

The European Reform of Vertical Restraints in an International Context

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Question: how many times do the words 'online' and 'Internet' appear in Regulation 330/2010, the current VBER*?

ANSWER:



*VBER = Vertical Block Exemption Regulation

Online distribution and the vertical agreements regulatory framework

▶ **Guidelines on Vertical Restraints 2010 (GVR):**

- ▶ 'In principle, every distributor must be allowed to use the internet to sell products' (para 52)
- ▶ Distinction between online active and passive sales (paras 51-59)



Challenges of the digital economy for competition law

*'Competition in major digital markets is different in some ways from competition in more traditional markets. This sector often includes **platform-based business models, multi-sided markets, network effects** and **economies of scale** which render competition issues more complex. Unlike in most economic sectors, as the digital economy becomes increasingly interconnected some **co-ordination and co-operation** between firms could be unavoidable, and may indeed be pro-competitive. Finally, digital markets are characterised by high rates of **investment and innovation**, which lead to rapid technological progress in the sector, and to increased **disruptive innovation**.'*

OECD

(<https://www.oecd.org/daf/competition/digital-economy-innovation-and-competition.htm>)

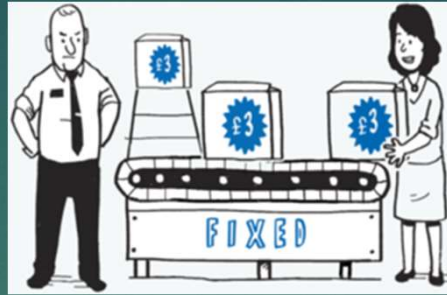
Adapting the rules to online distribution and the digital economy

- ▶ Current rules expiring in May 2022
- ▶ Long 'radio silence' on verticals on the part of the European Commission (and CJEU)
- ▶ Developments and 'new impetus':
 - ▶ *E-books MFN* investigations (2012 and 2017)
 - ▶ E-commerce sector inquiry (concluded May 2017), leading to 3 investigations:
 - ▶ retail price restrictions of various consumer electronics manufacturers
 - ▶ 'geo-blocking' practices between a game distribution platform and PC video game publishers
 - ▶ price discrimination in agreements between a hotel chain and European tour operators
 - ▶ CJ cases on online sales of luxury products: *Pierre Fabre* (2011) and *Coty* (2017)
 - ▶ EC decision on parallel imports: *AB InBev* (2019)
- ▶ Recent cases allow insights into **reform priorities**



Big questions for the reform

Minimum RPM



- ▶ Eliminating intrabrand price competition remains an object restriction
- ▶ Different to US position, where minimum RPM is analysed under the rule of reason; China also adopts a strict approach towards minimum RPM
- ▶ Economic rationale for this is doubtful, since there may be justifications (it is not inherently harmful); single market concerns in the EU?
- ▶ Risk of effects analysis: type 2 errors (in US, defendants win in over 90% of minimum RPM cases)
- ▶ European Commission's fines on electronics manufacturers (Asus, Denon & Marantz, Philips, and Pioneer) for imposing RPM suggest the focus is the possible horizontal or collusive effects
- ▶ Treatment unlikely to change under new rules

Should a manufacturer be able to lawfully prevent these situations?

Get off at the fashionable end of Oxford Street, drift into the achingly cool technology hall of London's most happening department store and view this year's must-have plasma courtesy of the sound and vision technologist in the Marc Jacobs sandals then go to dixons.co.uk and buy it.

Dixons.co.uk
The last place you want to go

Step into middle England's best loved department store, stroll through haberdashery to the audio visual department where an awfully well brought up young man will bend over backwards to find the right TV for you then go to dixons.co.uk and buy it.

Dixons.co.uk
The last place you want to go

Get off at Knightsbridge, visit the discerning shopper's fave department store, ascend the exotic staircase and let Piers in the pinstripe suit demonstrate the magic of the latest high-definition flatscreen then go to dixons.co.uk and buy it.

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(borrowed from Derek Ritzmann)

MFN clauses



- ▶ Problem: they 'may reduce the buyer's incentive to lower the resale price' (GVR), thus facilitating minimum RPM
- ▶ No penalties thus far but 2 investigations that culminated with remedies:
- ▶ Apple (2012)
- ▶ Amazon (2015)
- ▶ Show's EC's intention to remain firm on any practices that might lead to vertical price fixing

Restrictions of online sales

- ▶ Absolute ban is unlawful, even for luxury products (*Pierre Fabre*)
- ▶ However, sales of luxury products on platforms (amazon, ebay...) may be lawfully precluded (*Coty*)
- ▶ Other than the explanations about passive and active sales in the GVR, there is currently little clarity



Absolute territorial protection

- ▶ The most distinctive feature of the EU treatment of vertical (territorial) restraints
- ▶ EC's EUR 200 fine on *AB InBev* (2019) for preventing parallel imports of beer from The Netherlands into Belgium signals an insistence on the protection of the single market (but the EC relied on Article 102, not 101 TFEU)



What can we expect from the reform?

- ▶ The 'object' treatment is unlikely to be lifted from minimum RPM and certain territorial restrictions
- ▶ Clarifications needed about the extent to which restrictions on online sales might be lawful
- ▶ Towards a more flexible approach? CJEU has opened up the possibility to prove **objective justification** of object restriction as a way out of the illegality (requires the action of the CJEU) – guidance should elaborate on what constitutes objective justification
- ▶ These practices may continue to be treated as anticompetitive by object, but **legal and economic context** must be taken into account (à la *Cartes Bancaires*)
- ▶ Greater role for 101 (3) TFEU?



END – THANK YOU!

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