



UiO : Department of Private Law

University of Oslo

EU Competition Law –
Distribution restraints (Article 101 TFEU)

Eirik Østerud



- 1. Introduction**
2. Block Exemption Vertical Restraints
3. Application of Article 101 (1) TFEU
4. Application of Article 101 (3) TFEU

Introduction

- Art. 101 TFEU applicable to non-horizontal/vertical cooperation
 - Joined cases 56 & 58/64, Consten & Grundig v Commission
- Vertical restraints generally less of a concern than horizontal restraints
 - Less likely to restrict competition
 - More likely to achieve efficiencies
- Other competition law instruments applicable to vertical competition challenges
 - Article 102 TFEU - Abuse of dominance
 - E.g. exclusionary practices/exclusivity agreements
 - EUMR
 - Vertical mergers/acquisitions

Vertical agreements

- 1) Agreements/concerted practices between undertakings operating at a different level of the production or distribution chain
 - E.g. producer-wholesaler-retailer-consumer (“undertaking”)
- 2) Relating to the conditions under which the parties may purchase, sell or resell certain goods or services
 - E.g. export restrictions, price restrictions, exclusivity obligations

Legal sources and soft-law instruments

- Article 101 (1) TFEU
- Article 101 (3) TFEU
- Block Exemption Vertical Restraints («BEVR»)
 - Regulation 330/2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices
- Commission Guidelines on Vertical Restraints

Recap «undertaking»

- ECJ definition
 - “the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed” Case 41/90, Höfner and Elser v Macrotron, para 21
 - Agreements between “undertakings” and end-consumers not covered by Article 101
- Single economic entity doctrine
 - Article 101 TFEU not applicable to agreements e.g. between two companies within the same “undertaking”
 - E.g. agreements between parent and subsidiaries
 - Case C-73/95, Viho Europe v Commission
 - «The Court of First Instance was therefore fully entitled to base its decision solely on the existence of a single economic unit in order to rule out the application of Article [101 (1)] to the Parker group.» (para18)
 - Case 30/87, Bodson
 - Article 101 TFEU is «not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary (...)»

Agency agreements

- Sales restrictions in genuine agency agreements not covered by Article 101 TFEU
- The principal and a genuine agent is regarded as one «undertaking» - single economic entity
- Commission guidelines vertical restraints
 - “An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal.” (para 12)

Agency agreements (cont.)

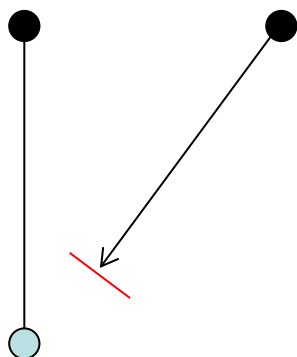
- Case C-217/05, CEEES
 - “the term ‘undertaking’ must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal” (para 40)
 - “In certain circumstances, the relationship between a principal and his agent may be characterised by such economic unity” (para 42)
 - “agents can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal’s undertaking” (para 43)
- Does the agent bear financial or commercial risks?
 - Yes: not a genuine agent – Article 101 applicable to sales restrictions
 - No: a genuine agent – Article 101 not applicable to sales restrictions
- Risks: costs (purchase, sale, transport, marketing), risk of stocks, contractual performance, product liability etc.

Recap «agreement»

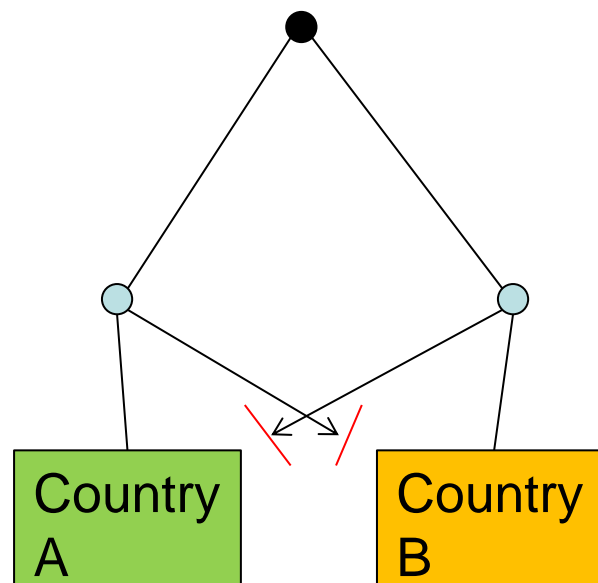
- Broad concept: «joint intention»
 - Case T-41/96, Bayer v Commission,
- Form irrelevant (oral, written, signed, unsigned, enforceable, “gentlemen’s agreements”)
- The distinction between «agreement» and unilateral conduct
 - Case T-41/96 Bayer
 - Restriction of supply to limit parallel exports to the UK
 - ”a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent.
 - Whilst the former do not fall within Article [101](1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article.”

Competitive concerns / theories of harm

Exclusion



Coordination



Vertical restraints

- Restrictions on the conditions under which the parties to a vertical agreement may purchase, sell or resell certain goods or services
- Examples
 - Export restrictions
 - Geographical/customer restrictions
 - Price restrictions
 - Single branding/non-compete/exclusive purchasing
 - Exclusive distribution
 - Selective distribution
 - Tying/full-line forcing

The road to a more effects-based approach to vertical restraints

- US
 - Dr. Miles (1911): price restraints per se prohibited
 - Schwinn (1967): non-price restraints per se prohibited
 - Albrecht (1968): RPM max per se prohibited
 - Sylvania (1977): Non price restraints rule-of-reason
 - Khan v. State Oil (1997): RPM max rule-of-reason
 - Leegin (2007): RPM min rule-of-reason
- EU:
 - The first years: Grundig, STM, De Haecht
 - 1997: Green paper on vertical restraints
 - 1999: Block exemption (Regulation 2790/99)
 - 2000: Guidelines vertical restraints
 - 2004: Guidelines 101(3) – genuine efficiency defence
 - 2010: Revised Block exemption (Regulation 330/10)
 - 2010: Revised Guidelines vertical restraints

Outline legal analysis

- 1) Is the agreement covered by the BEVR?
 - Applicability, market share thresholds, hard core restraints, excluded restraints
- 2) If no (on 1): Is the agreement contrary to Article 101 (1) TFEU?
 - Restriction of competition by “object” or “effect”
- 3) If yes (on 2): Is the agreement covered by Article 101 (3)?
 - Individual assessment: four cumulative conditions

1. Introduction
2. **Block Exemption Vertical Restraints**
3. Application of Article 101 (1) TFEU
4. Application of Article 101 (3) TFEU

Introduction

- Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices (“BEVR”)
- «Safe harbour»
 - Agreements covered by the block exemption are automatically exempt from Article 101 (1) TFEU - lawful
 - Rationale: Assumption that certain agreements (and under certain circumstances) will satisfy the conditions in Article 101 (3) TFEU
 - No presumption of illegality outside BEVR!
- (Other Block Exemptions)
 - Vertical agreements and concerted practices in the motor vehicle sector
 - Licencing agreements for the transfer of technology
 - R&D agreements
 - Specialisation agreements
 - Agreements in the insurance sector
 - Liner shipping consortia

Outline of the BEVR

- Art. 1 – Definitions
- Art. 2 – Exemption
 - “Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to vertical agreements.” (Art. 2.1)
- Art. 3 – Market share threshold
 - “The exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services.” (Art. 3.1)
- Art. 4 – Hard core restrictions
 - Remove the benefit of the block exemption to the agreement
- Art. 5 – Excluded restrictions
 - Not covered by the block exemption
 - The BEVR continues to apply to the remaining part of the agreement

Hard core restrictions (examples)

- RPM
 - Fixed or minimum resale price
 - (not recommended or maximum resale price)
- Export bans / absolute territorial/customer protection
 - (not the restriction of active sales into the exclusive territory or customer group allocated by the supplier to another buyer)
- Restriction of active or passive sales to end users by members of a selective distribution system
- Restriction of cross-supplies between distributors within a selective distribution system

Excluded restrictions (examples)

- Non-compete/exclusive purchasing
 - Any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- Post-term non-compete
 - Any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
 - One year exceptionally covered

1. Introduction
2. Block Exemption Vertical Restraints
3. **Application of Article 101 (1) TFEU**
4. Application of Article 101 (3) TFEU

Introduction

- No presumption of illegality outside the BEVR
- Case-by-case analysis required
- Application of the criteria in Article 101 (1) TFEU
 - Case law
 - Commission decisions
 - Commission guidelines vertical restraints

Vertical restrictions by “object”

- The concept of “object” restrictions
 - “object” vs “effect”
- By “nature” / “experience” restrictive of competition
 - “certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”. Case C-8/08, T-Mobile Netherlands, para 29
 - “restrictions which (...) have such a high potential of negative effects on competition that it is unnecessary (...) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market”. Commission guidelines Article 101(3), para 21

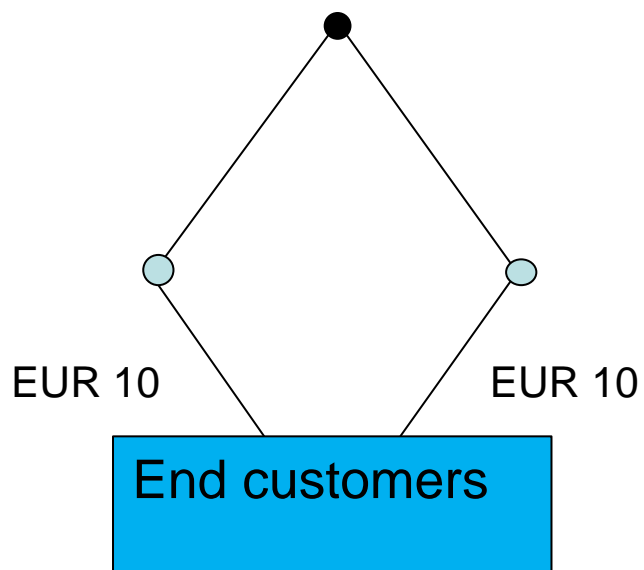
Relationship “object” (Article 101 (1)) and “hardcore” (BEVR)

- Distinct concepts
- AG Mazak, Case C-439/09, Pierre Fabre
 - “In my view, while the inclusion of such [hardcore] restrictions in an agreement would give rise to concerns regarding the conformity of that agreement with Article [101 (1)] and indeed, after examination of, inter alia, the particular agreement and the economic and legal context of which it forms a part, may in fact result in a finding of a restriction by object, there is no legal presumption that the agreement infringes Article [101 (1)].”
- Commission’s policy
 - Where a hardcore restriction is included in an agreement, that agreement is presumed to fall within Article 101(1). (Commission’s guidelines on vertical restraints, para 47)

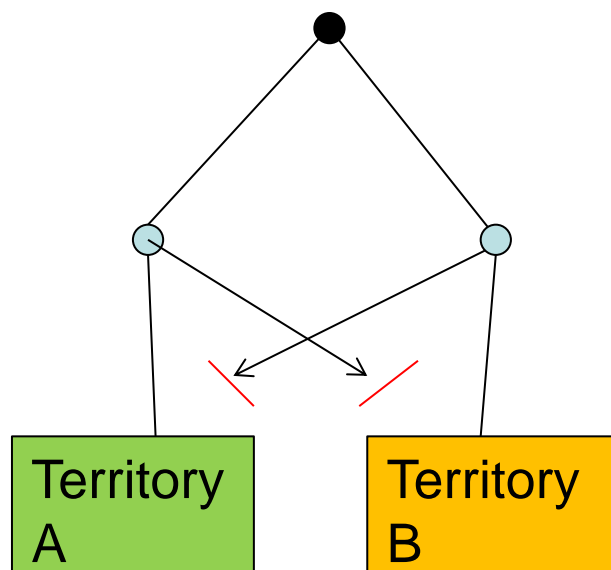
Examples vertical restrictions by “object”

- RPM (Resale Price Maintenance)
 - “provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction of competition within the meaning of [Article 101(1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty.” (Case 243/83, Binon, para 44)
 - See also Case 161/ 84, Pronuptia. (Price guidelines lawful provided no concerted practice for the actual application of such prices)
- ATP (Absolute territorial protection)
 - Restrictions on active and passive sales to a territory exclusively allocated to another distributor
 - “[A]n agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the [Union]” (Case 56/64, Consten & Grundig, p. 340)

RPM



ATP



Examples vertical restrictions by “object” (cont.)

- Export bans
 - “By its very nature, a clause prohibiting exports constitutes a restriction of competition, whether it is adopted at the instigation of the supplier or of the customer since the agreed purpose of the contracting parties is the endeavour to isolate a part of the market” (Case 19/77, Miller v Commission, para 7)
- Dual pricing to prevent export/parallel trade
 - Case C-501/06, GlaxoSmithKline v Commission
 - Agreement between GSK and Spanish wholesalers: higher prices charged for pharmaceuticals exported to other Member States
 - “[A]greements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition” (para 61)

Vertical restrictions by «effect»

- The concept of restrictions by “effect”
 - Does the agreement have actual or likely anti-competitive effects?
 - “the consequences of the agreement should (...) be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been [restricted] to an appreciable extent.” (Case 56/65, STM, p. 249)
- Factors/methodology
 - “account should be taken of the actual conditions in which [competition] functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned” (Joined cases T-374/94 etc, European Night Services and others v Commission, para 136)

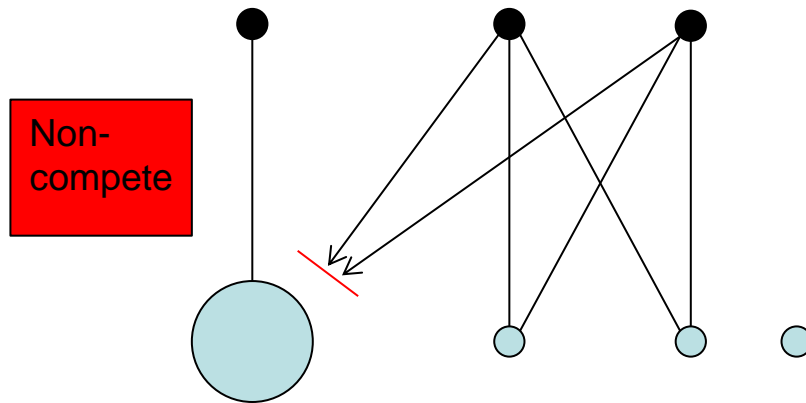
Analytical overview

- Possible negative effects
 - Foreclosure of other suppliers/buyers
 - Reduction of inter-brand competition
 - Reduction of intra-brand competition
 - Obstacles to market integration
- Relevant factors
 - The type and duration of the restraint
 - Supplier's market position
 - Competitors' market position
 - Buyer's market position
 - Entry barriers
 - Other factors (e.g. cumulative effects, etc.)

Examples vertical restrictions by “effect”

- Single branding/non-compete/exclusive purchasing
- Exclusive distribution
- Tying/full-line forcing

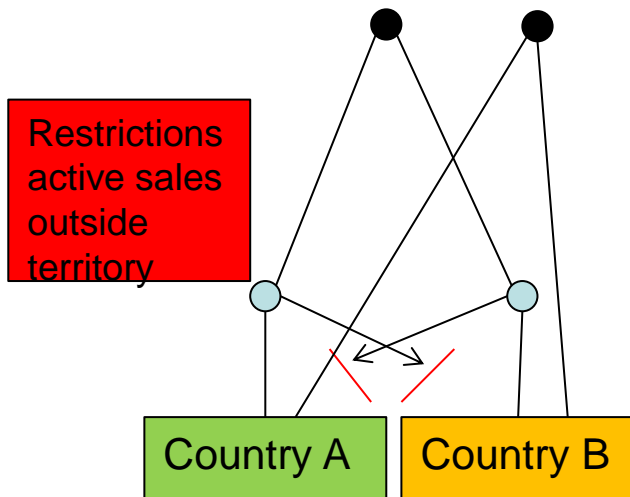
Single branding/non- compete/exclusive purchasing



- Foreclosure?
- Suppliers' market position
- Buyer's market position
- Competitors' market position
- Duration
- Barriers to entry (Alternative outlets)
- Network effect/cumulative effects

Exclusive distribution

- Restriction intra-brand competition?
- Suppliers' market position
- Competitors' market position
- Sufficient inter-brand competition?



1. Introduction
2. Block Exemption Vertical Restraints
3. Application of Article 101 (1) TFEU
4. **Application of Article 101 (3) TFEU**

Article 101 (3) TFEU

- Article 101 (3) applicable to both restrictions by “object” and by “effect”
 - Case T-168/01, GlaxoSmithKline v Commission, Case T-17/93, Matra Hachette v Commission
- Four cumulative conditions
 - Efficiencies
 - Consumers must receive a «fair share»
 - Indispensability
 - No elimination of competition

Potential efficiencies from vertical restraints

- Solve a «free-rider» problem
 - E.g. exclusive dealing to prevent competitors from free-riding on training, marketing, promotion, service etc.
- Entering a new market
 - E.g. exclusive distribution/territorial protection to incentivize a distributor's investments to establish a new market
- Preserve quality and reputation
 - E.g. selective distribution – qualitative criteria to become a certified distributor
- Security of demand
 - E.g. exclusive purchasing/quantity commitments to ensure sufficient demand to recoup necessary investments/achieve economies of scale