CALLOL | COCA

Antitrust Law on Vertical Restraints – Case Studies

Hamburg, 25 May 2019

Front picture: Four Towers, Financial District, Madrid

Content

- Multilevel distribution
- Vertical issues in a dominance context
- Export bans
- Pricing restrictions in a dominance context
- Horizontal/vertical conduct: agency pricing model and MFN clauses (Apple/eBooks case)
- Possible issue related to outsourcing agreements

Case 1: multilevel distribution. IP/ unfair trade infringement

01

- Clothing brand (Principal) appoints exclusive distributor (1LD) in the Territory
- 1LD sells goods to Level 2 distributor (L2D) for resale throughout Europe
- Principal finds that L2D is selling competing goods which infringe on Principal's trademarks in one Member State. In another Member State L2D's competing goods infringe on image of Principal
- Agreement between Principal and 1LD:
  - Obligations by 1LD to assist in preserving image of Principal
  - Principal can restrict 1LD from serving "Excluded House Accounts"

Case 1: multilevel distribution. IP/ unfair trade infringement (ii)

01

- Principal can allocate
  - Distribution territories
  - Clients
- Limitation: ACTIVE sales only
- What about PASSIVE sales?
  - Likely to be an issue as 2LD already in trade with 1LD
  - Bottomline: solidity of underlying IP/unfair trade claims

Case 2: multilevel distribution.

Discount scheme

01

- Principal enters into tripartite agreement with 1LD and 2LD. Principal also engages in distribution
- Bonus paid by Principal to 2LD on basis of orders from 2LD to 1LD. Each 2LD can buy from more than 1LD

Scale			Bonus 2019
0 €	up to	20.000 €	0,00%
20.000 €	up to	120.000 €	6,50%
120.000 €	up to	220.000 €	7,00%
220.000 €	up to	320.000 €	7,50%
320.000 €	up to	420.000 €	8,00%
420.000 €	up to	500.000 €	8,50%
500.000 €	up to	10.000.001 €	7,50%

Case 2: multilevel distribution.

Discount scheme (ii)

01

- Non-binding target of minimum purchases by 2LD set at €40,000
- Bonus scale not retroactive
- Information to calculate bonus supplied by 1LDs
- Possible issues?
  - Information exchanges?
  - Foreclosure?
  - Price-squeeze?

Case 3: *HmR v. IMS Health* case

02

- IMS Health (IQVIA) has 90% market share in pharmaceutical marketing data
- IMS Health provides three levels of remuneration to pharmaceutical wholesalers for data provided to IMS Health:
  - 100% if sole purchaser is IMS Health
  - 60% if one additional purchaser
  - 40% if two or more additional purchasers
- VBER unlikely to apply to vertical restraints to which dominant company is party

Case 3: *HmR v. IMS Health* case (ii)

02

- ECJ **Judgment of 6 September 2017, *Intel v. Commission***, case C-413/14, at points 137 and fol.

137 an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements

Case 3: *HmR v. IMS Health* case (iii)

02

138 However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139 In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market

Case 4: *AB InBev*

Unilateral bans

03

- Jupiler has 40% of the Belgian beer market
- Jupiler in the Netherlands is sold cheaper
- AB InBev is dominant in Belgium
  - Constantly high market share
  - Ability to increase prices
  - Barriers to entry
  - Limited countervailing power (brands)

- Dominance is not illegal. Abuse?
  - Changed packaging by altering size of cans and legends in Dutch only so they not re-imported in B
  - Limitation of units sold in the Netherlands
  - Instances of limitation of sales to distributor unless agreed to limit imports of less expensive beer
  - Instances of customer promotions to Dutch retailers conditional upon retailers not offering them to customers in Belgium

Case 5

Extra-Community export bans

03

- Clauses in agreements restricting exports outside of the EU:
  - Must be assessed under Article 101 TFEU if there is likelihood that products will be reimported
  - Likelihood assessed on basis of:
    - Possibilities of arbitrage (price differentials)
    - Nature of products (transportation costs, custom duties…)
- Clauses in agreements to extra-EU distributors restricting imports into the EU
- Possible restriction of active sales only? Restriction not necessarily required for passive sales as trademark rights may be opposed to imports into EU?

Pricing restrictions in a dominance context

04

- General rule is freedom
- In a dominance context there are various prohibitions of:
  - Excessive prices
  - Discriminatory prices
  - Loyalty rebates
  - Predatory prices
  - Price-squeeze

Vertical conduct with horizontal implications

Apple Ebooks case

05

- Already in 2010: 31 percent of Amazon electronic book sales are Amazon published books
- 40 percent of newly published books in the USare through Amazon
- 60 percent of e-book sales in the US taking place through Amazon
- 50 percent of book sales (not electronic books, but books) in the US are carriedout through Amazon
- In 2014 Amazon selling many new releases at US$9.99

Vertical conduct with horizontal implications

Apple Ebooks case

05

- Conduct harmed publishing houses. Not liked by Apple
- Path chosen: switch from wholesale model (RPM forbidden) to agency model (traditional in distribution of books)
- Collective rise of prices granting Apple substantial profit margin under agency model
- At the same time: MFN retail clause in agency agreements with Apple
- “Joint commitment device” to bring Amazon into agency model. Effect: rise prices accross the board
- Commitments: end agency and MFNs

Vertical-forward integration

05

- Insurance company wants to restructure its business operations by outsourcing its IT requirements which are substantial
- Insurance company enters into outsourcing agreement by means of which IT company takes care of insurance company's IT
- Vertical agreement. Neutral
- On a second variation, as part of the deal IT company acquires all of insurance company's IT equipment, workers and IT services related portfolio
- Is there a legal issue?

Contact

Callol, Coca & Asociados, SLP
Don Ramón de la Cruz, 17
E-28001 Madrid
Office +34 917 376 768
Fax +34 911 412 139

Pedro.Callol@CallolCoca.com