Speech Vereniging voor Mededingingsrecht meeting November 25th 2014: ACM's strategy regarding enforcement of vertical restraints

Introductory remarks

Thank you to Jolling de Pree and the Competition Law Association for organizing this meeting.
I am very pleased that Andreas Mundt is here with us today to discuss the issue of vertical restraints with us.
His speech showed us why the Bundeskartellamt is prominent in this field.

There are three things I would like to say about how ACM looks at vertical agreements.
Firstly, I want to talk about ACM's strategy to improve consumer welfare.
Secondly, I want to talk about developments in markets and enforcement policies.
And thirdly, I want to reflect on the implications of ACM's strategy.
Finally, I will give you some food for thought for the debate.

1. Consumer Welfare

Firstly, ACM's focus in all of its work, is on improving consumer welfare.
Our strategy states that we prevent or address behavior that harms consumer welfare.
Applied to vertical restraints, the strategy means that we want to address those market problems that are harmful to consumers.

Economic insights are important to help us understand when vertical agreements are harmful or not.
In many circumstances they are pro-competitive. In general, they can help to overcome inefficiencies in supply chains.
And in well-functioning markets these efficiencies will be passed on to consumers.
In such case, there's no need for ACM to intervene if that's the case.

Our strategy seeks to ensure that undertakings and consumers benefit from obvious efficiencies related to vertical agreements, but that they do not suffer from anti-competitive effects.

We do believe that vertical restrictions can be more harmful if they lead to diminished inter-brand competition.
Or when they are used in circumstances where inter-brand competition is not strong in the first place.

Let me try to give you two hypothetical examples of possible harmful behaviour.

Sometimes retail prices are easier to observe for producers than wholesale prices.
In such markets, imposing Resale Price Maintenance can improve the stability of a cartel among producers.
The reason is that it is easier for producers to form a cartel on a price that is more easily observed.

This holds because an effective cartel needs to quickly identify and discipline firms that undercut the cartel price.
In this scenario, the vertical restraint facilitates a restriction of inter-brand competition, which implies the usual harmful effects upon consumers.

Vertical restraints may also be harmful when inter-brand competition is already limited. Suppose this is the case.
And also suppose that online retailers can sell the product at lower cost than offline retailers.
In such a market, offline retailers could use their bargaining power to force the producer to exclude the online retailers from his distribution network.
This can be harmful for consumers, as it would prevent them from using the cheaper retail channel to obtain the product.

Our view on the Dutch law regarding fixed book prices is a case in point. In the Netherlands, this law prevents online retailers, who can sell books at lower costs, to pass on this benefit to consumers.

Of course, even in the just mentioned scenario's, the vertical agreements may also generate efficiency gains.
However, if we expect that the scope for efficiencies is low, ACM would definitely investigate these cases.

I want to stress that ACM will take note of the impact on consumer choice.
Our mission statement is clear. ACM promotes opportunities and options for businesses and consumers. Consumer choice drives competition.
Sometimes however, vertical restraints can hinder or obscure consumer choice.
As a consequence the competitive pressure of consumer behavior is diminished.

What is the problem in this situation?
Is it a vertical restraint or consumer behavior?
Consumers may only perceive a lack of competition, even if there is no consumer harm.
I believe that consumer empowerment could be an additional instrument to address these kind of "perceived" problems related to vertical restraints.

More generally speaking, ACM could draw on the experience of our campaigns on "Consuwijzer".
You might have noticed our campaign to help consumers make better decisions when choosing a health insurance that meets their needs. On "Consuwijzer" consumers can find tools to help them compare offers on different platforms and make the right choice.

This is an example of what we mean by opportunities and options for businesses and consumers.

To summarize:
ACM's strategy with regard to vertical restraints means that we will give priority to those situations

where there is a high risk for consumer harm. And where our actions will have most effect.

2. Market and policy developments

Next, I would like to share a few thoughts on market and policy developments.

Online distribution has really taken off over the last years.
This development seems to have given a boost to the use of vertical restraints.
How does this development affect ACM's overall view on vertical agreements?

Most of you are aware that vertical restraints have historically been a low priority interest for ACM and its legal predecessor NMa. There were two main reasons for this.

First of all, there's the economic rationale.
The balance of pro and anti-competitive effects has generally been positive in our assessments of vertical agreements.
The harm of illegal horizontal agreements, on the other hand, is much greater.
So these cases received much higher priority in NMa's enforcement.

I would like to remind you that a 2009 market study by the NMa - into possible illegal discrimination of online retailers by producers - showed no evidence of competition infringements.
And although less visible to you, over the past years we have investigated a number of complaints regarding a possible illegal combination of Resale Price Maintenance and refusal to supply.
In these cases, we did not find enough evidence to justify a full investigation.

Secondly, there is the judgment of the CBb, [the Administrative High Court for Trade and Industry], in the Secon case.
It states that even for a hard core restriction such as Resale Price Maintenance, ACM has to assess the appreciability of the restraint.
This places an extra burden of proof on ACM. Although it is debatable how much proof is required, we can safely say that this requires additional investments in investigations.

Our re-assessment of ACM's verticals policy makes clear that the underlying principles of competition law apply to offline distribution as well as to online.
They have not changed with the growth of e-commerce.
Also in online markets there could be pro- and/or anti-competitive reasons for vertical restraints.
What might be different though is that online dynamics could lead to new situations of potential harm.

For example, existing offline retailers may force producers to impose vertical restraints just to shield themselves from intense price competition from new online retailers, which may be harmful to consumers.
Another example is that producers deliberately restrict price competition from online retailers. This is

because they value some aspects of offline retail that online retail cannot provide. This may be beneficial to consumers.

The development of online retail also gives rise to new types of vertical agreements, like Across Platform Parity Agreements.
Examples can be found in online hotel booking platforms or Apple's agreements with publishers.
In essence, the platform requires the hotel, or publisher, to guarantee the platform will be able to offer the best deal.

I am sure you are all aware there's a lively debate going on, in the academic and the enforcement communities. The question is under what circumstances APPA's are harmful or beneficial.
We see that APPA's have the potential to increase prices across the market. However, APPA's may also generate efficiencies, such as solving a free rider problem. Therefore we would analyse APPA's case by case.

Our conclusion is that we will give priority to those situations where there is a high risk of consumer harm. As I said before, examples of situations where this is more likely are:

1. Where vertical agreements are used as an instrument to facilitate collusion between producers;
2. Where inter-brand competition is already limited and vertical agreements are used as an effective means to exercise market power.

Those are the situations in which enforcement by ACM will have the greatest impact on consumer welfare.

3. Implications

Finally, I want to share some thoughts on the implications of our strategy and some ideas for further debate.

With our strategy we try to balance two risks.
First, the risk of 'under-enforcement' if the market perceives ACM will not enforce harmful verticals.
Second, the risk of 'over-enforcement' if businesses were too careful and would refrain from using efficient distribution agreements.
ACM tries to mitigate these risks by being as transparent as possible.

I have tried to outline the circumstances under which ACM will act on vertical restraints.
And I have indicated that we will take possible efficiency gains in consideration. And of course, there's the guidance of the Guidelines and the courts.

I do realise that consumers, companies and their advisors seek transparency and predictability.
I want to give as much clarity to the markets as possible.

But we have to have realistic expectations about the level of certainty we can achieve.

Obviously, NCA's, and the EC, will need to cooperate to reduce legal uncertainty.
We need to build upon the knowledge of practical cases.
There's also an important role to play for businesses and their advisors.
They have to make sure their distribution systems, whether online, offline or hybrid, meet legal requirements.

That means, assessing risks and efficiencies using their knowledge of specific markets and business. This is important because civil courts, other NCA's or the European Commission, might require proof of the alleged efficiencies one day. More case law and more empirical data will allow us to find the right legal balance for vertical restraints.

In summary, we need to make sure our policy regarding vertical agreements is adequate in view of recent developments in markets and enforcement.

And we think openness about the outcome of this evaluation is beneficial to markets and consumers.
I think today's meeting contributes to this.
Furthermore, we will share our views in more detail in a Position Paper early next year. In the meantime ACM welcomes your views on this subject.

4. Food for thought and discussion

Ladies & gentlemen,
The central topic of today's meeting is 'vertical restrictions'.
Andreas and I have shared our views on this matter with you.
ACM's view is clear: we will give priority to those situations where there is a high risk of harm.
Let's use the rest of this meeting as a platform for further debate.

One interesting topic for discussion later this afternoon, is whether the Bundeskartellamt's approach is as radically different from ours as some argue.
I would like to ask Andreas the question whether he thinks that BKA faces higher expectations, for example from consumers or business to protect online commerce than maybe other authorities do?

Furthermore, I'm under the impression that little successful efficiency defences have been brought up, at other NCA's or in the civil courts.
Is that because the costs outweigh the legal risks?
Or because the efficiencies aren't that big in that particular case?
ACM takes the possibility of efficiencies into account in its prioritization.
We think this ensures the highest impact of our actions.
But the downside might be that we will see little efficiency defences too.

I hope we can discuss this matter further.

I find it heartening that the debate on verticals, RPM and MFN clauses, will go on over the next years. Because it is promising that there is such innovation in the way consumers and businesses or producers and retailers find each other.

In the meantime, ACM is not going to rush off, and take up cases against parties and fine them, simply because a restriction is labelled as hard core.
But neither should business have the idea, or the false sense of security, that verticals are always harmless.
We will continue to analyse complaints and cases.
If you as legal practitioners come across cases that meet the criteria for harm, you know where to find us.
And we will examine them seriously to see to what degree they have damaging effects and how best to address the problems (fines, commitments, etc.).

As Andreas has pointed out in his contribution to the Liber Amicorum of Bill Kovacic, international exchanges like today can help us all find the right balance in the legal approach to vertical restraints. I am sure that today's meeting will add to that goal.

I look forward to a lively debate.