

BER on vertical agreements and hardcore restrictions

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Block Exemption Regulation

- BER 2790/1999: article 81(1) does not apply to vertical agreements (VAs) if supplier has less than 30% market share.
 - Unless the vertical agreement includes hardcore restrictions (notably, RPM and some territorial restrictions, see below). In those cases, not even *de minimis* rule applies.
- BER (and vertical guidelines) being revised by the European Commission.

BER's rationale

- VAs very often entail efficiency gains: eg., avoiding double marginalisation, protecting investments in the relationship between upstream and downstream firms
- Likely to be *anti-competitive* only if firm involved has *substantial market power*: e.g., when they strategically affect inter-brand competition
- Spirit of BER (not hardcore restrictions): effects-based approach.

Hardcore restrictions, I: RPM

- Resale price fixing and floor forbidden.
- Possible anti-competitive effects of RPM:
 - Solves the monopolist's commitment problem
 - Facilitates collusion
 - Rey-Vergé: if interlocking chains, RPM raises price
- Likely that RPM a problem only when firms have substantial market share

RPM: efficiency effects

- RPM may help:
 - solve double marginalisation problem (price ceiling, price fixing)
 - solve free-riding (price floor, price fixing)
 - may help establish a certain brand image
 - in case of new products, it may help persuade retailers to carry the brand

An economics-based proposal

<15% mkt. share: RPM ok (*de minimis*);

>15%: burden of proving net beneficial effect;

>30%: very unlikely that the firm can show net beneficial effect;

Rationale: RPM by firms with little mkt. share likely to be pro-competitive, but they would not want antitrust risk (give legal certainty).

Also: “recommended” RPM may imply that firms with large mkt. share may impose prices anyway.

Hardcore, II: preventing parallel imports

Clauses prohibiting *active* sales ok; clauses prohibiting *passive* sales are not.

i) Price discrimination: ambiguous welfare effects

ii) Price discrimination: firms compete more aggressively

iii) Exclusive territories likely anti-competitive if used by firms with large market power.

No economic justification for 'black list'...but conflicts with 'economic integration' objective and equal treatment of EU citizens.

Territorial restrictions: A proposal

<15% share: restrictions to passive sales ok (*de minimis* rule)

>15%, burden on firms to prove net beneficial effect

>30% unlikely firm can show net positive effect

However: *Passive sales to individual citizens (not wholesalers) should never be prevented, whatever the market share.*