking invoicing and cash collection. The intermediary in such a case typically incurs a low level of commercial risk, in exchange for a low level of commission based on an EU sales price which the non-EU producer will have had a direct or indirect control over. Such B2B arrangements, even where they contain RPM, can be pro-competitive as they facilitate trade and* *allow customers to benefit from increased choice and competition in the relevant market(s). They would, therefore, in principle qualify for a case-by-case assessment under 101(3)*."

The above guidance would stand in parallel with the guidance at paragraph 40 of the existing Guidance which provides that an RPM breach can be avoided where an intermediary is free to lower the sales price by eating into/reducing his commission. Although this last piece of guidance can offer a solution to the potential application of RPM to tripartite selling structures (as described above), there are practical difficulties in ensuring a consistent documentation of the freedom to discount and therefore a reference to the possible mitigation of a hardcore application of RPM in the B2B context described would be of considerable value.

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