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# New Vertical Restraints Framework

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# Outline of the presentation

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  - New Vertical Restraints Framework
- **Clarifications and changes to the scope of the block exemption**
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  - Agreements between competitors
  - Market share threshold
- **Hardcore restrictions**
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  - Resale price maintenance
  - Resale restrictions & Online sales
  - Individual justification of hardcore resale restrictions
- **New specific restraints**
  - Upfront access payments (slotting allowances)
  - Category management

# Introduction

- Positive past experience:

a) Substance: framework of 1999 = effects based approach

- Authority/plaintiff must show likely negative effects under Article 101(1)
- Defendant must show likely efficiencies under Article 101(3) once likely negative effects are established
- "Safe harbour" below 30% market share threshold
- Meaningful enforcement = relevant issues of foreclosure & softening of competition (collusion) + taking account of efficiencies

b) Procedure: « modernisation » since 2004

- NCAs & National Courts empowered to apply Article 101(3)
- Notification system abolished
- Satisfactory interaction between NCAs & Commission post modernisation

# Introduction

- Objective: to update effects based approach

- Result: Commission adopts:

  - BER 330/2010 (OJ L 102 of 23/04/2010)
  - Guidelines on Vertical Restraints (OJ C 130 19/05/2010)

# Scope of the block exemption

**Notion of agreement**:

- No express agreement => unilateral request + acquiescence
  - Acquiescence can be deduced from a general agreement drawn up in advance
  - Tacit acquiescence = implementation of the unilateral policy by distributors
- Agreements between undertakings at different levels of the supply chain => exclusion of B2C agreements

# Scope of the block exemption

- Agency agreements (GL § 12 – 21):
  - No change of policy: intra-brand restrictions fall outside Art 101(1) if no risk borne by agent in relation to activities for which he is an agent
  - Discussion on risks taken by the agent in other product markets versus risks taken in the same product market
  - <u>Clarification:</u> only risks taken by the agent in the same product market are relevant => not possible to be agent for one product and independent distributor for another product of the principal if these products are in the same product market

# Scope of the block exemption

Associations of retailers (Article 2(2) BER): no change + clarification in the GL

- If limited number of retailers have turnover > 50 MEUR and if these retailers represent < 15% of association's turnover => assessment under Article 101 not affected

Vertical agreements between competitors (Article 2(4) BER):

- Coverage by the block exemption limited to dual distribution at the retail level

  => no turnover threshold anymore

# Scope of the block exemption

Market share threshold: benefit of BER depends not only on the supplier's MS, but also the buyer's MS:

- Not only suppliers, but also distributors may have market power (e.g. supermarkets) => coverage by the BER should also depend on buyer's market share
- For supplier: share on the market where supplier sells contract products to the buyer
- For buyer: share on the market where buyer purchases the contract products from the supplier
- Main reason for transitional period of 1 year (art. 9 BER)

# Scope of the block exemption

<u>Market share threshold extended to buyers</u>:

**Benefits:**

- No presumption of legality for potentially harmful conduct
- Better remedies against buyers' market power => no more need to withdraw the benefit of the BER & more possibilities of private enforcement
- No presumption of illegality => case by case analysis

**Possible drawback:**

competition problem is not excluded if buyers have market power on the downstream market

# Hardcore restrictions

**Clarifications on "hardcore approach" (GL section III.3)**

- hardcore = no block exemption + presumption of negative effects under Article 101(1) + it is unlikely that the conditions of Art 101(3) are fulfilled, but <u>individual exemption is not excluded</u> in case of convincing evidence of likely efficiencies

- Hardcore approach = a "rule of reason" approach where the order of bringing forward evidence and showing effects is reversed

  - first likely efficiencies need to be shown by the firm
  - before the likely negative effects are shown by the authority

# Hardcore restrictions: RPM

**RPM (GL section VI.2.10):**

- Possible negative effects:
  - facilitation of collusion (both up- and down-stream), in particular if interlocking relations
  - elimination of intra-brand price competition: direct effect is price increase
  - loss of pressure on the supplier's margin
  - foreclosure of smaller suppliers
  - loss of dynamism and innovation from in particular discounters

- Possible positive effects:
  - Launching a new product
  - Support short term low price advertisement campaigns
  - Free riding between distributors

# Hardcore resale restrictions (1)

- **New BER does not fundamentally change the hardcore list of resale restrictions**:

  - Passive sales restrictions are hardcore (but selective distribution)
  - Active sales restrictions are hardcore except to protect areas where there is exclusive distribution

  But (new!):

  - Restrictions on the buyer's place of establishment are not hardcore
  - Not only possible to prevent wholesalers to sell to end users, but also <u>to allow wholesalers to sell to some bigger end-users while not to others</u>

# Hardcore resale restrictions (2)

**Exclusive distribution**:

- Restrictions of active sales by a buyer party to the agreement are not hardcore, i.e. possibility to restrict active sales at more than one level of trade
- Exclusivity requires protection against active sales of all other buyers but not of the supplier, i.e. possibility to share exclusive territory with the supplier

- **Selective distribution**: restrictions of sales to unauthorised distributors is not hardcore in the territory reserved to operate selective distribution, i.e. possibility to reserve territory for future expansion of distribution network

# Online sales

- Guidelines <u>maintain</u> current distinction between active & passive sales
- Attempt to <u>refine</u> notion of active and passive sales as concerns on-line sales
- Allow consumers to benefit from the internet while allowing manufacturers to prevent possible free riding between distributors/distribution formats

# Online sales

**On the one hand: distributors should be free to have a website and engage in internet sales**

Guidelines provide examples of restrictions of passive sales:

- obligation to automatically reroute customers or terminate their transactions,
- obligation to limit the proportion of sales made online,
- dual pricing

# Online sales

**On the other hand**:

- Possibility to restrict active sales to protect exclusive distribution: unsolicited e-mails, targeted (online) advertisement

- To preserve the quality of distribution and prevent free riding the Guidelines clarify that the BER covers obligations to:
  - have one or more « brick and mortar » shops (but not to punish successful online sales),
  - impose a minimum amount of sales off-line
  - require quality and service conditions to be fulfilled for online sales that are equivalent to the conditions applicable for off-line sales
  - use of third party platforms only in accordance with standards and conditions agreed between parties

# Hardcore resale restrictions falling outside Article 101(1) or which fulfil the conditions of Article 101(3)

- Objective necessity to restrict sales (e.g. public ban on selling dangerous substances for reasons of safety or health)
- Active and passive sales restrictions necessary to protect market entry (new brand or new geographic market): outside Art 101(1) for 2 years
- Restrictions of active sales for testing of a new product in limited territory or customer group: outside Art 101(1) for the period necessary for testing
- Within selective distribution : restrictions of active sales of wholesalers to appointed retailers in other wholesalers' territories can help to solve a free riding problem
- Dual pricing can be justified if online sales lead to substantially higher costs for the supplier

# Specific vertical restraints

**Upfront access payments**

- Block exempted up to 30% MS
- Possible negative effects:
  - ➢ Downstream foreclosure
  - ➢ Upstream foreclosure
  - ➢ Downstream collusion
- Possible positive effects:
  - ➢ Asymmetry of information between supplier & distributor => successful market entry through better allocation of shelf space
  - ➢ Risk shifting back to suppliers (no free riding of suppliers on sales efforts of distributors)

# Specific vertical restraints

**Category Management**

- Block exempted up to 30% MS
- Possible negative effects:
  - Foreclosure of other suppliers
  - Collusion between distributors
  - Collusion between suppliers (exchange of info)
- Possible positive effects:
  - Improved presentation and assortment of products, leading to higher consumer satisfaction

# Thank you for your attention

The views expressed are those of the author and do not necessarily reflect those of DG COMP or the European Commission