

Controlling aggressive price practices between distributors of the same brand on the internet

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REGULATION (VBER) REVIEW

Art. 101 (1) TFEU

The following shall be prohibited as incompatible with the internal market: **all agreements** between undertakings, decisions by associations of undertakings and concerted practices which may **affect trade between Member States** and which have as their **object or effect the prevention, restriction or distortion of competition** within the internal market, and in particular those which:

- (a) **directly or indirectly fix** purchase or selling **prices** or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Block Exemption Vertical restraints (V-BER)

Art. 101 (1) TFEU

Resale price maintenance
(RPM) is a restriction of
competition under Art. 101 (1)
(TFEU)

Art. 4(a) VBER

Resale price maintenance (RPM)
is a **hardcore restriction**
within the meaning of
Art. 4(a) VBER

GUIDELINES ON VERTICAL RESTRAINTS

Article 4 of the Block Exemption Regulation contains a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation (5). Where such a **hardcore restriction** is included in an agreement, that agreement is presumed to fall within Article 101(1). It is also presumed that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the **block exemption does not apply**.

Where the undertakings substantiate that likely efficiencies result from including the hardcore restriction in the agreement and demonstrate that in general all the conditions of Article 101(3) are fulfilled, the Commission will be required to effectively assess the likely negative impact on competition before making an ultimate assessment of whether the conditions of Article 101(3) are fulfilled (2).

RESALE PRICE MAINTENANCE (RPM)

Art. 4 (a) Vertical Block Exemption Regulation (VBER)

“the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties”

DIRECT AND INDIRECT PRICE MAINTENANCE

Direct: contractual provisions or concerted practices that directly establish the resale price → restriction is clear cut

Indirect: an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level

LEEGIN CASE

US Supreme Court, 28 June 2007

The Supreme Court limited the rule from the *Dr. Miles* case by holding that vertical minimum price fixing, or resale price maintenance (**RPM**), was no longer per se illegal. Since the *Leegin* case, it has been **subject to a rule of reason analysis under Federal Law**.

In *California v ARC America Corp.* (1989), the Supreme Court recognized that “*Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.*” In other words, states may enact – and have enacted – their own antitrust laws to supplement federal antitrust laws. Since not all states share the Supreme Court’s view, **RPM still is per se illegal in some states** → Maryland and California have laws that make RPM unlawful and attorneys general in Illinois, Michigan and New York have targeted RPM in lawsuits with a mixed bag of success.

ENFORCEMENT EUROPEAN COMMISSION

Brussels, 24 July 2018 (IP/18/4601)

The European Commission fined, in four separate decisions, consumer electronics manufacturers **Asus, Denon & Marantz, Philips and Pioneer** for imposing fixed or minimum resale prices on their online retailers in breach of EU competition rules.

	Reduction for cooperation	Fine (€)
Asus	40 %	63 522 000
Denon & Marantz	40 %	7 719 000
Philips	40 %	29 828 000
Pioneer	50 %	10 173 000

EXAMPLES OF NATIONAL ENFORCEMENT

Germany

Bundeskartellamt
→ strict enforcement

United Kingdom

Competition and Markets Authority →
strict enforcement

Netherlands

Autoriteit Consument & Markt (ACM)
→ also intends to impose more fines
(*confirmed by Martijn Snoep, chair of
the board of the ACM since
September 2018*)

GUIDELINES OF THE DUTCH COMPETITION AUTHORITY

On 26 February 2019 the Autoriteit Consument & Markt (ACM) published new guidelines with regard to vertical agreements:

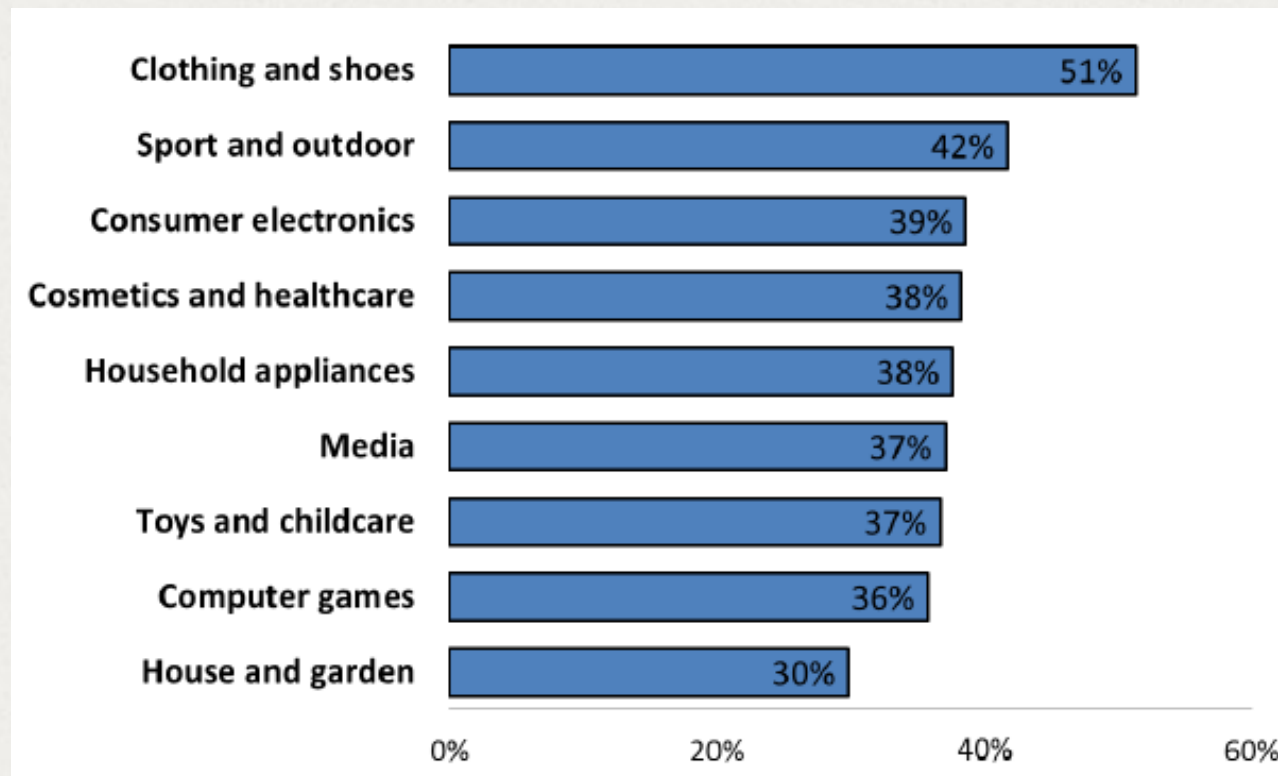
- RPM is a hardcore restriction, but using a **recommended retail price** or imposing a maximum price is **not a hardcore restriction**.
- Hardcore restrictions (such as **RPM**) **can still be permitted in case of economical advantages** (certain efficiency gains) which compensate the negative effects on the competition. An example of an efficiency gain for RPM → stimulation of the service to convince a consumer of certain positive characteristics of the product. RPM may be necessary to prevent that consumers use this service at a certain retailer, but buy the product at another retailer (who does not offer this service) for a lower price.
- It is **up to the supplier to argue convincingly that RPM is necessary** to provide the service and that other alternatives, which are not restricting competition, (such as selective distribution) are not an option.

PRICE RECOMMENDATIONS

The practice of **recommending a resale price** or requiring a retailer to respect a maximum resale price is permissible provided that the market share thresholds set out in that Regulation are not exceeded and that the recommendation does not amount to a minimum or fixed resale price as a result of threats, pressure or incentives (art. 4 (a) VBER).

USE OF PRICE RECOMMENDATIONS

Proportion of retailers that reported price recommendations per product category



Source: Preliminary Report on the E-commerce Sector Inquiry

WHY PRICE RECOMMENDATIONS?

Manufacturers express the view that the **price of a product** is the most immediate **way to communicate its quality** to the customers and provided several reasons for recommending retail prices:

- Intended positioning of the brand or the specific product → particularly important for premium products and luxury brands;
- Investment in research and development as well as other manufacturing costs are inextricably linked to a given recommended retail price;
- Manufacturers would have a better understanding than retailers of the price a customer would be prepared to pay;
- Manufacturers either believe that retailers need price guidance or state that they receive certain requests from retailers;
- Recommended retail prices may help avoiding or reducing cannibalization across channels and geographies.

RISK OF PRICE RECOMMENDATIONS

The risk is that price recommendations could be considered to be amounting to a minimum or fixed resale price (as a result of threats, pressure or incentives)

→ art. 4 (a) VBER = **hardcore restriction**

Not easy to draw the line when this is in fact the case.

MINIMUM ADVERTISED PRICING (MAP)

MAP policies are agreements in which a manufacturer sets advertising price limits for distributors and resellers. However, it does not stop a retailer from actually selling below a minimum price (RPM).

In the EU, there is no **Commission case law** on whether MAP policies, on their own, constitute (indirect) RPM. However, the **Commission has indicated** that **MAPs will likely be restrictive of competition** within the meaning of Article 101(1) TFEU. While efficiency defenses under Article 101(3) TFEU for such clauses are in principle not excluded, it will be very difficult for companies to demonstrate in a particular case that pro-competitive effects of the clauses outweigh the negative effects.

ENERVIT CASE

Italian Competition Authority, 20 November 2013

The Italian Competition Authority accepted that Enervit sent a formal notice to its resellers stating that *"its resellers remain free to freely determine the resale prices and the relevant discounts in compliance with the image and value of the Enervit' trademarks"*

→ Such “recommendation” is thus allowed, although it entails some boundaries a seller’s freedom to fix its resale prices

REVIEW VERTICAL BLOCK EXEMPTION REGULATION

- The Vertical Block Exemption will **expire on 31 May 2022**.
- The European Commission published its evaluation roadmap on the functioning of the Block Exemption on Vertical Agreements and the relevant Guidelines.
- A public consultation was held from February 2019 until 27 May 2019.
- European Commission shall determine if it will let the Regulation lapse, prolong its duration or revise it in order to take proper account of new market developments such as online platforms.
- The submissions have not been made public yet.

→ Consequences for Resale Price Maintenance?

Questions?



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