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Distribution Law Center Countdown IX - Hardcore restrictions (Resale price maintenance)

What?

Certain types of vertical restraints are particularly likely to hinder competition and harm consumers. These hardcore restrictions will not benefit from the safe harbour provided in the VBER and will often amount to an infringement of Article 101 TFEU. Resale price maintenance (“RPM”) constitutes a prime example of such hardcore or black-listed restrictions.

RPM refers to vertical price fixing: a situation where, as a result of a vertical agreement, the buyer’s ability to set its resale price is restricted. A clear-cut example of RPM would be an agreement between a manufacturer and a distributor requiring the distributor to sell the supplier’s products at a fixed price or at a price above a certain minimum level. The most clear-cut application of RPM is the direct imposition of resale prices (or maximum discount levels or fixed distribution margins) by means of a contractual provision. However, RPM can be implemented also through indirect measures such as benefits to the distributor for complying with a given price level (or penalties for failing to do so).

RPM must be distinguished from the permissible practice of imposing maximum and recommended resale prices. Such practices may benefit from the VBER (subject to the 30% market share threshold), provided that in practice they do not amount to fixed or minimum resale prices (as result of pressure from or incentives offered by the supplier).

Vertical price fixing is considered to constitute one of the most serious infringements of competition law and it is deemed unlikely to generate significant efficiencies to qualify for an exemption under Article 101(3) TFEU. What is more, the prohibition of RPM is vigorously enforced by national competition authorities in the EU and, recently, also by the European Commission.

Now?

Under the current VBER, RPM constitutes one of the hardcore restrictions described in Article 4(a). As such, it cannot benefit from the block exemption and will have to be assessed individually under Article 101 TFEU. That said, the current Vertical Guidelines explicitly state that RPM, as a hardcore restriction, is presumed (i) to fall within the scope of Article 101(1) TFEU (definition of anticompetitive agreement) and (ii) not to satisfy the

conditions of Article 101(3) TFEU (efficiency defence).

This presumption of RPM's anticompetitive nature results from the fact that such arrangements restrict competition in a number of ways: they may lead to price increases, collusion between both suppliers and distributors, foreclosure of smaller rivals of suppliers and reduction of innovation at distribution level.

Despite that, the European Commission recognizes that in some circumstances, RPM may be necessary to achieve certain efficiencies, in which case the agreement will be exempted under Article 101(3) TFEU. Both the current and the (draft of the) future Vertical Guidelines give three examples of such cases: (i) the launch of a new product; (ii) short-term promotion and (iii) additional pre-sales services provided by retailers.

The future as of 1 June 2022?

The key principles regarding RPM are likely to remain unchanged under the new VBER. The wording of Article 4(a) VBER, providing that RPM cannot benefit from the block exemption regime, will not change. This is reflected in the current proposals of the Vertical Guidelines, which are largely based on the current Vertical Guidelines. In the proposed document, the Commission indicates that RPM is likely to fall within Article 101(1) TFEU and not to satisfy Article 101(3) TFEU, albeit without clearly referring to this observation as a presumption.

While the current proposals of the Vertical Guidelines set out the same principles and examples of RPM as their predecessor, some notable additions are included:

- Online platforms: the current proposals of the Vertical Guidelines clearly state that Article 4(a) VBER is fully applicable in the online platform economy. According to these proposals, a provider of online intermediation services is prohibited from imposing a fixed or minimum sales price for the transaction that it facilitates.
- The European Commission notes the increased use of price monitoring software in e-commerce. While the technology may be new, the approach to this practice is the same as to its analogue counterpart: price monitoring does not in and of itself amount to RPM, but it increases price transparency and may facilitate RPM.
- The current proposals of the Vertical Guidelines also clarify that minimum advertised price policies ("MAPs") may also amount to RPM. MAPs refer to policies which prohibit retailers from advertising prices below a certain level set by the supplier. For example, such policies may infringe competition law if the supplier sanctions distributors for ultimately selling below the set level or prevents them from communicating that the final price could differ.
- By contrast, under the current proposals of the Vertical Guidelines price fixing in fulfilment contracts will not always constitute RPM. A fulfilment contract is a vertical agreement between a supplier and a buyer that

executes a prior agreement between the supplier and a specific end user. Fixing the resale price in a fulfilment contract will not constitute RPM on condition that the end user has waived its right to choose the undertaking that should execute the agreement.

In practice?

- The rules on RPM remain largely unchanged. Vertical price fixing is considered to constitute a serious restriction of competition and as such, does not benefit from the safe harbour provided by the VBER. RPM includes both direct and indirect measures restricting the buyer's ability to set its resale price. Such arrangements are likely to infringe EU competition law.
- These rules are fully applicable in the digital environment, including in relation to online platforms.
- The European Commission has clarified that vertical price fixing may be permissible in fulfilment contracts, subject to certain conditions. By contrast, minimum advertised price policies may in some cases constitute a prohibited RPM.

Assessment?

In the EU, RPM is presumed to infringe Article 101 TFEU, and this approach seems likely to continue under the new VBER. By contrast, in the US, vertical price fixing is no longer treated as a *per se* restriction of competition. Some may be disappointed that the evaluation of VBER was not seized as an opportunity to bring EU law rules on RPM closer to their American counterparts. This would allow businesses greater flexibility and could permit more extensive use of new technologies in distribution.

That said, it is unfortunate that the current proposals of the Vertical Guidelines fail to illuminate some important issues raised during the evaluation of the current VBER regime. Firstly, the draft Guidelines do not provide any additional (compared to the current Guidelines) explanation regarding recommended or maximum resale prices. It would be helpful to better understand when such arrangements could in fact amount to a RPM.

Secondly, both businesses and consumers would benefit from greater clarity regarding the conditions for exempting RPM under Article 101(3) TFEU due to efficiencies offered. Is RPM allowed for short-term promotions only when they are organized in franchise systems, and if not, what other distribution systems are eligible? If RPM is used for the introduction of a new product, how long can it be maintained for? What kind of evidence could be used to prove efficiencies? Additional guidance would allow businesses to bring new products to the market, lower prices and offer better customer service without having to choose between budget constraints on the one

hand and legal risks on the other.

Want to know more? Stay tuned...

Counting down towards 1 June 2022 we aim to provide you with regular updates and the necessary legal knowhow in order to fully prepare your business for the future. Please also check out the [Distribution Law Center](#) platform and our [LinkedIn](#) page for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.

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