# VERTICAL RESTRAINTS

## AND ITS
## COMPETITON LAW IMPLICATIONS

Pázmány Péter Catholic University – Budapest

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José Sá Reis

University of Porto
Faculty of Law

# 1.

# VERTICAL RESTRAINTS WITHIN ART. 101 TFEU

# 1. V.R. WITHIN ART. 101 TFEU

As we all know, art. 101 TFEU is all about **agreements between undertakings**

We also know that such agreements can be either **horizontal** or **vertical.**



# 1. V.R. WITHIN ART. 101 TFEU

**HORIZONTAL** agreements are those entered into between undetakings who are in the **same level of the production and distribution chain.**

Which is to say,

between **actual** or **potential competitors**

# 1. V.R. WITHIN ART. 101 TFEU

Horizontal agreements are **generally illegal** – but there are, of course, some exceptions: check 101(3).

In order to immediately understand why that is, we must only ask ourselves a rather simple question:



# 1. V.R. WITHIN ART. 101 TFEU

If competitors are bound to be **rivals** in the market, and fight for its **largest possible share,** that will guarantee them a **larger financial outcome,**

then **why on earth should they agree about anything,** if not to **maximize their own profit at the exepense of other market players**?

# 1. V.R. WITHIN ART. 101 TFEU

these “other market players” will normally fall into one of the following categories:

- **competitors;**
- other **non-competing undertakings** (suppliers, distributors, financers, etc)
- final **consumers**



# 1. V.R. WITHIN ART. 101 TFEU

The harm suffered by these subjects is the legal and economic rationale for the **prohibition** and **punishment** of virtually any cartels.

This means that non-justified horizontal agreements **can**, and **most times will**, lead to one or more of the following outcomes:

## 1. V.R. WITHIN ART. 101 TFEU

i. **Fines:** the main (and softer) path for public enforcement, applied by the national competition authorities or by the EU Commission, and can go up to **10% of the undertaking's turnover in the preceding year, multiplied by the number of years that the cartel was active.**

Although EU law does not prescribe fines for **directors,** most members do.



## 1. V.R. WITHIN ART. 101 TFEU

ii. **Criminal sanctions:** the extreme path for public enforcement.

Several countries still stick to fines as the main public enforcement measures, but many have included sanctions of **imprisonment** for individuals (mainly directors) participating in cartels.

# 1. V.R. WITHIN ART. 101 TFEU

It's part of the traditional legal competition framework in most **common-law jurisdictions** (USA, Canada, UK, Australia), **not so much in civil-law tradition** legal systems; lately, though, the bias is changing.



# 1. V.R. WITHIN ART. 101 TFEU

- **Hungary, Italy, Germany**: up to 5 years, limited to pulblic tender cartels (the same in **Austria** and **Poland**, but with a 3-year limit)
- **Denmark**: up to 18 months for any cartels, up to 6 years for public tender cartels;
- **France**: up to 4 years for any cartels
- **Portugal, Spain**: no criminal sanctions at all

# 1. V.R. WITHIN ART. 101 TFEU

iii. **Compensation:** the **private enforcement.** According to the regime set out in Directive 2014/104 (november 26, 2014), each member state had to implement internal legal measures in order to **secure consumers and other players damage compensation** for competition offences.



# 1. V.R. WITHIN ART. 101 TFEU

BUT LET'S FOCUS ON WHAT MATTERS NOW.

If we can easily understand why horizontal agreements are punished, the same does not apply to contracts between undertakings that provide **complementary**, and **not competing**, services.

# 1. V.R. WITHIN ART. 101 TFEU

Classic example: **producer/distributor agreement:**

An undertaking that **produces** electronic devices is not necessarily the one who is best placed to **sell** them to final consumers. It will then establish a partnership with **another undertaking** that will carry this part of the business.



# 1. V.R. WITHIN ART. 101 TFEU

Anyone understands this very simple and intuitive idea, that derives from the very concept of **business specialization.**

Nevertheless, art. 101 TFEU does not make any distinction, and apparently prohibits **any agreement** between undertakings, be it vertical or horizontal, **as long as** such agreements:

# 1. V.R. WITHIN ART. 101 TFEU

*"…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."*



# 1. V.R. WITHIN ART. 101 TFEU

That amounts to say that, as a general rule, vertical and horizontal agreements can be prohibited or sanctioned **in the same terms.**

However, this conclusion seem to contradict the common sense conclusion we had reached before:

# 1. V.R. WITHIN ART. 101 TFEU

**Anyone** understands that vertical agreements are absolutely **indispensible for economic efficiency;** but **no one** understands that, as a general principle, **rivals make agreements** with each other.



# 1. V.R. WITHIN ART. 101 TFEU

That's why we can never forget that any agreement **will only fall** under art. 101 **if and when** it presents a serious threat of "***preventing, restricting or distorting***" competition, either because its **object** is anti-competitive by nature, or because its **effects** have proven, in concrete, to be anti-competitive.

## 1. V.R. WITHIN ART. 101 TFEU

This leads us to another conclusion, that also derives from common sense:

Generally speaking, whereas the great majority of cartels are anti-competitive (therefore illegal), **the great majority of vertical agreements are pro-competitive**, or at most **neutral from a competition law standpoint.**



## 1. V.R. WITHIN ART. 101 TFEU

There's another point we must be aware of, in order to understand how competition law applies to vertical business structures.

**Not all** vertical business relationships entangle vertical agreements, at least not in a sense that is **relevant for coompetition law purposes.**

# 1. V.R. WITHIN ART. 101 TFEU

In the last decades we have seen the rise of **giant corporate groups** where production, distribution, marketing, transportation or even insurance and financing, are all **vertically integrated within the group,** normally through companies with separate legal existence but **ultimately controlled by the same parent.**



# 1. V.R. WITHIN ART. 101 TFEU

In such cases we have **intra-group relations** that are **irrelevant** as to the application of art. 101 TFEU, according to the **single economic entity doctrine:** there can not be an agreement between two branches of the same group/entity, **because they can not "exert separate competitive force on the market".**

# 1. V.R. WITHIN ART. 101 TFEU

For instance: if the corporation X manufactures clothes that are sold exclusively at the stores owned by corporation Y, but both are controlled by parent company Z, then **Z is ultimately reponsible for all business decisions taken by both X and Y.**



# 1.1. V.R. WITHIN ART. 101 TFEU

This means that between X and Y **there is not an exclusive distribution agreement** to which the legal framework on vertical restrictions applies, but instead a **single distribution strategy within the group** controlled by Z, in the same terms as would happen if X and Y **were not** legally separated entities, but **mere branches or dependencies** of Z.

## 1. V.R. WITHIN ART. 101 TFEU

Even though it's not written in the TFEU or in any legislative act, this is the consolidated doctrine in EU law since the Comission's 1969 decision on **Christiani/Nielsen.**



## 1. V.R. WITHIN ART. 101 TFEU

This doctrine has two main consequences:

i. **There can be no agreements** whatsoever, and hence, no cartels, between a **parent** and a **subsidiary**, or between **sibling** companies – which is, of course, **good news** for the "entity";

**BUT**

## 1. V.R. WITHIN ART. 101 TFEU

ii. Parent companies are **financially liable** for infringements carried by its subsidiaries; moreover, the 10% threshold for calculating the fine shall **take into account the parent's turnover,** not the subsidiary's (hence, potentially the turnover of the **whole conglomerate**) – which is **extremelly bad news.**



## 1. V.R. WITHIN ART. 101 TFEU

**ANYWAY,**

we have to keep in mind that agreements between legally separate companies **can fall into any of the three main categories we have seen,** with substancial diferences as to their consequences.

# 1. V.R. WITHIN ART. 101 TFEU

One last warning.

In this lecture, we will focus only in **true agreements,** for which I mean agreements that are the result of the free will of both parties.

This means that any supposed agreements **imposed by a dominant undertaking over a weaker counterpart,** who has no economic means to refuse it, should probably not fall under art. 101 TFEU.



# 1. V.R. WITHIN ART. 101 TFEU

Instead, it should fall **under art. 102,** since the matter here is the **abuse of a dominant position** that an undertaking who controls the market can exert over its partners.

The supposed agreement should be treated as it is: an **unilateral conduct** imposed by one undertaking upon others, regardless of its more contractual or tacit form.

# 1. V.R. WITHIN ART. 101 TFEU

Just to be clear: in such cases the matter **is not** that two or more undertakings colluded in a way that prevents or reduces competition; the matter is that **one of them is in a position where it can impose upon the others** the conditions it chooses.



# 1. V.R. WITHIN ART. 101 TFEU

Of course, it's often difficult to understand if a behaviour should fall under 101 or 102.

The ECJ has considered, for instance, that when an undertaking excludes from its network the distributors who **resell below the recommended price,** that should be treated under 101, and not 102, because there was a previous, and ilegal, price agreement between supplier and distributor.

(***AEG Vs. Commission,*** 25 October 1983).

# 1. V.R. WITHIN ART. 101 TFEU

More recently, and regarding a case where spanish pharmaceutical wholesalers were excluded from the distribution network of a specific product because they did not follow the instructions not to re-export that product to a market where it was more expensive, the ECJ stated that:

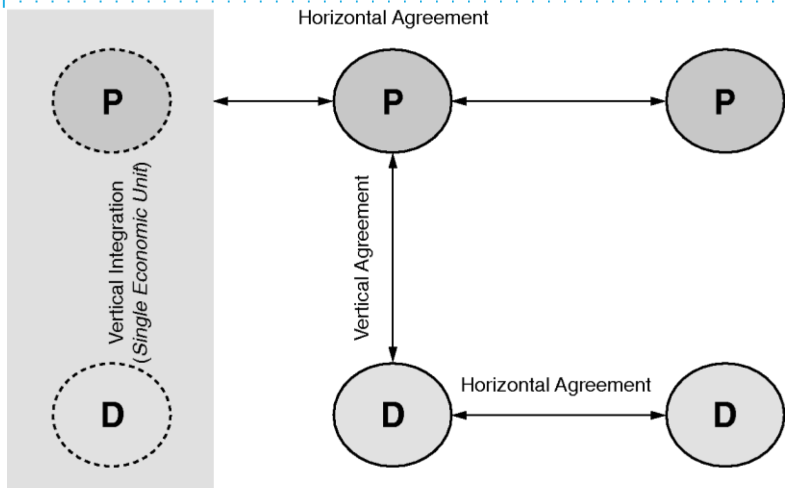


# 1. V.R. WITHIN ART. 101 TFEU

*"For an agreement (...) to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal* ***constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly,*** *and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers."*

*(**Bayer Vs. Commission**, 6 January 2004)*

# 1.1. V.R. WITHIN ART. 101 TFEU




Taken from Robert Schultze, '*An introducion to European Law*'



# 2.

# THE LEGAL FRAMEWORK OF V.R.

## 2. THE LEGAL FRAMEWORK OF V.R.

As we have seen, vertical agreements fall into 101.

But as we also have seen, most of those agreements don't have the objective, and don't produce the effect, of reducing or preventing competition.

On the contrary, they are **essential for the efficiency** of the economy as a whole.



## 2. THE LEGAL FRAMEWORK OF V.R.

That's why most of them will benefit from the exception set on **101 (3) TFUE**, which says that the prohibition (and the consequent sanctions) will not apply to an agreement if it proves **not to be harmful** for competition.

In order to prove it, the said agreement will have to pass a **test of economic balance**, where its ***market* "pros"** will be weighed against its ***market* "cons"**.

## 2. THE LEGAL FRAMEWORK OF V.R.

According to 101 (3), the prohibition **does not apply** to any agreement that:

i. *"contributes to **improving the production or distribution** of goods or to **promoting technical or economic progress**";*
ii. *"allows **consumers** a fair share of the resulting benefit";*
iii. *"does not impose on the undertakings concerned restrictions which are not **indispensable** to the attainment of these objectives";*
iv. *"does not afford such undertakings the possibility of **eliminating competition** in respect of a substantial part of the products in question."*



## 2. THE LEGAL FRAMEWORK OF V.R.

These exemptions may be granted **individually** to a certain agreement, if the concerned parties chose to submit them to the Comission or to the NCA, or by means of a **block exemption,** as defined on a specific Regulation approved with that objective.

This is the case for some categories of agreements which, according to the rules of experience, **will not harm competition as long as they abide to the parameters** that those Regulation will set.

## 2. THE LEGAL FRAMEWORK OF V.R.

We can find such block exemptions for the following categories of agreements:

i. **Horizontal cooperation** agreements, which can be
   - **R & D** agreements, or
   - **Specialization** agreements;

ii. **Licensing** agreements for **transfer of technology;**

iii. **Vertical agreements** – in general, and also specifically for the **motor vehicle** sector.



## 2. THE LEGAL FRAMEWORK OF V.R.

The one that interests us today is the general **block exemption for vertical agreements.** To understand it properly, we need two EU texts:

- the **Commission Regulation n. 330/2010** (20 April), where the regime is laid and to which we will refer as **VABER** (**V**ertical **A**greements **B**lock **E**xemption **R**egulation);
- the **Commission Guidelines on Vertical Restraints** (notice 2010/C 130/1, 19 May 2010), that further clarified it.

## 2. THE LEGAL FRAMEWORK OF V.R.

In simple terms, the exemption applies to any vertical agreement, thus providing what is known as a ***"safe harbor regime"***, as long as it complies with **the following conditions**:



## 2. THE LEGAL FRAMEWORK OF V.R.

i. the **market share** of **both the supplier and the buyer** can not exceed **30%**.

Market shares are calculated according to art. 7. In case they fall below 30% when the agreement was made, but **later raise above** that threshold, they may still benefit from the exemption for **up to two years:** see paras. (c) and (d).

## 2. THE LEGAL FRAMEWORK OF V.R.

ii. the agreement **can not include** any clause mentioned in **art. 4 "black list"**: in case it does, **the whole agreement is void.**

It may, though, contain clauses mentioned in **art. 5 "grey list":** in that case the agreement will stand valid as a whole, and **only the concerned clauses will be void.**

We will look at those articles more thoroughly when we go through the regime of the different contracts.



## 1.2. THE LEGAL FRAMEWORK OF V.R.

In addition to this, and according to art. 6, the Commission may decide that the VABER shall not apply to a certain relevant market if it finds that there are **palalell networks of identical vertical restraints** which stand for **more than 50%** of the said market.

Example: undertakings A, B and C, each representing 20% of a market, all impose to their buyers single-brand obligations. Though none is above the 30% threshold, the fact that the majority of the market is subject to that condition may be enough for the VABER not to apply to the whole market, and hence to any of the agreements.

## 2. THE LEGAL FRAMEWORK OF V.R.

**The Guidelines** are very useful in explaining how these rules **apply** to certain contractual types and how, according to the Commission, they should be **interpreted** by the Eurpean and national Courts and by the NCAs.

It's important to keep in mind that these Guidelines **are not binding** on any of those authorities, and they can move away from these interpretation. Nonetheless, being an "authentic interpretation" of a legal text drew by the Commission itself, it is in fact **hugely influential**.



# 3.

# DISTRIBUTION AND SOME OTHER VERTICAL AGREEMENTS

## A FIRST APPROACH TO THEIR COMPETITION REGIME

# 3.1. SINGLE BRANDING

## 3.1.1. WHAT IS IT?

Single branding is a kind of distribution agreement whereby the buyer agrees **not to buy** (or at least, not to buy above limited amounts) **any goods and services that constitute the object of the contract from the competitors of the supplier.**

He is obliged, hence, to buy (and resell) products of **one single brand** – that of the supplier.



# 3.1. SINGLE BRANDING

## 3.1.2. WHY DO WE CARE?

It's true that single branding agreements may have **positive effects** for both suppliers and buyers, and even for consumers.

i. For the **supplier**:
   - **Guaranteed outflow** of the production;
   - Better **planning** of distribution network and investments.

# 3.1. SINGLE BRANDING

ii. For the **buyer:**

- **Better prices and conditions,** financial and logistic help from the supplier;
- **Guaranteed inflow** of the goods/services he will resell;
- Better **assistance** in post-contract matters (repair, upgrades, etc.)

iii. For the **consumers:**

- Better overall service (price and quality), as a consequence.



# 3.1. SINGLE BRANDING

So, again, why we care?

Because these positive aspects bring along some **threats** for the **competitive environment,** namely the **consumers** and **other undertakings** that are, or want to be, in the same market.

Such dangers are, in short, the following:

# 3.1. SINGLE BRANDING

i. **Barriers to entry:** if several buyers are bound to stick to a single supplier, that may (and most possibly will) prevent the **entrance of new suppliers** in the same market, or the **growth** of the existing suppliers' market share



# 3.1. SINGLE BRANDING

ii. **Restriction of inter-brand competition:** as a result, the supply market will tend to have **few competing brands;** this will restrict both the consumers' **choices** and the **incentives for innovation.**

Moreover, the existence of few competing undertakings will facilitate **collusion** among them, making the formation of cartels easier.

# 3.1. SINGLE BRANDING

iii. **Barriers to cross-border trade:** if the buyer is **prevented from importing** the goods or services that are the object of the contract, **intra-EU commerce may suffer,** and the "**single open market**" goal of the Treaties may be harmed.



# 3.1. SINGLE BRANDING

## 3.1.3. What's the regime?

According to VABER 1(1)(d), single branding clauses are ***non-compete obligations***:

*"direct or indirect obligation **causing the buyer not to manufacture, purchase, sell** or **resell** goods or services which **compete with the contract** goods or services, or any direct or indirect **obligation on the buyer to purchase** from the supplier or from another undertaking designated by the supplier **more than 80 %** of the buyer's total purchases of the **contract goods** or services and their **substitutes** on the relevant market".*

## 3.1. SINGLE BRANDING

They are **not mentioned** in art. 4 black list: therefore no agreement that includes such a clause will ever be void just because of it.

However, since their effect may be harmful, **5 (1)(a) limits their duration to 5 years**: a non-compete obligation that goes beyond this limit is subject to the **general rule of 101 TFUE**, and **may be void** if it has the effect of restricting or distorting competition.



## 3.1. SINGLE BRANDING

This limit **does not apply** if the supplier has made **important investments on the buyer's premises**: see **art. 5(2):** in such cases, the obligation **may endure** as long as the buyer occupies the premises.

## 3.1. SINGLE BRANDING

Sill relating to this topic, the buyer **cannot be prohibited** from manufacturing, purchasing, selling or reselling products that compete with the supplier's **after termination** of the contract: see art. **5(1)(b).**

There can be an **exception,** limited to **1 year,** if the restriction is necessary to **protect the supplier's know-how,** that the buyer acquired throughout the contract: see **5(3)**



## 3.1. SINGLE BRANDING

### 3.1.4 CASE LAW: Stergios Delimitis c. Henninger Brau

28.02.1991 (C-234/89; EU:C:1991:91)

**Market definition:** "beer distribution in premises for the sale and consumption of drinks";

**Two-fold test** set by the ECJ:

- **Market foreclosure:**

  analysis of the **network** of identical agreements, their **duration**, the **quantity** of competing **products** and **sellers** subjected to them, and their **proportion** within the **overall** market;

- **Contribution** of the given agreement to that foreclosure.

# 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

## 3.2.1. WHAT IS IT?

In a way, we can say it's **symmetrical** to single branding.

Here, it's the supplier that agrees to **sell his products to one single buyer**, who will be his **exclusive distributor** in a given **territory**, or to a given group of **clients.**




# 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION


Granting this exclusivity privilege to every distributor will normally (though not necessarily) **encompass an obligation to the distributor himself**: he's contractually **prohibited** to sell his products in the territories, or to the clients, that **were attributed to other distributors.**

These are normally called ***territorial protection*** and ***non-solicitation*** clauses.

## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

### 3.2.2. WHY DO WE CARE?

As happens with single branding, while exclusive distribution brings **benefits** both to supplier and buyer, it also brings with it some **threats** to the market and to competition.

Let's start with the benefits.



## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

i. **Buyer:**

   obviously, greater **market power** within the area/clientele

i. **Supplier**

- easier to **control and manage** the business results in the given area or group of clients, and to identify and correct inefficiencies of the distribution network;
- uniform protection/management of the **brand's image;**
- **economies of scale:** transport, marketing, logistics.

## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

**Main threats** to competition:

i. **Preventing intra-brand competition**

If a distributor has a monopoly within the area/clientele, his **incentive to improve** (through **price, quality** and **innovation**) is **highly reduced.**

**Attention:** this is the case only **if inter-brand competition is also poor:** otherwise he will suffer the competition from other brands offering similar products.



## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

ii. **Market sharing,** which may lead to price discrimination: if distributors are monopolists, they can set the price they want, causing final prices to differ within the exclusive areas, and hence some consumers paying more than others for the same product;

iii. **Collusion** (especially between distributors) is facilitated: **hub and spoke cartels,** where a single supplier can connect (and therefore facilitate the collusion of) many distributors – or vice-versa.

## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

iv. Barriers to **cross border trade**

If the distributor cannot 'invade' the other distributors' territories or clients, he may be **prevented from exporting**: imagine a **small national market** where there is only **one exclusive distributor** to a certain product. He will probably be contractually prohibited to sell to other territories**, and hence to export:** this will most probably constitute a **restriction by object**, according to the **Consten/Grundig doctrine.**



## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

v. **The case of multiple exclusive distribution**

It often happens (for instance, in cosmetics, clothing or automobiles) that the same buyer is the exclusive distributor for diferent and competing brands.

When this is the case**, inter-brand competition** may also be threatened: the same distributor **alone** will be able to establish the conditions for the monopolist selling of **different and competing products** within the area.

## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

### 3.2.3. WHAT'S THE REGIME?

Art. **4(b)** VABER seems to embrace any territorial and clientele protection clause. Remember that if ever a distribution contract includes a clause falling under this list, **the contract as a whole will be void.**

However, it contains **exceptions** that limit the prohibition to a reasonable extent. Let's look at them.



## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

i. **Only active sales** are prohibited

This means that if a contract prohibits a distributor to accept **passive** (non-solicited) sales, the contract as a whole is **void.**

Let's look at the Guidelines (para. 51) to better understand this distinction.

# 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

*"«**Active**» sales mean **actively approaching** individual customers by for instance **direct mail**, including the sending of **unsolicited e-mails**, or **visits**; or actively approaching a specific customer group or customers in a specific territory through **advertisement in media**, on the **internet** or other **promotions specifically targeted** at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory."*



# 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

*"«**Passive**» sales mean **responding to unsolicited requests** from individual customers including delivery of goods or services to such customers. **General advertising or promotion** that reaches customers in other distributors' (exclusive) territories or customer groups but which is **a reasonable way to reach customers outside those territories or customer groups**, for instance to reach customers in one's own territory, are passive sales. General advertising or promotion is considered a reasonable way to reach such customers **if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.**"*

## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

**See also para. 61:**

*"A distributor which will be the first to sell a new brand or the first to sell an existing brand on a new market, thereby ensuring a genuine entry in the relevant market,* ***may have to commit substantial investments to start up and/or develop the new market*** *where there was previously no demand for that type of product in general or for that type of product from that producer. Such expenses may often be sunk and in such circumstances it could well be the case that* ***the distributor would not enter into the distribution agreement without protection for a certain period of time against (active and) passive sales into its territory or to its customer group by other distributors.***



## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

*Where substantial investments by the distributor to start up and/or develop the new market are necessary,* ***restrictions of passive sales by other distributors*** *into such a territory or to such a customer group which are necessary for the distributor to recoup these investments* ***generally fall outside Article 101(1) during the first two years*** *that this distributor is selling the contract goods or services in that territory or to that customer group,* ***even though such hardcore restrictions are in general presumed to fall within Article 101(1).***"

# 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

ii. *The restriction of* ***sales to end users*** *by a buyer operating at the* ***wholesale*** *level of trade are permitted;*

iii. *the restriction of the buyer's ability to* ***sell components****, supplied for the purposes of* ***incorporation****, to customers who would use them to* ***manufacture the same type of goods*** *as those produced by the supplier is permitted.*



# 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

**3.2.4.: Case law: Consten/Grundig c. Commission**

13.07.1966 (56-58/64, EU:C:1966:41)

Consten was the exclusive distributor of Grundig devices in french territory, and had obtained the **registry of the trademark "Gint"** (Grundig International) for that territory, which should guarantee that **no other distributors could sell that brand** in France.

When other distributors started to use the mark in **paralell imports purchased from german resellers,** Grundig notified the Commission of the distribution agreements it had in place, so as to enforce it and prevent the use of the trademark by those distributors; the Commission refused to grant an exemption on the basis of 101(3), and Grundig and Consten appealled to the ECJ.

## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

Among other things, the Court said that:

*"Competition may be distorted within the meaning of Article 85 (1) not only by agreements which limit it as between the parties, but also by agreements which* ***prevent or restrict the competition which might take place between one of them and third parties."***

*"By such an agreement, the parties might seek, by preventing or limiting the competition of third parties in respect of the products, to create or guarantee for their benefit an* ***unjustified advantage at the expense of the consumer or user,*** *contrary to the general aims of Article 85."*

*"An agreement between producer and distributor which might tend to res****tore the national divisions in trade*** *between Member States might be such as to* ***frustrate the most fundamental objectives of the Community".***



## 3.2. EXCLUSIVE DISTRIBUTION AND TERRITORIAL/CLIENT PROTECTION

This case and **Societé Technique Miniére** (LTM) (30.06.1966, 56/65, EU:C:1966:38) are the first ones where vertical restrictions were thoroughly analysed.

LTM was very importante, furthermore, in setting the criteria for the distinction between **restrictions by object and by effect.**

# 3.3. 'MOST-FAVOURED NATION (CONSUMER)' CLAUSES (MFN/MFC)

## 3.3.1. WHAT IS IT?

It's a clause that connects the **price fixed in the agreement between supplier X and buyer Y to the price that X will grant to buyer Z,** stating that Y can demand from X the same conditions he offers to Z.

These clauses have been gaining importance in **digital platforms,** especially in hotel booking.



# 3.3. 'MOST-FAVOURED NATION (CONSUMER)' CLAUSES (MFN)

## 3.3.2. WHY DO WE CARE?

MFN clauses present some threats to competition:

i. **They lessen the incentive** to the **supplier** to **offer better conditions,** because it must extend them to all other distributors;

ii. They also **lessen the incentive** of the **distributor** to **fight for better conditions,** since they would be extended to its competitors even if they did nothing, which means he would not improve in relative terms.

# 3.3. 'MOST-FAVOURED NATION (CONSUMER)' CLAUSES (MFN)

They can presente themselves in **two forms:**

**Wider,** if the supplier agrees not to offer his services (e.g., a hotel room) for a smaller price in competing **platforms** (Booking Vs. Airbnb);

**Narrower,** if he only agrees not no offer a better price in **his own reselling channel** (the hotel's own webpage).



# 3.3. 'MOST-FAVOURED NATION (CONSUMER)' CLAUSES (MFN)

## 3.3.3. What's the regime?

There is no specific EU law regime, and MFN clauses are not included in VABER.

# 3.3. 'MOST-FAVOURED NATION (CONSUMER)' CLAUSES (MFN)

## 3.3.4. CASE LAW

There is no proper case law; however, in the ***Apple e-Book*** case, the Commission settled with the retailers in the condition they should terminate their contracts with MF clauses.



# 3.4. RESALE PRICE MAINTENANCE (RPM)

## 3.4.1. What is it?

The **fixing**, by the **supplier**, of the price that should be applied **by his distributors** to the final consumers of the goods and services.

This practice can take a **variety of forms** that we must **differenciate,** because they may deserve a diferent treatment.

## 3.4. RESALE PRICE MAINTENANCE (RPM)

i. **pure and simple price fixing**: "you will ***always*** charge €3,5 for this ice cream"
ii. **minimum price fixing**: "you will charge ***at least*** €3 for this ice cream"
iii. **maximum price fixing**: "you will ***not charge more*** than €5 for this ice cream";
iv. **price recommendation**: "we ***advise*** you to charge €3,5 for this ice cream".



## 3.4. RESALE PRICE MAINTENANCE (RPM)

Beware: **price recommendations may be actual impositions**, if they in fact contain a **strong incentive** for the recommendation to be followed: these incentives can be discounts, financial or technical assistance from the supplier, the maintenance of the distribution relationship, etc.

# 3.4. RESALE PRICE MAINTENANCE (RPM)

## 3.4.2. WHY DO WE CARE?

As in almost any case, RPMs have some **advantages**:

i. **increase of non-price competition** among distributors: if the impact of the price factor is small or non-existent, distributors will have to find **other forms of winning market share**; that can be a better overall service, better post-sale assistance, more attention to the costumer, etc:



# 3.4. RESALE PRICE MAINTENANCE (RPM)

ii. may be the only form of organizing a **discount campaign of the supplier's products**, which can be beneficial to final consumers, especially in franchising os selective distribution agreements; that should not last longer than 6 weeks, according to the Guidelines (para. 225)

# 3.4. RESALE PRICE MAINTENANCE (RPM)

iii. may be the **only way to avoid free-riding:** resellers that benefit from the best stores, where the final costumers can go try the products and get relevant information, but don't make an investment on location, trained personnel, stock maintenance, etc., and are therefore **able to resell at a lower price.**



# 3.4. RESALE PRICE MAINTENANCE (RPM)

The costumers **will profit from the investment** made by the best distributors, but **will end up buying the product where the price is smaller,** which normally will mean online or other cheaper-maintenance stores (with less and not so well-trained employees, smaller stock, located far from the better areas, worse post-selling services, etc.). These are, thus, the **free-riders.**

## 3.4. RESALE PRICE MAINTENANCE (RPM)

Even if this is true, RPM have many downsides:

i. Restriction of the resellers' **price fixing freedom**;
ii. Reduction (or elimination) of **intra-brand competition** through price;
iii. **Barrier to the entry of new suppliers**, if the supplier has suficient market power and can fix low prices;



## 3.4. RESALE PRICE MAINTENANCE (RPM)

iv. **Reduction of the pressure** over the supplier's profit margin, since it is more or less guaranteed;
v. **Collusion among resellers** is easier.

# 3.4. RESALE PRICE MAINTENANCE (RPM)

## 3.4.3. WHAT'S THE REGIME?

Apparently, any RPM would seem to fall under 101 (1) (a): ***"agreements that directly or indirectly fix purchase or selling prices or any other trading conditions"*.**

However, art. 4(a) VABER leaves **maximum price fixing** and **price recommendations *out of the prohibition***: as long as the other conditions are met, such practices can benefit from the exemption.



# 3.4. RESALE PRICE MAINTENANCE (RPM)

In these terms, only **straightforward** price fixing and **minimum** price fixing constitute hard core restrictions that lead to a restriction by object – those whose concrete effects don't need to be proven.

This was the prevailing approach in the USA for many decades, but was abandoned in 2007 after the **Leegin** case: since then, all price restrictions are judged according to the **rule of reason**, and **no longer treated as *per se* infringements.**

# 3.4. RESALE PRICE MAINTENANCE (RPM)

## 3.4.4. CASE LAW

**BINON C. AGENCE ET MESSAGERIES DE LA PRESSE**

03.07.1985 (243/83, EU:C:1985:284)

Even though many member states' national law prescribes the possibility of price fixing for newspapers and magazines, the ECJ found it contrary to competition law, and sustained that **all press distributors are free to determine the price at which they sell such products.**



# 3.4. RESALE PRICE MAINTENANCE (RPM)

Even if it is understandable as a matter of principle, this approach seems **rather unrealistic**, given the particularities of the market (especially, the fact that such products have a **very short life-span**).

In fact, and even though the ECJ has not altered its jurisprudence, this price-fixing practice is **followed virtually everywhere in the EU**, and there seems not to be an urging social demand for it to change.

# THANK YOU!

reis@direito.up.pt