Regulating Vertical Agreements

A Comparative Law and Economics Review of the EU and Brazil

Maria Fernanda Caporale Madi



Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com

Website: Irus.wolterskluwer.com

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-2650-8

e-Book: ISBN 978-94-035-2651-5 web-PDF: ISBN 978-94-035-2652-2

© 2020 Maria Fernanda Caporale Madi

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. More information can be found at: lrus.wolterskluwer.com/policies/permissions-reprints-and-licensing

Printed and bound by CPI Group (UK) Ltd, Croydon, CRO 4YY

Table of Contents

Fore	word		xi
List	of Abbr	eviations	xiii
List	of Figur	es	xv
List	of Table	28	xvii
Ackı	nowledg	gements	xix
Снаі	PTER 1		
Intro	duction	1	1
1.1	Setting	g the Scene: Motivations and Concerns	1
	1.1.1	The Complex Assessment of Vertical Agreements	1
	1.1.2	0	3
	1.1.3	The Experience from the EU and Its Upcoming Challenges	5
1.2	The Aim of the Book		7 8
1.3	Overview of the Chapters		
Сна	PTER 2		
Ecoi	nomic A	nalysis of Vertical Agreements	11 11
2.1		Introduction: The Regulatory Dilemma of Vertical Agreements	
2.2	The Economic Efficiencies of Vertical Agreements		14
	2.2.1	0	15
	2.2.2		15
	2.2.3	Reducing Transaction Costs	19
	2.2.4	Other Efficiency Arguments: Considerations Regarding Online	
		Markets	23
2.3	Antico	ompetitive Effects of Vertical Restraints	25
	2.3.1	Increasing Collusion in Markets	25
	232	Reducing Intra- and/or Inter-brand Competition	2.7

Table of Contents

	2.3.3	Market Foreclosure and Higher Barriers to Entry	28	
	2.3.4	Other Anticompetitive Effects: Considerations Regarding Online	29	
2.4	The De	Markets	29	
2.4	The Double-Sided Aspect of Selected Vertical Restraints: An Overview of Economic Efficiencies and Anticompetitive Effects			
	2.4.1	Resale Price-Fixing (Resale Price Maintenance or RPM)	31 31	
	2.4.2	Geo-Blocking	33	
	2.4.3	Selective Distribution	34	
2.5		olitical Economy of Competition Policies	35	
2.6	The Complexity of Vertical Agreements and the Enduring Debate on			
		making	38	
Снар	TER 3			
Antit	rust En	forcement of Vertical Agreements in Brazil	41	
3.1	Introdu	uction: The Choice of Brazil as a Case Study	41	
3.2	History	y and Framework of the Brazilian Competition Law and Policy	43	
	3.2.1	The Origins of Competition Policy in Brazil: From 1934 to 2011	43	
	3.2.2	The Current Goals of Competition Law in Brazil	46	
3.3		olution of Brazilian Competition Law Oriented to Vertical		
	Agreer		49	
	3.3.1	Vertical Agreements under Law No. 8.884/1994: An Unclear		
		Legal Framework	50	
	3.3.2	Vertical Agreements under Law No. 12.529/2011: Favouring Ex		
		Post Enforcement	52	
3.4	The Ex Post Enforcement in Brazil: Relevant Jurisprudence and Current			
	Challe	· ·	56	
	3.4.1	RPM: SKF Case	59	
	3.4.2	0 0	64	
	3.4.3	Cases Involving Digital Businesses	66	
	3.4.4	Challenges to Ex Post Enforcement	67	
		3.4.4.1 CADE's Institutional Design	67	
. .	mı o	3.4.4.2 The Judiciary System	69	
3.5		ontext of Antitrust Policy in Brazil: The Interacting Group of	30	
	Agents		70	
	3.5.1	Behind Resolution No. 17/2016: Identifying Interest Groups of	1	
	252	Agents	71	
	3.5.2	Main Assumptions about the Behaviour of Relevant Actors	74	
	3.5.3	Qualitative Analysis of the Context of Public Consultation No.	76	
2.6	Conclu	02/2016	76	
3.6	Concil	uding Remarks	80	
	TER 4	eement Policy and Enforcement in the European Union	83	
4.1		uction: The Choice of the EU in the Comparative Study	83	
4.2		History and Framework of EU Competition Law 8		

STJ00112202

		Table of Co	ntents
4.3	The M	odernization of EU Competition Law	89
1.5	4.3.1	The Green Paper and the White Paper	89
	4.3.2	The Context of the EU Modernization of Competition Law: A	0,7
	4.5.2	Public Choice Perspective	92
4.4	The 20	104 Reform: The Three Enforcement Components	97
1.1	4.4.1 The Consolidated Antitrust Jurisprudence, the VBER and the		
	7.7.1	Guidelines	97
	4.4.2	The ECN: Cooperation among EU Member States	100
	4.4.3	Intensification of Ex Post Control	101
4.5		hallenges of the Current EU Enforcement of Vertical Agreements	102
	4.5.1	Challenge #1: Uncertainties of the Digital Economy	105
	4.5.1	4.5.1.1 Selective Distribution in Online Marketplaces	106
		4.5.1.2 MFN Clauses and Price Parity Arrangements	108
	4.5.2	Challenge #2: Different Procedural and Institutional Realities	100
	4.5.2	among the EU Member States	111
4.6	Concli	iding Remarks	119
1.0	Concid	nemarks	117
Снав	PTER 5		
Enfo	rcemen	t Costs of Vertical Agreements: A Comparative Law and	
		Analysis	121
5.1		uction: The Policy Options for Vertical Agreements	121
5.2		ure Review	123
5.3		le Dimensions of Antitrust Enforcement	125
	5.3.1	Timing of Legal Intervention	126
	5.3.2	Form of Sanction	126
	5.3.3	The Role of Public and Private Agents	127
	5.3.4	Considerations on Enforcement Costs	129
5.4		nation Costs	130
	5.4.1	Cost of Gathering Market Information	130
	5.4.2	Cost of Assessing the Effects of Vertical Agreements	133
5.5		ive Costs	138
5.5	5.5.1	Fines	138
	5.5.2	Antitrust Errors	142
	5.5.3	The Role of the Judiciary and Private Enforcement	148
	5.5.4	The General Trust in Institutions	151
5.6	Admir	nistrative Costs	154
5.7		ntitrust Cost Curve	156
J.,	5.7.1	Building the Cost Curve	156
	5.7.2	The Three-Stage Policy Framework Applicable to Vertical	_
		Agreements	161
	5.7.3	Limitation of the Framework: Political Economy Distortions	164
5.8		Recommendation for the EU and Brazil	165

STJ00112202

Table of Contents

Сна	PTER 6	
Con	173	
6.1	Summary of the Findings	173
6.2	Policy Recommendation	179
6.3	Future Research	182
References		185
Inde	2X	197