CHAPTER III

Vertical agreements

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1. Introduction

In recent years vertical agreements under EU competition law have been the focus of considerable attention, not just in connection with the regulatory work of the Commission, the Council and the European Parliament, but also in the practice of the courts and in legal academic writings. The legal literature has been based on a number of specific cases where the EU’s legal authorities have had to decide on the validity of contractual arrangements of this kind under EU competition law.1

From the point of view of the smaller Member States, this interest in the subject is due to the fact vertical agreements will often be a practical method for use by small and medium sized enterprises which wish to extend their marketing activities to the wider European market, and this is an interest

1. Even prior to the first block exemption regulation, Regulation No 67/67/EEC on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, the CJ had laid down some principles on the permissibility of and prohibition of certain key restrictive terms in these kinds of contracts. For example, see the discussion below of Case 56/65, Société Technique Minière v Maschinenbau Ulm, and Joined cases 56 and 58/64, Consten and Grundig v Commission.
which is unlikely to decrease in intensity as the market grows with the accession of new Member States.

Vertical agreements are contractual arrangements between undertakings which, according to the content of the agreements, are at different levels of the production or distribution chain. For example, this would apply to an agreement between the producer of goods and a wholesaler who buys goods from the producer with a view to selling them onwards to retailers on a particular market. If the wholesale level is cut out, a vertical agreement can exist between the producer and a retailer.

In addition to this, there are horizontal agreements, which are agreements between undertakings which are on the same level of the production or distribution chain. Horizontal agreements are discussed in more detail in Chapter IV. Such agreements exist when they have a ‘Community dimension’, affecting trade between Member States etc., see Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), and are considered as being a potential hindrance to the achievement of the goal of market integration. In contrast to vertical agreements, horizontal agreements have an inherent tendency to lead to market sharing, as the parties to such agreements can clearly be considered to be actual or potential competitors, and to be in a position to enforce ‘naked restrictions’ in their part of the shared market.

2. Agreements between wholesalers and retailers are also vertical agreements. The same applies to agreements between two producers, A and B, of substitutable goods if, for example, under the agreement A appoints B as its agent in a market, without B correspondingly selling goods to A, in other words, without there being a market-sharing agreement between the parties. See the distinction made between horizontal agreements and vertical agreements in Christopher Bellamy & Graham Child: European Community Law of Competition, 2008 p. 140 et seq.

3. This term was used in earlier American legal practice as an expression of unilateral price setting and the exclusion of competitors from the market. In contrast to this there are ‘ancillary restraints’, which are restrictions on competition which are accessory to a transaction which is otherwise competitive; compare with Article 2(3) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, and paragraph 31 of the Commission’s guidelines on vertical restraints and the more detailed discussion in section 3 below. Ancillary restraints is a special term in common law countries which has arisen as a necessary consequence of the fact that Section 1 of the Sherman Act does not allow for a dispensation corresponding to that in Article 101(3) TFEU. Refer also to the comments below on the rule of reason doctrine and Case T-112/99, Métropole Télévision (M6). See also Valentine Korah & Denis O’Sullivan: Distribution Agreements under the EC Competition Rules, 2002 pp. 83-84.