

European Economic Law

Lesson 9

Art. 101 TFEU – Vertical Agreements

Art. 101 TFEU - Vertical Agreements

Vertical Agreements

Agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (see definition in Art. 2 (1) block exemption regulation on vertical agreements)

→ e.g. distribution agreements

Art. 101 TFEU - Vertical Agreements

- Art. 101 TFEU covers horizontal *and* vertical agreements.
- ECJ – *Consten and Grundig* (1966)
Craig/de Bürca, p. 974-75
 - Art. 101 TFEU protects interbrand *and* intrabrand competition


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Interbrand competition

Competition between firms that have developed brands or labels for their products in order to distinguish them from other brands sold in the same market segment. Although not perceived as being fully equivalent by consumers, branded products nevertheless compete with each other, but normally to a lesser degree. Coca-Cola versus Pepsi is an example of inter-brand competition.

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Intrabrand competition

Competition among distributors or retailers of the same branded product, be it on price or non-price terms. For example, a pair of Levi's jeans may be sold at a lower price in a discount store as compared to a department store, but often without the amenities in services that the latter provides.

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➤ There is a debate about the harmfulness of vertical restraints (see *Craig/de Búrca*, 990 et seq.)

Traditional approach: Vertical restraint are as dangerous as horizontal ones.

Chicago School: All vertical restraints should be completely lawful.

See also *Barry Hawk* (1995, in *Craig/de Búrca*, p. 993): "The ... explanation for the inadequate economic analysis under 85 (1) lies in the Commission's stubborn ... adherence to the definition of a restriction on competition as a restriction on the 'economic freedom' of operators in the marketplace."

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In European competition law, a compromise has been found:

- Every type of vertical restraint should be assessed on its own. Like in the field of horizontal restraints, there are hardcore and simple restrictions.
- The efficiency-enhancing effects of vertical agreements are to be taken into account.

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- See European Commission, Guidelines on vertical restraints (2010), n. 6:

"For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies."

- According to this view, dangers of vertical restraints are:
 - input foreclosure
 - customers foreclosure
 - harm to consumers (e.g. by resale price maintenance)

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Particularly important types of vertical restraints

- resale price maintenance
 - exclusive distribution
 - selective distribution
 - tying
- ➔ see the following definitions



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Resale price maintenance

Agreements or concerted practices between a supplier and a dealer with the object of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product/service to his customers. A provision which foresees resale price maintenance will generally be considered to constitute a hard-core restriction. [...]

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→ Resale price maintenance is considered a hardcore restriction.



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Exclusive distribution

A distribution system, in which a company grants exclusive rights on its products or services to another company. The most common forms include single branding and/or exclusive territory rights, whereby a single distributor obtains the right to market a supplier's product in a specific territory. The supplier's purpose in granting exclusivity is normally to provide the distributor with incentives to promote the product and provide better service to customers. [...]

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→ Exclusive distribution is considered a simple restriction. By contrast, absolute territorial protection is considered a hardcore restriction.



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Absolute territorial protection

Practice by manufacturers or suppliers, relating to the resale of their products and leading to a separation of markets or territories. Under absolute territorial protection, a single distributor obtains the rights from a manufacturer to market a product in a certain territory, and other distributors are prohibited from selling actively or passively into this territory.

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passive sales: sales in response to unsolicited requests from individual customers

→ Absolute territorial protection is considered a hardcore restriction.


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Selective distribution

'Selective distribution system' means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors.

Art. 1 (1) (e) BER on Vertical Agreements

➔ Selective distribution is considered a simple restriction (purely qualitative selection under certain conditions is no restriction at all).

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Tying

Commercial practice of conditioning the sale of one product on the purchase of another product. If tying is not objectively justified by the nature of the products or their commercial usage, such practice may restrict competition.

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➔ Tying is considered a simple restriction.


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- According to existing law (Art. 101 TFEU), the same rules (as presented in the horizontal context) apply to vertical restraints.
- Agreements caught by Art. 101 (1) TFEU need a justification by block exemption or directly under Art. 101 (3) TFEU.
 - Not caught by Art. 101 (1) TFEU
 - genuine agency agreements
 - purely qualitative selective distribution

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Block exemption regulations
- vertical relationships -

- vertical agreements (Regulation 330/2010)
- vertical agreements in the motor vehicle sector (Regulation 461/2010)
- technology transfer agreements (Regulation 772/2004)
- ➔ relevance of market shares; no "black clauses"


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- The most important text is the block exemption regulation on vertical agreements of 2010.
 - see Art. 2, 3, 4 and 5 BER on vertical agreements
- The treatment of vertical restraints has become much more lenient under the preceding text of 1999.
- The regulation of 2010, or rather the Guidelines of 2010 have added further changes in this sense.

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Practical conclusion for distribution arrangements

A choice has to be made between:

- Exclusive distribution with exclusion of active sales, or
- Selective distribution

A third possibility

- Selective distribution plus the commitment of the supplier to supply only one dealer in a given territory. In this case, neither active nor passive sales may be restricted.

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Practical conclusion for distribution arrangements

Comparison

- In a selective distribution system, dealers are subject to quality standards, but active sales may not be prohibited.
- In an exclusive distribution system, active sales may be prohibited, but dealers may not be selected.

What system a supplier/manufacturer will opt for?



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- How do you assess a fixed book price regime under Art. 101 TFEU?
