Whether there are reasons to worry?

Frank Wijckmans

It is always good to take a step back. Putting aside for a moment the detail of the files on your desk and the final complex twists and turns needed to complete an advice. What are we working on? Are things still right? Are priorities still priorities?

Allow me, reader, to take you head-on right away. You are an extra. You should also be an extra. This applies not only to the competition lawyer and jurist, but also to the competition authority. The leading role is and should be for the companies and entrepreneurs. Their creativity, their dedication, their commitment to employees and customers, their pursuit of success and profit should be central. It is these factors that generally run the economy and create prosperity and, excuse reader, not (or certainly not primarily) the application or enforcement of competition law.

It is like the referee in a football match. The less he or she stands out, the better. As soon as the referee becomes too prominent, it comes at the expense of the match and the spectacle. The top referee is he or she who realises that he or she is an extra who has to put in the effort so that the footballers' talent can be showcased to the maximum. There is nothing more exasperating than a referee who stops the game too often and draws attention to himself. Precious time is lost and the game runs sub-optimally. Not only the competition authority, but advisors too are referees in the competition story. Let that be clear.

Against this background, it is extremely pleasing to find a strong introductory section on restrictions of competition by nature ("restrictions of competition by object") in the European Commission's brand-new Horizontal Guidelines. Let's face it, this type of restriction of competition offers an evidentiary "short cut" for referees. In this branch of law where the essential issue is the impact on free competition (i.e.: effects), it is curious if exactly this topic (effects) is allowed to be left totally unaddressed. Certainly margin numbers 23 and 24 of the new Horizontal Guidelines therefore make it clear that restraint is appropriate and certain strict conditions must be met before the "short cut" may be applied. Not only is this right, it is simply the (compiled) case law of Luxembourg.

With those new Horizontal Guidelines and the vertical counterpart (now in force for a year), we have a fresh frame of reference. Many things have remained the same, numerous things have been adjusted or added. I certainly do not underestimate the feat of arriving at such texts. I have witnessed up close the seriousness with which this is worked on and can assure anyone that it is always a deliberate exercise. That said, I can already hear every entrepreneur asking, "And what is it now? Is

it allowed? Is it not allowed? And if it's not allowed, why? And further, do you understand what it says there?".

Let's face it, the application of competition law in a normal business context (i.e. when no wholly inappropriate cartels are involved) is not getting any easier as new texts are launched. Take information exchange or sustainability in the Horizontal Guidelines.

Admittedly, perhaps we are going a little too short in assuming that under the previous horizontal guidelines, only individualised and unrecorded information on future prices and volumes ended up in the "by object" category. However, if I am correct, from an economic point of view, this was already a trade-off between enforcement cost and negative impact on business by disallowing this information exchange, and thus not the hard outcome of an economic analysis.[1] The new Horizontal Guidelines further open up that "by object" category and it is not immediately clear what belongs there and what does not. Margin numbers 23 and 24 become all the more important here, but whether they will really act as a brake remains to be seen.

With sustainability, it is not really any different. I understand that there was a vision within the European Commission not to devote a separate chapter to this at all. This reflects the fear that classic restrictions on competition will be dressed up nicely in a sustainability suit. Although hard work has been done on the text, you cannot ignore the fact that this fear is still the undercurrent. And then the entrepreneur says: "Do they want it or not? Then let them just say so".

You get the same feeling with other, even vertical themes. Take hybrid scenarios of distribution and genuine agency. The Vertical Guidelines devote several paragraphs to this (margin numbers 36 ff). In a number of sectors (think of the automotive sector), these kinds of scenarios have been actively considered to prepare for the marketing challenges of the future. A close reading and application of the Vertical Guidelines shows that this comes with a very high (sometimes prohibitively high) price tag. The fear that suppliers will create spill-over effects from agency (especially in terms of pricing) to independent concessions is clearly the undercurrent here. And again, you hear the entrepreneur asking, "Do they really not want it? Then let them say so". Rightly so, because if it is wrong, you are dealing with resale price maintenance and that is one of the hobbyhorses of competition authorities.

Perhaps this is a good time to kick in an open door. Compliance with competition law is achieved with clear rules of the game. If an entrepreneur has to choose between uncertainty and ambiguity or (possibly stricter) but predictable and clear rules, he will choose the latter (at least in my experience).

[1] UWE-KÜHN, K., "Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results", *OECD Policy Roundtable on Information Exchanges between Competitors under Competition Law*, 2010.

However, that is not what is going on now. Now, a (too) strict approach is often opted for because of uncertainty and ambiguity. This is not a good thing. It is like the football player who does not know whether or not he can incur a yellow or red card for something and then just decides not to take a risk and holds back. But that is not what you want from a footballer. He should go to the sporting limit and be whistled back if he goes over it. But then that limit must be sufficiently clear.

In the context of competition law, such clarity is mainly created through block exemptions. But even there, surprises occur. I am not talking about the technicity of block exemptions per se (ever cobbled together a ban on active selling in a distribution context?), but the "little devils out of a box" that in the corporate world do not contribute to confidence in "our business". Some examples.

One of the important differences between a hardcore restriction and an excluded restriction is that the former excludes the application of the block exemption for the entire agreement, while the latter does not and only affects the restriction in question. This is at least what the attentive reader will infer from the text of the block exemption. After all, that language is hard to misunderstand. However, the Vertical and Horizontal Guidelines have a little surprise in store. If the excluded restriction is not separable or severable from the rest of the agreement, then the benefit of the block exemption is lost to the integral agreement. Anyone reading this quickly will say, "Still logical". But no still. It is not because a restriction is an excluded restriction that it necessarily falls under the prohibition of Article 101(1) TFEU (think, for example, of ancillary restraints) or could not benefit from an individual exemption (see also: Vertical Guidelines, margin number 246). That severability is otherwise not a matter of competition law, but of national contract law, and that in turn will depend on the law chosen or the application of the IPR rules. So, in the middle of the competition law analysis, there comes a question of contract law (which may be resolved differently depending on the applicable law) and which may have the effect that a prohibition of competition fully excludes the applicability of the block exemption. I could go on, but we have already done so elsewhere.[2] Comprenne qui pourra.

Another example where the Vertical and Horizontal Guidelines hand-in-hand create uncertainty is that of information exchange. Article 2(5) of Regulation 2022/720 contains a specific test for information exchange in cases of dual distribution to benefit from the block exemption. However, the Horizontal Guidelines (margin number 370) seem to elevate that test to a generally applicable test regardless of whether there is dual distribution. Even the footnote to this margin number does not create absolute clarity on this. The confusion that may thus arise is unpleasant and incorrect.

[2] PEEPERKORN L. en F. WIJCKMANS, F., "The new EU Competition rules for supply and distribution agreements: no revolution, but an evolution of the effects-based approach", *ECLR* 2023, 143.

Or have you already had a closer look at the example in margin number 164 of the Vertical Guidelines? It's about selective distribution in a sports goods market with seven manufacturers. Five of them apply selective distribution. Each of them stays neatly below the 30% market share limit, with the highest market share being 25% and the lowest 10%. As a good competition lawyer, you don't see an immediate problem and this seems to be exactly the type of market situation for which Regulation 2022/720 should fully apply and there should be no doubt about it. So, no. With a justification that is feathery light, it indicates that the benefit of the block exemption should most likely be withdrawn. This example was already in the 2010 Vertical Guidelines (margin number 188) and I had really hoped that the European Commission would have realised that you undermine any semblance of legal certainty if you cast doubt on the applicability of the block exemption with such fluency. What this example says cannot possibly even come close to the standard of proof that must be met in order to proceed to withdrawal. However, the example has been retained (whether very deliberately or not). And the entrepreneur then says, "What am I supposed to do with this?". And as an advisor, you then begin to blush slightly. "Legal certainty, well...".

A final one for the road. At numerous conferences, the insertion in the Vertical Guidelines of margin number 197(c) was welcomed with much fanfare as a major novelty. This margin number deals with the possible applicability of Article 101(3) TFEU to resale price maintenance (RPM) when a product is regularly sold below the wholesale price and thus used as a "loss leader". A known problem often complained about by affected companies. Temper your enthusiasm, however, dear reader. First of all, there is the introductory sentence of margin number 197 which clearly stresses that this situation does not relieve the parties from showing that all four conditions of Article 101(3) TFEU are fulfilled. Furthermore, litera (c) points to a range of circumstances that may justify resale price maintenance. It will not escape the reader that those circumstances are quite demanding. Finally, and possibly most importantly, even if the above steps can be successfully completed, RPM (which can then benefit from individual exemption) remains a hardcore restriction and eliminates the application of the block exemption to the vertical agreement. This is not explicitly stated in the Vertical Guidelines, but it is the case. Elsewhere, we have described this as a "trap for the unwary".[3]

The above illustrates that there is currently quite a lot of uncertainty associated with the application of competition law. Especially companies that have already come into contact with a competition authority then tend to be very cautious. This leads to the sometimes crazy situation where the advisor has to plead with his client that there are no good reasons not to do certain things. Often, the answer then is that, after an earlier contact with a competition authority, a "zero risk" approach was opted for. Then, however, things are upside down. Instead of following entrepreneurial instinct, companies do not do certain things because of the uncertainty involved in applying competition law and the

[3] PEEPERKORN L. en F. WIJCKMANS, F., "The new EU Competition rules for supply and distribution agreements: no revolution, but an evolution of the effects-based approach", *ECLR* 2023, 132-133.

unpredictability of what the competition authority will say if the practice is ever investigated. I have only seen this downright bad trend increase in recent years.

The solution may not be simple, but it is obvious. Translate all the complex economic and legal considerations into clear rules of the game that are easy to apply in practice. Limit those rules of the game to what really matters to safeguard free competition. That some take offence at the lack of sophistication and complexity is entirely their problem. Willingness to comply with the rules of the game will benefit.