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Distribution agreements

Distribution agreements: an overview of EU and national case law

BLOCK EXEMPTION (REGULATION), DISTRIBUTION AGREEMENT, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, FOREWORD, HARDCORE RESTRICTION, INTRA BRAND COMPETITION, RULE OF REASON, EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT, INTERNET, ONLINE PLATFORMS

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Distribution agreements and competition law is a topic high on the agenda at the moment in Europe and beyond.

In this article, I would like to challenge a general comment that I often hear as a practitioner; that the enforcement of vertical restrictions mainly concerns the European Union ("EU") – which, in my opinion, is only partly true. Indeed, undertakings face multiple local rules and a high enforcement level around the globe as illustrated by the number of vertical cases pursued by antitrust authorities over the past months. And, undertakings will also very soon face a second set of rules in Europe with the UK currently in the process of adopting standalone competition rules applicable to vertical agreements.

I would also like to highlight certain trends at European and global levels showing that vertical enforcement by competition authorities is indeed high, but it seems mainly focused on resale price maintenance ("RPM") and, to a lesser extent, online sales restrictions (or a combination of the two). Other distribution-related restrictions seem to be less pursued by antitrust authorities. This is not surprising since RPM, in particular, is a *per se* restriction in a number of jurisdictions (the most well-know counterexample being the US, where vertical restraints generally, including RPM, are analyzed under the rule of reason, at least at Federal level) and competition authorities have their own priorities and limited resources leading them to focus their enforcement efforts on certain practices.

Taking the US as a point of comparison, the fact that antitrust enforcement focuses primarily on RPM (albeit not exclusively) – and less so on a number of other restrictions – should lead antitrust authorities, in particular in Europe, to envisage a simpler "effect-based" framework of analysis targeting situations of market power and actual foreclosure or price increase risks. The purpose here is not to say that RPM should be treated under the *per se* rule compared to certain other vertical restrictions, but rather to suggest that the overall approach toward distribution agreements should be revisited and simplified since enforcement is much more limited outside the RPM sphere. A more relaxed approach toward RPM would also be welcome, but, at this stage, the debate is raging, and RPM seems to be the focal point around the globe (including in the US where the debate is open, with certain States resistant to the rule of reason).

Regrettably at the European level, the Commission is not relaxing its overall approach, but rather about to adopt final revised vertical rules which are still overly conservative and complex. Undertakings will find themselves conducting a thoroughly revised self-assessment of multiple distribution arrangements and certain of the Commission's concepts will most likely lead a number of them to adopt an excessively conservative approach toward certain mechanisms such as dual distribution, dual pricing, promotion campaigns, or agency arrangements.

Vertical restraints are high on the agenda in Europe with actual enforcement primarily focusing on RPM and online sales

In Europe, distribution agreements are high on the agenda, with the ongoing revision of the European Commission (the "Commission") revised Vertical Block Exemption Regulation ("VBER") [*1*] and accompanying guidelines (the "Vertical Guidelines") [*2*]. The two-year revision process started by the Commission in 2018 is reaching the final stage with the publication of the draft VBER and draft Vertical Guidelines on 9 July 2021. Stakeholders had until 17 September 2021 to submit their final comments on the two drafts to the Commission before the publication of the final texts on 1st June 2022, when the current rules will expire.

The Commission is not the only antitrust authority in Europe revisiting vertical restrictions. Indeed, post-Brexit many undertakings started asking what the status of the VBER and Vertical Guidelines would be for vertical agreements involving the United Kingdom (the "UK") and how they should analyze cross-border restrictions. At this stage, the current VBER and Vertical Guidelines are retained, but the two texts will expire on 31st May 2022. The Competition and Market Authority ("CMA") has launched a consultation on its proposed recommendation that the Secretary of State replaces the retained VBER when it expires with a UK Vertical Agreements Block Exemption Order, tailored to the needs of businesses operating in the UK and UK consumers, and updates the arrangements to take account of market developments [*3*]. The consultation phase ended on 22 July 2021 and it is expected that the CMA will publish its findings in the course of Autumn 2021.

Besides, actual enforcement is very high in Europe, largely driven by National Competition Authorities ("NCAs"). In this respect, I will refer to statistics that we have shared in a previous article this year [*4*] concerning the enforcement of vertical restraints in Europe. Our first observation in that study was that vertical restrictions were mostly enforced by NCAs [*5*], with approximately 250 decisions out of nearly 400 investigated cases over the period January 2021–April 2021, while the Commission has adopted only 16 decisions over the same period.

Our second finding was that a vast majority of the cases had an RPM element (76%) and that RPM was the vertical restriction attracting not only the harshest sanctions but above all which was sanctioned quasi-systematically (in 88% of the cases).

The past months confirm this trend. RPM (as well as online sales restrictions) are at the top of the list, as illustrated by a number of recent cases published since Spring 2021 (which was the end of the period covered by our study).

In March 2021, the Hungarian Competition Authority settled a case involving a nail product supplier accused of RPM and geographical restrictions in contracts with distributors.

In April 2021, the Romanian Competition Council raided undertakings in the electronics sector against potential RPM practices.

In July 2021, the French Competition Authority ("FCA") imposed a €125m fine on several undertakings active in the optical sector for RPM and online sales restrictions [*6*]. Interestingly, brand protection was once again at the heart of the discussion, since the practices concerned RPM and online restrictions imposed on retailers for the sales of luxury branded products. However, unsurprisingly, the FCA stood firm, finding that brand protection was not a legitimate justification to RPM or online restrictions. The FCA notably sanctioned practices consisting of impeding retailers' ability to put branded products under-sale or to include them in low price promotion campaigns. This decision has been appealed before the Paris Court of Appeal but remains interesting, as the FCA elaborates on the standard of proof for an RPM practice.

On 23 July 2021, the CMA launched an investigation into suspected breaches of competition law relating to long-term exclusivity in the supply of electric vehicle charge points on or near motorways [*7*]. This investigation follows a market study that found that a lack of charge points may prevent drivers from switching to electric cars [*8*].

In August 2021, a backpack maker was fined in Germany and Austria for RPM and online sales restrictions [*9*].

On 17 September 2021, Greece's Competition Commission raided companies in the school equipment sector for alleged RPM practices.

Save for the CMA investigation in the UK which concerns long-term exclusivities, all these recent cases involve an RPM practice and/or online restrictions, consistent with our previous findings. The Dutch Competition Authority has recently closed an investigation into alleged RPM in the home furnishings sector in August 2021. However, this seems a rather isolated case. In the meantime, the Dutch authority has fined Samsung €39 million for RPM with seven online retailers concerning televisions.

RPM also seems to be the focal point in the rest of the world

The trends identified above seem relevant also to the rest of the world. Indeed, just looking at the past few months' headlines, competition authorities across the globe are also focusing on RPM and online sales restrictions. Just to mention a few:

In China, the State Administration for Market Supervision ("SAMR") issued a record-setting fine of RMB764 million (approx. €100m) against Yangtze River Pharmaceutical in April 2021 for engaging in RPM practices. SAMR noted the importance of online sales in this decision, and as the digital economy has become an area of increased scrutiny in China with the intensification of SAMR's investigations against online platforms, the issue of online sales restriction is inevitably on the radar. On 1st October 2021, SAMR also fined electronic device manufacturer Bull Group €39.5 million for RPM including threats and sanctions on retailers.

In June 2021, the Malaysian Competition Authority focused on agreements between car manufacturers and insurance companies following a public consultation and a report. In the Malaysian Competition Authority's view, warranty restrictions imposed by car manufacturers may possibly prevent or restrict competition in the car repair and service industry [*10*].

On 10 August 2021, the Turkish Competition Authority ("TCA") entered into its first settlement decision in the context of online sales restrictions and RPM in the electrical appliances sector.

On 23 August 2021, the Competition Commission of India issued its second RPM fine after an investigation into anticompetitive conduct by an Indian car manufacturer concerning discount control policy vis-à-vis its dealers [*11*]

On 9 September 2021, the Australian antitrust enforcer has accepted commitments from a bathroom manufacturer for RPM. Earlier, in March 2021, the Australian Federal Court had ordered FE Sports to pay a $350,000 penalty also for RPM [*12*].

In September 2021, Taiwan's Fair Trade Commission fined Foodpanda, a food and grocery delivery platform for imposing prices to restaurants and preventing them from developing their own takeaway services. The FTC said it issued the NT$2 million fine after it found that Foodpanda was forcing its affiliated restaurants and eateries to list the same prices in their physical stores as on the Foodpanda online platform, which was a violation of the Fair Trade Act.

I could continue listing vertical cases currently being sanctioned or pursued outside Europe, but this already gives a good indication that the number of jurisdictions pursuing vertical cases in 2021 is high and that, as in Europe, the focus of antitrust agencies seems to be primarily RPM.

This trend confirms that compliance with competition law is critical for undertakings as far as their relationships between suppliers and/or resellers and their distribution agreements are concerned, not only to prevent possibly very high fines by antitrust authorities but also to ensure enforceability of their distribution arrangements. However, this is also a call for relaxing the overall approach toward vertical restraints, focusing solely on the most restrictive ones, in particular those implemented by monopolistic undertakings. This would allow undertakings to focus their compliance efforts on actual competition risks and also ease the assessment of their commercial agreements

Again, the purpose is not to argue that it is legitimate to pursue RPM (either under the per se approach or the rule of reason). This is rather to acknowledge that, currently, RPM seems to be the focal point of antitrust authorities and to question whether maintaining an overall rigid and complex approach toward distribution arrangements in Europe was necessary since some vertical restrictions seem to be much less enforced in practice, both at EU and national levels.

Taking the US approach as an example?

Regulation of distribution agreements is often pushed into the background as far as the US are concerned since the enforcement climate is considered to be moderate, including towards RPM. The Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") generally take a more permissive approach, reflecting the view that vertical restraints are less harmful and can be efficiency-enhancing. This does not mean that US authorities are not scrutinizing vertical restrictions at all. They are, but increasingly focusing on restraints by monopolistic suppliers that may effectively exclude competitors or facilitate coordinated conduct. The recent change at the head of the FTC is unlikely to drastically change this approach. There might be a greater scrutiny of the tech or pharma industries, but RPM or other distribution agreement-related restrictions are unlikely to become the new priority.

Moderate enforcement in the US is often associated with the fact that, save in certain States, vertical restrictions are analyzed in the US on a case-by-case basis under the rule of reason. The landmark case in this respect is, of course, the Supreme Court decision in Leegin Creative Leather Products v. PSKS [*13*] in 2007, which dropped the

per se approach toward RPM [*14*]. However, the debate on RPM in the US is not entirely closed. There were several attempts to restore the per se rule at the Federal level, and some US States have enacted laws or are enforcing RPM agreements under the per se rule (so-called Leegin repealers such as Maryland, California, or Kansas).

Other restrictions included in distribution arrangements are also typically assessed under the rule of reason in the US. For example, as far as exclusive dealing arrangements ("EDA") are concerned, the plaintiff must prove that EDA forecloses "competition in a substantial share of the line of commerce". Elements taken into consideration include duration and term inability, where the EDA is sited in the distribution chain, the existence of alternative methods of distribution, market entrance or exit, and the prevalence of EDA. The same applies to the customer or territorial restrictions seen, on the contrary, as hardcore restrictions in Europe (under Article 4 b) of the VBER). In the US, they are often upheld based on procompetitive effects, and found anti-competitive where there is significant product differentiation among competitors and therefore an increased need for intraband price competition.

The Commission could have followed the US approach and used the opportunity offered by the revision of the VBER and Vertical Guidelines to revisit its overall legal framework applicable to distribution arrangements. This would have had the bene􏰀t of allowing undertakings to focus their compliance effort on restrictions with actual enforcement risks, rather than investing time, efforts, and money to ensure that their distribution networks and agreements fit restrictive frameworks of analysis despite rather low enforcement for many vertical restraints.

The missed opportunity at the EU level is disappointing. The draft rules submitted for consultation on 9 July 2021 by the Commission remain overly conservative and are even stricter than before on certain aspects such as dual distribution, with market share thresholds as low as 10%. The Commission now refers to RPM and more generally hardcore restrictions as "by object" restrictions in the draft Vertical Guidelines, which seems difficult to reconcile with the most recent case law of the European Court of Justice on by-object restrictions in Budapest Banks [*15*] and Generics [*16*]. A number of concepts developed in the Vertical Guidelines remain subject to interpretation and could lead to over-cautious approaches by undertakings (e.g., certain online sales restrictions, exceptions to RPM, agency agreements, or dual distribution).

There is no doubt that the debate will be heating up in the coming years, and that there will be further opportunities to rediscuss these issues in 10 years time when the Commission will launch a new consultation to revise the upcoming VBER and Guidelines.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[*1*] EU Commission, Vertical block exemption regulation, Draft C(2021) 5026 final, 9 July 2021 ; See ***Maurits J. F. M. Dolmans, Patrick Bock, Thomas Graf, Andris Rimsa, Vladimir Novak, Edward Dean, Sophie Donnelly,*** *The EU Commission seeks public comments on*

draft revised Vertical Block Exemption Regulation and Vertical Restraints Guidelines, 9 July 2021, e-Competitions July 2021, Art. N° 101797 ; ***Kyriakos Fountoukakos, Florian Huerkamp, Kristien Geeurickx, Marcel Nuys, Daniel Vowden, Susan Black,*** *The EU Commission publishes drafts of revised Vertical Block Exemption Regulation and Vertical Guidelines, 9 July 2021, e-Competitions July 2021, Art. N° 101507* ; ***European Commission,*** *The EU Commission invites interested parties to provide comments on draft revised Vertical Block Exemption Regulation and Vertical Guidelines, 9 July 2021, e-Competitions July 2021, Art. N° 101617.*

[*2*] EU Commission, Vertical guidelines, Draft C(2021) 5038 final, 9 July 2021 ; See ***Andrzej Kmiecik, Andreas Reindl, Valérie Lefever, Margot Vogels,*** *The EU Commission publishes the draft revised Vertical Block Exemption Regulation and draft revised Guidelines on Vertical Restraints, 9 July 2021, e-Competitions July 2021, Art. N° 101936* ; ***Marc Israel, Tilman Kuhn, Mark D. Powell, Yann Utzschneider, Mathis Rust, Peter Citron,*** *The EU Commission publishes for public consultation drafts of revised Vertical Block Exemption Regulation and draft revised Guidelines on vertical restraints, 9 July 2021, e-Competitions July 2021, Art. N° 101513* ; ***Enzo Marasà, Irene Picciano,*** *The EU Commission starts a consultation on the revised Vertical Block Exemption Regulation and Vertical Guidelines, 9 July 2021, e-Competitions September 2021 - II, Art. N° 102206.*

[*3*] Retained Vertical Agreements Block Exemption Regulation - GOV.UK (*www.gov.uk*); See ***Marc Freedman, Todor Papanov,*** *The UK Competition Authority launches a consultation on the future of national competition rules applicable to vertical agreements post-Brexit, 10 February 2021, e-Competitions February 2021, Art. N° 99579* ; ***Ariane Le Strat,*** *The UK Competition Authority and the EU Commission seek views from stakeholders on the Vertical Block Exemption Regulation, 10 February 2021, e-Competitions February 2021, Art. N° 99598.*

[*4*] See ***Emmanuelle Claudel, Nicolas Ferrier, Patrice Bougette, Frédéric Marty, Florence Ninane, Noemie Bomble, Irène Luc, Andreas Mundt, Olivier Guersent, Marion Carbo, Charlotte Colin-Dubuisson, Sima Ostrovsky, David-Julien dos Santos Goncalves,*** *Perspectives on the proposed reform of the Vertical Restraints Regulation and its Guidelines, September 2021, Concurrences N° 3-2021, Art. N° 102089.*

[*5*] Austria, Belgium, France, Germany, Italy, Poland, Portugal, Spain, and the UK.

[*6*] See ***French Competition Authority,*** *The French Competition Authority fines several eyewear brands and manufacturers for imposing selling prices and restrictions on online sales (Luxottica / LVMH / Chanel / Logo), 20 July 2021, e-Competitions July 2021, Art. N° 101829* ; ***Alain Ronzano,*** *Fixed prices: The French Competition Authority manages to nail a manufacturer of sunglasses and eyeglass frames for a practice of prescribed prices and, incidentally, for a practice of prohibiting online sales (Luxottica), 22 July 2021, Concurrences N° 3-2021, Art. N° 101783.*

[*7*] Investigation into the supply of electric vehicle charge points on or near motorways - GOV.UK (*www.gov.uk*) ; See ***Stephen Wisking, Kristien Geeurickx, Marcel Nuys, Florian Huerkamp,*** *The UK Government publishes the report of its market study into the electric vehicle charging sector, 23 July 2021, e-Competitions July 2021, Art. N° 101802.*

[*8*] *https://competitionandmarkets.blog.gov.uk/2021/08/04/electric-vehicle-charging-cma-finds-more-needs-to-be-done/*.

[9] ***German Competition Authority***, *The German Competition Authority imposes a € 2 million fine on a national manufacturer of sustainable ergonomic backpacks for price-fixing (Fond Of), 17 August 2021, e-Competitions August 2021, Art. N° 102104.*

[10] *https://files.lbr.cloud/public/2021-06/17.6.2021%20Draft%20Final%20Report.pdf?VersionId=fddMlTOv4Q9UnCSTg7nxyz1rT7OwT2.9* .

[11] Indian Competition Authority, Maruti Suzuki India, Case No. 01 of 2019, 23 August 2021 ; See ***Rahul Singh, Alisha Mehra,*** *The Indian Competition Authority fines a leading automobile manufacturer €26 million for its discount control policies in only the second case in a decade finding RPM practices anticompetitive (Maruti Suzuki India), 23 August 2021, e- Competitions August 2021, Art. N° 102117*]. This case is interesting in that the practices at stake are similar to those recently sanctioned by the FCA in the optical sector. Indeed, they concerned the prohibition of a supplier from offering discounts to their customers beyond that prescribed by the supplier. If a dealer was found giving extra discounts, a penalty was applied by the supplier.

[12] Australian Federal Court, FE Sports, Press release, 24 March 2021; See ***Australian Competition Authority***, *The Australian Federal Court fines a sports brand for resale price maintenance (FE Sports), 24 March 2021, e-Competitions February 2021, Art. N° 99817* ; ***Alyssa Phillips***, *The Australian Federal Court orders a wholesaler of cycling accessories and sporting products to pay $350,000 for engaging in resale price maintenance (FE Sports), 24 March 2021, e-Competitions March 2021, Art. N° 100908.*

[13] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) ; See ***Peter J. Carney, Kristen J. McAhren***, *The US Supreme Court overturns its long-standing prohibition against vertical agreements between manufacturers and their dealers setting minimum resale prices (Leegin Creative), 28 June 2007, e-Competitions June 2007, Art. N° 38050* ; ***David T. Fischer, Donald M. Barnes***, *The US Supreme Court sets aside Dr. Miles rule on resale price maintenance agreements as per se illegal replacing it with the rule of reason standard (Leegin Creative), 28 June 2007, e-Competitions June 2007, Art. N° 48820* ; ***Angela M. Buerkle***, *The US Supreme Court reverses the 96 year old-doctrine governing resale price maintenance agreements as per se illegal replacing it with the rule of reason standard (Leegin Creative), 28 June 2007, e-Competitions June 2007, Art. N° 42835.*

[14] US Federal Trade Commission, Nine West Group, Case No. No. C-3937, 6 May 2008 ; See ***Bridget E. Calhoun, Ryan C. Tisch, William Randolph Smith***, *The US FTC modifies a 2000 consent order and sets aside the prohibitions imposed on a manufacturer to set minimum resale prices in contracts with retailers (Nine West Group), 6 May 2008, e-Competitions May 2008, Art. N° 52948.*

[15] EU Court of Justice, Budapest Bank, Press release, 2 April 2020; See ***Duncan Liddell, Alexi Dimitriou, Donald Slater, Denis Fosselard***, *The EU Court of Justice confirms the limitations that apply before courts can classify anticompetitive agreements as a restriction of competition by object under Art 101 TFEU in a multilateral interchange fee credit card transaction (Budapest Bank), 2 April 2020, e-Competitions April 2020, Art. N° 94633* ; ***Christian Ritz, Johanna Brock-Wenzek***, *The EU Court of Justice emphasizes the need for a case and context-specific evaluation of 'by object' restrictions and provides guidance on what sort of evidence is relevant, in a multilateral interchange fee credit card transaction (Budapest Bank), 2 April 2020, e-Competitions April 2020, Art. N° 94678* ; ***Lesley Hannah***, *The EU Court of Justice finds, following a preliminary reference, that certain interchange fees imposed by a bank payable on cross-border card transactions within the EEA are anticompetitive (Budapest Bank), 2 April 2020, e-Competitions April 2020, Art. N° 95229.*

[***16***] EU Court of Justice, Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma, C-307/18, 30 January 2020 ; See ***Catriona Hatton, Paul Lugard, Daniel Vasbeck***, *The EU Court of Justice clarifies for the first time when patent settlement agreements that restrict a generic pharmaceutical company's ability to enter the market infringe the EU antitrust rules (Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma), 30 January 2020, e-Competitions January 2020, Art. N° 93745* ; ***Sandrine Mathieu, Amélie Lamarcq***, *The EU Court of Justice clarifies the conditions under which pay- for-delay agreements preventing generic versions of a patented medicine from entering the market or delaying such entry may constitute a restriction of competition 'by object' or 'by effect" as well as an abuse of dominant position (Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma), 30 January 2020, e-Competitions January 2020, Art. N° 94657* ; ***Anne Federle, Pauline Van Sande***, *The EU Court of Justice clarifies that when patent settlement agreements restrict a generic pharmaceutical company's ability to enter the market they infringe EU antitrust rules (Generics - UK / GlaxoSmithKline / Actavis / Xellia Pharmaceuticals / Merck / Alpharma), 30 January 2020, e-Competitions January 2020, Art. N° 95846.*