Kluwer Competition Law Blog

Visma and the notion of vertical restrictions

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On the 18th of November, the European Court of Justice delivered its *Visma* (case C-306/20) ruling, that regardless of some important observations, appears to have largely gone unnoticed by the anti-trust community. Probably, overshadowed by the General Court ruling in *Google Shopping* a few days prior, but from a practical perspective arguably amounts to a much more essential case. In *Visma*, the Court of Justice reconfirms fundamental principles when it comes to vertical restraints, including that these should not be a priority and that intrabrand restrictions, only limiting the distribution of the seller's own product, rarely would present problems under Article 101. Neither of these principles are novelties, but as DG COMP currently is finalizing its position on the next Vertical Block Exemption and associated guidelines, the ruling is most timely by reconfirming the legal framework, including that many vertical restrictions would elude Article 101.

The background of the Visma case

The *Visma* case originated in Latvia, where the National Competition Authority in 2013 had condemned a distribution agreement used by the software supplier SIA Visma. According to the terms of this agreement, the distributors had to register potential customers with Visma and were in return granted six-months of exclusivity with respect to closing the deal unless the customer protested. According to the National Competition Authority, this limited competition among the distributors and precluded rivals from offering the end-users better terms. It even fell short of the usual principles for assessing vertical restrictions as it qualified as neither a selective nor exclusive distribution system. Actually, according to the National Competition Authority, the restriction took the form of a by-object restriction subject to a strict review and by this *de facto* illegal regardless of the absence of any material effects.

Visma challenged the findings of the National Competition Authority, and after some initial overturns and remitting of the case, it eventually ended up before the European Court of Justice as a preliminary referral. Here, the latter was, i.a., called to clarify if the distribution agreement was prohibited under Article 101 and whether it should be reviewed as a restriction by object or effect. There was some unclarity as to the details and scope of the exclusivity clause as Visma, e.g., disputed that the clause prevented the distributor from actively approaching customers or passively accepting requests from these. Even its object was debated, as Visma viewed it as an instrument to organize its collaboration with its distributors in a practical way. However, it would be plausible to accept that following registration, other distributors would be reluctant to deal with a marked customer establishing a level of priority and, in this, a theoretical distortion of competition. Moreover, in the course of the case, it was uncovered that Visma's market share did not exceed 30 % and that trade between member states was unaffected, which is why the case only pertained to the national version of Article 101 and not EU rules. By this, the European Court of Justice was not required to rule on the application of EU's Vertical Block Exemption, why it remained unsolved, what had motivated the National Competition Authority to rebut the availability of this, and the principles it stands for, including the current Vertical Guidelines.

The Court of Justice ruling

Based on the reply, it appears that the European Court of Justice was unhappy with the (limited) supplied information and structure of the questions. Nevertheless, the European Court of Justice initially instructed the National Court (and any enforcers) to decide the exact scope of an agreement and any alleged anti-competitive clauses herein, the objectives pursued by these, and the larger economic and legal context they fit into. The Court then transitioned to recalling how vertical agreements are less likely to be harmful than horizontal agreements and how restrictions of competition between distributors of the same brand (*intrabrand competition*) rarely would be unproblematic unless competition between different brands (*interbrand competition*) already was weakened.

When it came to the essential question of how to qualify the agreement, a restriction by *object* or *effect*, the Court did not provide a clear answer but left this for the National Court to decide. However, in its instructions, the former noted that the by-object concept should be used restrictively and only applied against clauses that (genuinely) appeared anti-competitive, taking their content, purpose, and larger context into consideration. Embedded in this, the Court appeared unwilling to see a by object restriction, and there are merits to this. Regardless of the uncertainty on the true purpose of the clause and its actual effect, it's challenging to formulate a clear theory of harm associated with it. The clause mostly appears as a form of a priority clause confined to Visma's own product, and thus, an intrabrand restriction, limiting the circulation of the brand owner's products. Presumably, this is done against some carefully balanced commercial consideration and any damage would, at least in the short run, be limited to the owners own sales. Moreover, from a legal perspective, this could, if anything, establish a system of exclusivity and thereby be covered by EU's Vertical Block Exemption provided the market share did not exceed 30 %, and passive sales were not prevented. Void of any cross-border effect, the block exemption did not apply, but the associated Vertical Guidelines would still offer guidance for the national version of Article 101, and it remains unknown why the National Competition Authority had not consulted these.

What to take from the Visma ruling

The European Court of Justice's ruling in *Visma* reaffirms essential principles, including that vertical restraints should not be a priority under Article 101, that the concept of by-object restriction must be applied narrowly and how intrabrand restrictions normally would elude Article 101. These are principles cited in EU Vertical Guidelines and confirmed in *Maxima Latvija* (Case C-345/14), interestingly also from Latvia, and involving the appraisal of a lease clause preventing the owner of a shopping centre from leasing out space to competitors of the tenant. In contrast to the National Competition Authority, the European Court of Justice was unwilling to see this as a by-object restriction. Essentially, as the clause was vertical in scope and, in light of its context, unqualified to create the inflated risk of material damage warranting a by-object designation. With *Visma*, the European Court of Justice has confirmed these principles and made them much more explicit by creating (or confirming) a presumption of pure intrabrand restrictions as unproblematic.

The *Visma* ruling also touches upon other issues, including that the system of traditional distribution forms, described in EU's Vertical Block Exemption and associated guidelines, only are examples and should not be used mechanically for evaluation purposes. Undertakings are not obligated to squeeze their preferred distributions system into these but can blend elements, or develop completely new elements unless they are deemed problematic by object or effect. Inspiration for the former can be found in the hardcore list in the block exemptions, usually considered by-object restrictions, while the latter can be established using the counterfactual analysis. By this, the appraisal of vertical agreements should focus on the line between *intrabrand* restrictions and *interbrand* restrictions, where neither should be considered a priority and in particular, the former often would fall short of Article 101.

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