



ARTICLE 101 AND VERTICAL RESTRAINTS: THE START OF THE EFFECTS-BASED APPROACH AND DECENTRALISATION

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The views expressed are those of the speaker and do not necessarily reflect those of DG Competition or the Commission



Article 101 and its development (1)

In a nutshell, the historical development of EU competition policy is a development towards focussing on the effects in the market, which is linked to recognising the protection of consumer welfare as its goal, and away from investigating possible restrictions of the freedom of action of market participants, which is linked to protecting the competitive process as such.

Article 101 and its development (2)

- Until the mid-nineties, the overall approach of EU antitrust policy was form-based
- A policy that was based on finding a potential infringement as soon as the freedom of action of one of the parties was compromised or restricted was making the reach of Article 101(1) too wide.
- Combined with an obligatory notification system this led to a huge number of notifications and the need to adopt block exemption regulations, in particular for supply and distribution agreements, to counter this mass problem

Article 101 and vertical restraints: the past (1)

- The Commission BERs of the 70s and 80s were exempting certain restrictions and combinations of restrictions without regard to the market position of the parties involved
- Agreements and clauses which fell outside the BERs were considered as suspect and were generally assumed to restrict competition, as it could easily be shown that they restricted one or the other party's 'Handlungsfreiheit'
- So effectively too much and too little was covered by the BERs
- This led to a straight jacket effect, in particular in the area of supply/distribution agreements, where many (new) arrangements were excluded from coverage by the BERs

Article 101 and vertical restraints: the past (2)

- Jan 1997: Green Paper on Vertical Restraints: intense debates on form-based versus effects-based approach
- Dec 97 - March 98: internal discussions about options paper: how to marry effective protection of competition and adequate legal certainty
- Outcome discussion: wide block exemption, capped by market share threshold(s), black list approach, complemented by guidelines and ending need to notify vertical agreements
- Council Regs 1215 and 1216/1999 , VABER 2790/99, Guidelines on Vertical Restraints 2000

The effects-based approach for verticals: a success?

- Effects-based approach a success:
 - Introduction of possibility to exempt retro-actively was first step towards Reg 1/2003 and abolishing notification system and decentralising application of Art 101
 - Effects-based approach, by narrowing application of Art 101(1), was second necessary step to enable decentralisation
 - Umbrella block exemption capped by market share threshold and with black list approach enabled effective protection of competition while allowing adequate legal certainty
 - Enabled agencies to focus resources on protection of competition
 - Combination of wide BER complemented by guidelines subsequently adopted for horizontal and tech transfer agreements
 - Review and renewal 10 years later without much discussion

The enforcement practice: a success? (1)

- ECN enforcement practice in vertical cases within the scope of the VABER from April 2013 – March 2018: 76 prohibition and commitment decisions
- 59 cases concern hardcore restrictions:
 - RPM: 51
 - Resale restrictions: 22, in particular territorial restrictions (8) and online sales bans (12)
 - $51+22=73 > 59$ i.e. 14 cases with RPM and resale restrictions
- 17 cases concerned by effect restrictions, in particular Retail MFC/parity clauses (5) and non-compete obligations (6)

First conclusion: NCAs focus on where it matters: on hardcore restrictions, in particular loss of price competition, with second place for resale restrictions, in particular online sales restrictions

The enforcement practice: a success? (2)

- 59 hardcore cases: 46 prohibitions with fines, 4 prohibitions without fines, 9 commitment decisions: i.e. 78% fined
- 17 by effect cases: 3 prohibitions with fines (1 concerned also the application of Art 102) , 5 prohibitions without fines, 9 commitment decisions: i.e. 18% fined (12% if only under 101)

Second conclusion: risk of fines, as expected, considerably lower if agreement does not contain a hardcore restriction, but even with a hardcore restriction no automatic fining. Again this is in line with the adopted effects-based approach.

The enforcement practice: a success? (3)

- Retail Most Favoured Customer clauses: new type of restriction
- Number of cases: Commission's e-Books (2012) and Amazon (2017) commitment decisions, NCAs hotel booking and other cases
- Overall convergent enforcement: Retail MFCs treated as by effect restriction covered by VABER, similar analysis of possible negative effects on platform competition, wide retail MFCs generally prohibited because no efficiencies, narrow RMFCs may be necessary to avoid free riding by supplier on platform's investments, only different appreciation of the latter

Third conclusion: even new restrictions dealt with coherently under the effects-based approach



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