Response to the
European Commission

Review of the competition rules applicable to vertical agreements – July 2009

28 September 2009

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1. INTRODUCTION

1.1 We welcome this opportunity to comment on the European Commission's (the **Commission**'s) July 2009 review of the competition rules applicable to vertical agreements and in particular the draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (the **Draft Block Exemption**) and the draft Commission Notice – Guidelines on Vertical Restraints (the **Draft Guidelines**).

1.2 In general we consider the Draft Block Exemption and the Draft Guidelines to be clear and the changes to reasonably reflect market developments and case law of the Community Courts since the adoption of the current rules. However, we are of the view that there are some aspects that would benefit from clarification

1.3 Our specific comments and suggestions on the Draft Block Exemption and Draft Guidelines are set out in more detail in the sections that follow.

2. VERTICAL AGREEMENTS WHICH GENERALLY FALL OUTSIDE ARTICLE 81(1)

- **Agency agreements**

2.1 Paragraphs 14 and 16 of the Draft Guidelines introduce new guidance in relation to risks related to other activities. In particular it includes "activities undertaken in other product markets" as an example of such a risk. It would be helpful if further clarification, perhaps through examples, could be given in the Draft Guidelines. How, if at all, should other (product) markets be assessed differently from after sales and repair services?

3. APPLICATION OF THE BLOCK EXEMPTION REGULATION

- ***Vertical agreements containing provisions on intellectual property rights (IPRs)***

3.1 Article 2(3) of the Draft Block Exemption makes clear that it applies to "vertical agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers". Paragraph 31 of the Draft Guidelines set out five conditions which must be fulfilled in order that a vertical agreement containing IPRs can fall within the scope of the Block Exemption. However, there are certain products which, due to their non-physical nature, can only be distributed through the transfer of IPRs, for example the distribution of music via downloading arrangements or distribution of films via TV licensing (including so-called "electronic sell-through" distribution). It would be helpful if the Commission could clarify that agreements for the distribution of non-physical products which rely on IP licensing (e.g. film licensing) should be distinguished in the Draft Guidelines from, for example, "copyright licensing such as broadcasting contracts concerning the right to record and/or broadcast an event" (see paragraph 33 of the Draft Guidelines) which are explicitly stated to fall outside the scope of the Block Exemption.

- ***Restriction on passive sales***

3.2 Paragraph 56 of the Draft Guidelines describes a situation in which restrictions of passive sales into a territory will generally fall outside Article 81(1): i.e. for the first two years of a distributor selling contract goods or services in a particular territory or to a particular customer group, where it is "the first to sell a new brand or the first to sell an existing brand on a new market". In order to provide clarity as to when this exception can be relied on, we consider that it would be helpful for the Commission to include a definition of the concepts of "new brand" and "new market".

- ***Excluded restrictions under the Block Exemption Regulation***

3.3 Article 5(a) of the Draft Block Exemption excludes from the coverage of the Block Exemption direct or indirect non-compete obligations, the duration of which is indefinite or exceeds five years. However, it goes on to state that the five-year duration limit does not apply when the goods or services are resold by the buyer "from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer". Paragraph 63 of the Draft Guidelines notes that the reason for this exception is that it is normally unreasonable to expect a supplier to allow competing products to be sold from premises and land owned by the supplier without his permission. We consider that this justification for longer non-competes applies to vehicles owned by suppliers and from which its products are resold by buyers (e.g. vehicles belonging to a franchisor). We suggest that the Draft Block Exemption and Draft Guidelines are amended to also allow non-competes of the same duration as the period of use of such vehicles by the buyer.

4. ENFORCEMENT POLICY IN INDIVIDUAL CASES

- ***Relevant factors for the assessment under Article 81(3)***

4.1 Paragraph 119 of the Draft Guidelines notes that an Article 81(3) assessment is made on the basis of the facts existing at a given point in time and that the assessment is sensitive to material changes in the facts. Paragraph 121 explains that for the application of the indispensability test undertakings are not required to consider hypothetical and theoretical alternatives but must demonstrate why "seemingly realistic and significantly less restrictive alternatives would be significantly less efficient". We consider that the Draft Guidelines should more clearly reflect the fact that the assessment of the Article 81(3) criteria is an ex ante analysis, made on the basis of reasonably perceived investment risks at the time that the agreement is entered into. The fact that a risk does not materialise does not change an assessment that the agreement fell within Article 81(3) if the risk was a reasonable factor to take into account at the time the agreement was made.

- ***Single branding***

4.2 We welcome the removal of the sentence "Dominant companies may not impose non-compete obligations on their buyers unless they can objectively justify such commercial practice within the context of Article 82" (in paragraph 141 of the current guidelines). We consider the new wording "Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies" in paragraph 129 of the Draft Guidelines to be more appropriate.

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