Industrial Organization in Context

VRBE

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Market Share Thresholds

On April 20, 2010, the Commission adopted an updated Vertical Restraints Block Exemption Regulation with effect from 1 June 2010.

- Its provisions include market share thresholds for buyer and seller (Guidelines, Para 23):

  "In order for the block exemption to apply, the supplier's and the buyer's market share must each be 30 % or less," provided the vertical agreement does not include "hardcore restrictions of competition."

- The buyer's market share threshold signals increased attention to the possible exercise of monopsony power.

- The Regulation makes a distinction between active sales and passive sales (Guidelines, Para 51):
  - "Active" sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. ...
  - "Passive" sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers.
- Territorial or customer-group restrictions on passive sales are hard-restrictions of competition, and disqualify a vertical contract from the Block Exemption (Regulation, Article 4).
- Territorial or customer-group restrictions on active sales are permitted.

- The Commission regards the internet (Guidelines, Para 52), "a powerful tool to reach a greater number and variety of customers," as a powerful tool also to promote market integration.
- A distributor's sales over its website are passive sales, and cannot be restricted under the Block Exemption.
- But producers may impose website quality standards on their distributors, and may require their distributions to main brick-and-mortar outlets (Guidelines, Para 54).

Minimum RPM is a hardcore restriction of competition, not block-exempted under the Regulation (Article 4). Negative effects of minimum resale price maintenance may include (Guidelines, Para 224):

- "Firstly, RPM may facilitate collusion between suppliers by enhancing price transparency on the market...
- "Second, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, that is, at the distribution level. ...
- "Third, RPM may 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.
- "Fourth, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. ...

- "Fifth, RPM may lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem, that is, where it has an interest in lowering the price charged to subsequent distributors.
- "Sixth, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands ...
- "Lastly, RPM may reduce dynamism and innovation at the distribution level."

Vertical Restraints Block Exemption

Minimum resale price maintenance

The Guidelines recognize that resale price maintenance may have efficiency effects as well (Para 225):

- "[W]here 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 the manufacturer's interest to promote the product. ...
- "Similarly, fixed 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) ...
- "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. ...

- "RPM may help to prevent such free-riding at the distribution level."

Although minimum resale price maintenance disqualifies a vertical contract from the Block Exemption, if the parties to the contract can make a compelling case for efficiency effects, they may request that the Commission grant an exemption under Article 101(3).

Motor Vehicle Distribution

- On 27 May, 2010, the Commission adopted a specific regulation covering distribution in the motor vehicle sector, with effect from 1 June.
- After a three-year transition period, the previous block exemption for vertical contracts dealing with distribution of new motors is withdrawn (Article 2).
- Such contracts will be governed by the general rules for vertical contracts.

Motor Vehicle Distribution

- Vertical contracts for the motor vehicle aftermarket — post-sales service, spare parts — continue to receive a block exemption, subject to the 30 per cent market share limitation of the general Vertical Block Exemption regulation.
- But they may not contain hard-core restrictions on competition, including (Article 5) restrictions on the access of independent repair shops to supplies of spare parts.
- This policy seeks to prevent artificial increases in the cost of entry into aftermarkets.

Motor Vehicle Distribution

- The 30 per cent market share limitation is of practical importance.
- The Commission expects that agreements between vehicle manufacturers and their networks of authorised repairers and spare part distributors will no longer benefit from the automatic exemption, because these networks usually have a market share of over 30%.
- This will make it easier to deal directly with refusals to release technical information or the misuse of warranty terms aimed at excluding independent repairers or with new types of restrictions that may arise.