

THE COMMISSION'S E- COMMERCE REPORT

IBRAC

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THE COMMISSION'S E-COMMERCE REPORT

OUTLINE OF PRESENTATION

- ◎ THE COMMISSION'S SECTOR INQUIRY ON E-COMMERCE
- ◎ EU COMPETITION LAW ON VERTICAL AGREEMENTS
- ◎ IS EU COMPETITION LAW FIT FOR PURPOSE IN RELATION TO E-COMMERCE?

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THE COMMISSION'S SECTOR INQUIRY

- ◎ THE DIGITAL AGE MEANS THAT THE PATTERNS OF DISTRIBUTION AROUND WHICH THE EU COMPETITION RULES DEVELOPED ARE DIFFERENT
- ◎ THE STATISTICS REVEAL THAT HUGE NUMBERS OF CONSUMERS PURCHASE, OR SEARCH, ONLINE
- ◎ AND QUITE APART FROM MANUFACTURERS AND RETAILERS HAVING THEIR OWN WEBSITES, THERE ARE ALSO ONLINE MARKETPLACES AND PRICE COMPARISON TOOLS

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THE COMMISSION'S SECTOR INQUIRY

- ◎ THE REPORT CONTAINS A GREAT DEAL OF INFORMATION ABOUT HOW PRODUCTS ARE DISTRIBUTED ONLINE AND ABOUT THE KIND OF RESTRICTIONS THAT ARE TO BE FOUND
- ◎ MANUFACTURERS TEND TO REGARD MATTERS SUCH AS BRAND IMAGE AND THE QUALITY OF PRE- AND POST-SALES SERVICES AS MORE IMPORTANT THAN PRICE COMPETITION
- ◎ RETAILERS ATTACH MORE IMPORTANCE TO PRICE COMPETITION

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THE COMMISSION'S SECTOR INQUIRY

- ◎ THE REPORT DESCRIBES THE VARIOUS, AND NUMEROUS, RESTRICTIONS THAT ARE FOUND IN ONLINE COMMERCE
- ◎ THESE INCLUDE
 - CROSS-BORDER RESTRICTIONS
 - RESTRICTIONS ON THE USE OF MARKETPLACES
 - PRICE RESTRICTIONS
 - EXCLUSIVITY RESTRICTIONS
 - PARITY PROVISIONS

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EU COMPETITION LAW ON VERTICAL AGREEMENTS

- ◉ ARTICLE 101 CAN APPLY TO VERTICAL AGREEMENTS: *CONSTEN & GRUNDIG*
- ◉ THE 'SINGLE MARKET IMPERATIVE' IS A KEY COMPONENT OF EU COMPETITION POLICY
- ◉ IT FOLLOWS THAT ABSOLUTE TERRITORIAL PROTECTION AND EXPORT BANS WILL USUALLY BE CLASSIFIED AS RESTRICTIONS OF COMPETITION BY OBJECT

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EU COMPETITION LAW ON VERTICAL AGREEMENTS

- ◉ RESALE PRICE MAINTENANCE IS ALSO REGARDED AS RESTRICTIVE OF COMPETITION BY OBJECT
- ◉ THERE CONTINUE TO BE MANY RPM CASES AT MEMBER STATE LEVEL
- ◉ OTHER 'RESTRICTIONS' - FOR EXAMPLE EXCLUSIVE DISTRIBUTION, EXCLUSIVE PURCHASING, PARITY PROVISIONS ARE SUBJECT TO EFFECTS ANALYSIS

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EU COMPETITION LAW ON VERTICAL AGREEMENTS

- ◎ THE WIDE APPLICATION OF ARTICLE 101(1) TO VERTICAL AGREEMENTS IS NOT THE END OF THE MATTER
- ◎ ARTICLE 101(3) CAN APPLY TO RESTRICTIONS THAT LEAD TO AN IMPROVEMENT IN THE DISTRIBUTION OF GOODS, PROVIDED THAT THE OTHER TERMS OF THAT PROVISION ARE SATISFIED

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EU COMPETITION LAW ON VERTICAL AGREEMENTS

- ◉ IN PARTICULAR, FROM 1967 ONWARDS THERE HAVE BEEN BLOCK EXEMPTIONS FOR VERTICAL AGREEMENTS
- ◉ THE CURRENT REGULATION IS REGULATION 330/2010
- ◉ BASICALLY ALL VERTICAL AGREEMENTS ARE BLOCK EXEMPTED, SUBJECT TO ARTICLES 3, 4 AND 5

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EU COMPETITION LAW ON VERTICAL AGREEMENTS

- ◉ ARTICLE 3 CONTAINS THE MARKET SHARE THRESHOLD OF 30%
- ◉ ARTICLE 4 CONTAINS THE 'HARDCORE' RESTRICTIONS
 - NB IN PARTICULAR THE DISTINCTION BETWEEN ACTIVE SALES AND PASSIVE SALES
 - PASSIVE SALES MUST BE POSSIBLE
 - AND ACTIVE SALES WITHIN A SELECTIVE DISTRIBUTION SYSTEM
- ◉ ARTICLE 5 SETS OUT A FEW 'EXCLUDED' RESTRICTIONS SUCH AS NON-COMPETE TERMS

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EU COMPETITION LAW ON VERTICAL AGREEMENTS

- ◉ THE BENEFIT OF A BLOCK EXEMPTION MAY BE WITHDRAWN IN CERTAIN CIRCUMSTANCES
- ◉ THIS MIGHT BE A USEFUL TOOL IN THE ONLINE COMMERCE SECTOR WHERE PARTICULAR RESTRICTIONS TURN OUT TO BE PROBLEMATIC BUT ARE NOT BLOCK EXEMPTED (FOR EXAMPLE INSISTENCE ON THE MAINTENANCE OF A BRICKS AND MORTAR OPERATION)

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◎ CROSS-BORDER RESTRICTIONS

- ARTICLE 4(B) OF REGULATION 330/2010
- THE VERTICAL GUIDELINES DISCUSS THIS IN RELATION TO ONLINE COMMERCE
- SEEMS TO HAVE WORKED REASONABLY WELL IN PRACTICE
- NOTE THE COMMISSION'S INITIATION OF PROCEEDINGS IN THE CASE OF GUESS, 6 JUNE 2017 (CLOTHING AND ACCESSORIES)

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- RESTRICTIONS ON THE USE OF MARKETPLACES
 - *PIERRE FABRE*
 - BAN ON INTERNET SALES A HARDCORE RESTRICTION UNLESS IT COULD BE OBJECTIVELY JUSTIFIED
 - THE BAN WAS NOT BLOCK EXEMPTED UNDER REGULATION 330/2010
 - AND ONE ASSUMES THAT IT WOULD NOT SATISFY ARTICLE 101(3) ON AN INDIVIDUAL BASIS
 - *COTY*
 - BAN ON USE OF MARKETPLACES, BUT ONLINE SALES PERMITTED BY RETAILERS: JUDGMENT AWAITED!: AG OPINION 26 JULY 2017

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◎ PRICE RESTRICTIONS

- ARTICLE 4(A) OF REGULATION 330/2010
- NOTE THE COMMISSION'S INITIATION OF PROCEEDINGS IN RELATION TO CONSUMER ELECTRONICS, FEBRUARY 2017
- SEVERAL CASES ON THIS HAVE BEEN BROUGHT BY THE CMA IN THE UK: PRIDE MOBILITY; ROMA; ULTRA FINISHING; ITW LTD; PING; POOLE LIGHTING

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- ◉ PRICE PARITY PROVISIONS: *APPLE/E-BOOKS*
 - AN 'UPSIDE DOWN' HUB AND SPOKE CASE
 - PRICE PARALLELISM BETWEEN THE E-PUBLISHERS
- ◉ PRICE AND NON-PRICE PARITY PROVISIONS: *AMAZON/E-BOOKS*
 - AN 'ABUSE OF DOMINANCE' CASE WHERE AMAZON IS MAKING IT HARDER FOR OTHER PLATFORMS TO COMPETE WITH IT IN THE MARKET FOR THE E-TAILING OF E-BOOKS; COMMITMENTS TO DROP THE PROVISIONS, MAY 2017

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- ◎ PRICE PARITY PROVISIONS: *PRIVATE MOTOR INSURANCE, UK MARKET INVESTIGATION*
 - PROHIBITION OF PROVISION PREVENTING INSURERS FROM MAKING THEIR PRODUCTS AVAILABLE MORE CHEAPLY ON OTHER ONLINE PLATFORMS
- ◎ PRICE PARITY PROVISIONS: *HOTEL ONLINE BOOKING*
 - !!!.. NEED FOR EU-WIDE CONSULTATION

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THANK YOU FOR YOUR ATTENTION

