

Vertical restraints – recent developments in the EU and Poland

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Guess decision – key facts

- Guess Group operated a selective distribution system in 27 EU Member States
- A formal antitrust investigation into Guess' distribution system was launched in June 2017, as a follow up to the e-commerce sector inquiry (launched in May 2015)
- In December 2018, the Commission fined Guess **approx. €40 million** for violating **Article 101(1) TFEU** by preventing **its authorized distributors** from
 - using the Guess brand names / trademarks for the purpose of keywords for online search advertising (Google AdWords);
 - selling online without a specific authorization from Guess (which Guess could refuse)
 - selling to end-users located outside the authorized retailers' allocated territories;
 - cross-selling among authorized wholesalers and retailers; and
 - independently deciding on the resale (retail) price
- Commission relied on internal documents to show that the rationale for the restrictions was to maintain high retail prices, in particular in CEE countries

Guess decision – policy implications

- Decision reaffirms the Commission's recent trend to focus on restrictions in distribution agreements
 - Commissioner Vestager: *“Our case complements the geoblocking rules that entered into force on 3 December – both address the issue of sales restrictions that are at odds with the Single Market.”*
- Commission followed *Coty* in emphasising that selective distribution is lawful if the *Metro* criteria are met
- Fines:
 - 50% reduction for cooperation (one of the few non-cartel cases with such a reduction; fact-sheet on cooperation in non-cartel matters)
 - These are restrictions “by object”, but “vertical agreements and concerted practices of the kind in issue in this case are, by their nature, often less damaging to competition than horizontal agreements.”

Vertical restraints: Poland (I)

- RPM was the focus of UOKiK's enforcement efforts until 2015, when the UOKiK announced a more economic approach
 - Some RPM decisions concerned the online sector, e.g., *Royal Canin* (2013, fines for restrictions on online sales); *Emmaljungs* case (2015, commitments concerning restriction of online sales of strollers)
- Vertical restraints and RPMs had a comeback since 2017:
 - Numerous dawn raids in the last couple of years in relation to verticals (i.e., musical instruments, sport equipment and apparel; photographic equipment, gas compressors)
- The UOKiK intends to focus on on-line RPM restraints
 - Last week (15.05.2019) the UOKiK announced an investigation into Solgar Polska (dietary supplements) for RPM in brick-and-mortar and online shops

Vertical restraints in Poland (II)

- *Anyro* judgement of 15 February 2019 of the Polish Supreme Court confirms that:
 - RPM is a restriction of competition by object
 - Detailed examination of the relevant market not required (*de minimis* exemption inapplicable)