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EUROPEAN BRANDS ASSOCIATION
EUROPÄISCHER MARKENVERBAND

AIM[®] POSITION PAPER

AIM RESPONSE TO COMMISSION CONSULTATION ON VERTICAL RESTRAINTS **NON-CONFIDENTIAL VERSION**

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AIM Response to Commission Consultation on Vertical Restraints

Introductory Comments

AIM generally supports the existing Block Exemption Regulation and Guidelines, which are perceived to have worked well in most cases. Much of the proposed new Exemption and Guidelines will be equally useful.

However, AIM has reservations about the wisdom of issuing Guidelines for the highly complex and evolving commercial practices of category management and upfront access payments before the legal analysis of these practices has been fully tested through Commission decisions and European Courts' rulings. [§<...]

Although we appreciate the Commission's perspective that these are only Guidelines, and that the inclusion or omission of specific trade terms in Guidelines does not prevent the application of Article 81 to each case on its merits, the Commission should be aware that in practice National Competition Authorities and Courts frequently rely on Commission Guidelines as a more persuasive authority.

Accordingly, and given that the overwhelming majority of vertical restraints cases are now dealt with by NCAs, not by the Commission, we perceive a risk that NCAs will use the Guidelines in a more restrictive way than intended by the Commission, giving rise to a regime with legal consequences applicable across the EU and which has not been implemented through the established means of decided cases (i.e. Commission decisions with the possibility of judicial review by the European Courts). This would clearly not conform to Community legal principles and the balance of powers and competences established by the EC Treaty.

1. Category management

General

Overall, AIM believes that category management is best dealt with under the general application of Article 81, and does not believe that any specific guidance on category management is necessary. Category management processes are continually evolving, so that any specific guidance risks quickly becoming form-based and obsolete.

We do not believe that any Guidelines on category management should be included because appropriately-practised category management is pro-competitive. As the UK Competition Commission has said: "category management can introduce efficiencies as a result of suppliers' better knowledge of consumer demand" (*Report on the Supply of Groceries 2008*). Sound category management planning helps the retailer to develop the optimal offering for the category, irrespective of the brand, so as to best match consumer

demands and expectations. By including this new section in the draft Guidelines, the Commission is prejudging the competitive nature of the practice which can have far-reaching consequences. The very fact of including detailed wording on this topic will inevitably lead to more cautious and even negative legal advice that will hamper pro-competitive behaviour.

Category management is not an anti-competitive vertical restraint but a pro-competitive practice which delivers extra value to consumers, and in many cases may fall outside Article 81 altogether. The fact that category management, as any other vertical practice, could be misused for anti-competitive ends does not justify the questioning of the practice itself given that it does not in any way restrict competition.

In addition, it is vital that the Commission understands that that there is no universal consensus as to what category management means or entails in practice; as a result, a great deal more explanation of the practical effects of the guidance would be required if the section were to stay in the final Guidelines, including a comprehensive definitions section. Every category management arrangement is unique, reflecting the mix of products and parties involved. If this subject is to be included the Commission should therefore provide examples of proven negative effects caused by category management processes resulting in actual, not speculative, foreclosure. If such negative effects are clear then these can be articulated as a user-friendly blacklist.

As drafted the Guidelines will create great legal uncertainties for suppliers that provide category management services if they have products in their portfolio with a market share in the product category concerned exceeding 30%. [~~...~~] The proposed Commission Guidelines as they currently stand will not help in-house lawyers in giving practical guidance to their commercial colleagues on what is permitted and not permitted. There is a serious risk that advice will become overly cautious and negative, leading to companies deciding to reduce or abandon category management despite the fact that this practice has been recognised to lead to efficiencies and have clear consumer benefits.

If the subject remains in the finalised Guidelines, it is important that the process is properly represented, the factual misunderstandings in the current text are removed or at least amended with increased emphasis on the efficiencies and consumer benefits and the section should start by highlighting these consumer benefits before stating the potential anti-competitive issues. As such, we hope that the following clarifications will be of use to the Commission in finalising the Guidelines.

Specific

First, it should be clearly recognised in the Guidelines that category management advice is non-binding and delivers recommendations only. The distributor is always free to choose whether or not to implement the recommendations. Category management does not involve the distributor entrusting the supplier with the marketing of a category of products. Rather AIM believes, as recognised by the UK Competition Commission in 2008, that category management is *“any exchange of information between a retailer and supplier with the overall objective of improving sales or performance across a category of products sold by the retailer”*. It is a fully collaborative relationship where the supplier performs the role of a consultant based on instructions, guidance, strategy and data provided by the retailer, and the retailer maintains its role of client and final arbiter of all proposals put to it.

All decisions as to pricing, shelf position and promotions in-store are ultimately taken by the retailer. It is misleading to infer that the supplier is “entrusted” with any decision making.

This is supported by the fact that no retailer delegates any of its decisions to a single supplier and nor is it in its interests to do so. At all times, the retailer remains in control of the ultimate decisions and always is able to (i) reject the proposal made by the adviser, or implement the proposal in-store but with significant modifications and (ii) compare the recommendations made by the adviser with the shelf offerings of competing retailers. [§< ...] Ultimately, the output of category management advice is the optimum range on shelf aimed at promoting footfall to, and growth of, the category to the benefit of all.

Second, contrary to the suggestion in the draft Guidelines, category management does not promote collusion between retailers; each retailer will have very different aims and strategies and will receive very different advice as a result. Moreover, the supplier is not privy to the holistic offering choices being made by each retailer for the entire store of which the supplier’s category advice is only one small part. Overall, we believe that any potential risk relating to collusion or information-sharing should be dealt with under the general provisions of Article 81, given that such practices constitute essentially horizontal rather than vertical issues.

Third, there is no clear evidence that, as suggested by the Commission, small suppliers are negatively impacted by category management given that the purpose of the process is to generate increased sales for the category as a whole (benefiting all suppliers operating within the category). A recommendation which simply results in the transfer of market shares between suppliers is not productive category management advice and any category adviser that gave such poor advice, which would be likely to lead to falling traffic to the category in store, would be rapidly replaced. [§< ...]

Finally, as previously emphasised, category management is not comparable in any way to single branding, as seems to be suggested in the current draft Guidelines.

The implication that the practice is permissible for pairs of manufacturers/retailers below the 30% threshold but questionable (or worse) for those over the threshold will lead to confusion and negative effects for the supply chain and for consumers, considering that category advisers may hold a larger market share in relation to some product categories.

2. Upfront access payments

General

As with the proposed text on category management, our overriding view is that, where relevant, upfront access payments should be dealt with under the general principles of Article 81, rather than targeting the practice for specific guidance. [§< ...]

As such, we hope that the following clarifications will be of use to the Commission in finalising the Guidelines.

Specific

[§<...] Upfront access payments do not foreclose other retailers; manufacturers do not decide where to sell their products based on access fees. Suppliers who have a market share in excess of 30% necessarily achieve this result by distributing their products through the largest number of retail chains.

Upfront access payments should not be seen as a means of foreclosing suppliers. [§<...] The suggestion in paragraph 200 of the draft Guidelines that “[u]pfront access payments may also result in anti-competitive foreclosure of other suppliers if the widespread use of upfront access payments increased barriers to entry for small entrants” is therefore inaccurate. [§<...]

The Commission’s notion that upfront access payments are a tool by which manufacturers persuade retailers to list new products based on the manufacturer’s consumer knowledge is flawed; multiple retailers are in possession of POS (point-of-sale) and loyalty card data, giving them access to a vast amount of shopper data (e.g. purchasing behaviour and preferences that is used to forecast and measure product performance) which is not available to their suppliers. The suggestion therefore in paragraph 203 of the draft Guidelines that a “supplier would normally agree to pay an upfront access fee if he estimates a low probability of failure of the product introduction” is misguided. It does not reflect the significant resources and financial costs that are expended by the supplier prior to launch nor the sophistication of retailers in judging consumer perception of new products. The fee level is not determined by reference to the perceived probability of success or failure of the product introduction. [§<...]

Finally, we would be grateful for further clarity from the Commission on how a supplier with more than a 30% market share funding a promotion in a major retailer can in any way be seen as anti-competitive, as indicated in paragraph 199 of the draft Guidelines. Upfront access payments cannot be confused with contributions to promotional campaigns which remunerate specific and measurable services. Promotional campaigns are legitimate and pro-competitive practices. A consequence of this new provision could be that some of the leading products on the markets may not be promoted as suppliers with more than 30% market shares may be cautious before funding promotional campaigns, leading to clear consumer detriment as those products most in demand may not be promoted as much as they are at present. The suggestion in paragraph 204 that “suppliers may have incentives to free-ride on distributors’ promotional efforts” is equally troubling; suppliers meet the majority of the costs involved in new product launches and fund a majority of the promotional activity for their products.

3. Resale price maintenance

We agree with the Commission that some forms of RPM may lead to efficiencies and consumer benefits and we welcome the Commission’s recognition of this. However, we believe that for this acknowledgement to have any practical value, the Block Exemption must expressly clarify the proposed short-term exceptions to the general rule.

We agree with the Commission that an undertaking with a market share above 30% should be able to plead, and substantiate, an efficiency defence. [§<...]

We have some concern about the proposed wording of paragraph 221 of the draft Guidelines. In particular, we consider that the reference to “2 to 6 weeks” should be deleted: this timeframe is too narrow and does not provide sufficient flexibility to design campaigns, some of which might require specific packaging, so could only be run efficiently for longer periods. It would be more constructive to mirror the last sentence of paragraph 48: “... *the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM*” – a mechanism for a low price campaign could include, for example, a “price-marked pack” where availability of the pack in the market could extend beyond a clearly defined time period.

We are also very concerned about the wording in paragraph 223 of the draft Guidelines which suggests that price recommendations and maximum prices may be problematic, in particular if they are followed “*by most or all of the resellers*”. The legality of recommended prices does not depend on whether they are followed or not but on whether the price recommendation is accompanied by some form of anti-competitive behaviour on the part of the supplier. In the absence of threats or measures encouraging distributors to comply with the recommendation, the fact that most or even all distributors have followed the recommendation should not give rise to any concern. In addition, the reference to a “*monitoring mechanism*” should be deleted given that regular monitoring of retail price forms part of the normal commercial activity of well-managed companies and should therefore be expected from all companies. Alternatively, the potential concerns of such a mechanism should be more clearly articulated. Finally, “*the possibility*” of retaliation should instead refer to whether or not the supplier “*has in fact retaliated*”; the facts of a case, rather than theoretical possibilities, should always form the basis of any assessment of possible anti-competitive effect. [§<...]

4. Buyer’s market share

We welcome the Commission’s recognition of the importance of buyer power.

However, we note that in terms of self-assessment it is impossible for an FMCG supplier to know the downstream market share of each of its customers in each relevant market, particularly if the buyers operate in different geographic markets or purchase through different divisions or channels. Uncertainty as to market share is compounded by the even greater uncertainty as to what the relevant market definition is or should be. This uncertainty will create unnecessary reluctance to deal, particularly where the manufacturer has reason to believe that its customer’s market share is close to the threshold. [§<...]

Conversely, we do not understand why small buyers (annual turnover not exceeding €100 million) have been removed from Article 2(4) of the Block Exemption.

5. Internet sales and selective distribution

We are pleased that the Commission recognises the important role that selective distribution systems play in delivering quality services and products to consumers.

However, great care should be taken before permitting unfettered online distribution of all products.

AIM's members welcome the benefits to trade and to consumers brought by the Internet. However, we believe that for European consumers truly to benefit from the Internet they must also be protected, just as they are when purchasing from physical outlets and sellers. We also firmly believe, and understand that the Commission believes, that assessment of consumer welfare, and competition, is not based only on the retail price: other parameters including quality, service, choice and, in certain categories, image are also vital. Despite its benefits, the Internet is not a perfect substitute for the physical world for brands that compete on more than price alone.

We agree that requiring e-distributors to maintain viable bricks-and-mortar premises is an important safeguard against e-distributors outside the selective distribution network who free-ride on the efforts of those within that network. We also fully agree that standards required of retailers within a selective distribution network should at the very least be equivalent for websites as for physical outlets. The consumer deserves the same level of protection whether s/he purchases online or in-store; given the ease with which unauthorised or fraudulent sellers can mask themselves behind website addresses, avoiding rules on distance selling and other consumer protection regulations, consumer interests must be seriously considered. Although this is clearly not the right forum to debate counterfeit issues, the problem of unauthorised online dealers must be borne in mind. There is certainly no justification for treating trading over the Internet more leniently than in the offline world.

We are concerned with one of the restrictions that the Commission lists as a hardcore restriction of passive selling in paragraph 52 of the draft Guidelines. There may be legitimate practical or logistical reasons why a distributor may want to redirect customers to another website, for example, to ensure that they get the information that is most suited to their location/market. In particular for medicinal products, where different claims are approved for different markets, the distributor may wish to ensure, and may be under a legal obligation to ensure, that customers are only viewing claims that have been approved for advertisement in their jurisdiction/market.

Manufacturers of any products, if they have objectively justified reasons such as upholding levels of consumer service, should be allowed to choose their distribution channels, physical or online, or to restrict their sales to certain outlets. The principle of freedom to choose trading partners enshrined in most systems of contract law should not be called into question by Guidelines in relation to a highly specific provision of competition law.

6. Territorial and post-termination restrictions

We welcome the Commission's proposal that a restriction on passive sales by other distributors outside the market be permitted for a period of two years where substantial investments are necessary to start up and/or develop a new market, but also invite the Commission to adopt a more straightforward approach to sales restrictions in general, notably by allowing fully a restriction on active sales by a distributor outside an allocated customer group or territory.

Article 5(b) of the Block Exemption says that the exemption in Article 2 will only apply to a post-termination restriction if it "*is limited to the premises and land from which the buyer has operated during the contract period*". This is unduly restrictive; if it is permissible to impose a post-termination restriction to protect know-how (which is now more broadly defined) this should be acceptable to protect know-how not just when the restriction is limited to the premises/land the buyer operated from during the agreement. Therefore, we would like to see these words deleted.

7. Market Definition

As a general statement we register concern about the statement in paragraph 100 of the draft Guidelines, which creates a negative presumption against vertical restraints affecting the distribution of branded goods as compared to non-branded goods. A restraint of competition is a restraint whatever the identity of the perpetrator; an agreement between a seller and a buyer of an unbranded good can cause as much damage as a comparable agreement relating to branded goods. As such, we do not think it is helpful to make any general statements in this regard.

8. Transitional arrangements

Finally, if the Commission does make the changes questioned above, we would ask you to consider implementing a transitional period so as to enable businesses to review and/or adjust existing arrangements that are within the current Regulation but would fall outside the new Regulation.

*AIM, European Brands Association
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AIM is the European Brands Association. It represents the branded goods industries in Europe on key issues which affect the ability of brand manufacturers to design, distribute and market their brands. AIM's membership groups 1800 companies of all sizes through corporate members and national associations in 22 countries. These companies are mostly active in every day consumer goods. They employ some two million workers and account for over 350 billion Euro in annual sales in Europe alone. AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come.

Our corporate members include: Bacardi-Martini ▼ Barilla ▼ Beiersdorf ▼ Bongrain ▼ Cadbury Schweppes ▼ Campbell Europe ▼ Coca-Cola ▼ Colgate-Palmolive ▼ Danone ▼ Diageo ▼ Energizer ▼ Ferrero ▼ Freudenberg/Vileda ▼ Georgia Pacific ▼ GlaxoSmithKline ▼ Heineken ▼ Heinz ▼ Henkel ▼ Johnson & Johnson ▼ Kellogg ▼ Kimberly-Clark ▼ Kraft Foods ▼ Leaf International ▼ Lego ▼ Lindt & Sprüngli ▼ LVMH ▼ Mars ▼ McCain Foods ▼ McCormick ▼ Nestlé ▼ Oetker International ▼ L'Oréal ▼ Osram ▼ Pepsi-Cola ▼ Pernod Ricard ▼ Philips Lighting ▼ Procter & Gamble ▼ Reckitt-Benckiser ▼ Royal FrieslandCampina ▼ Sara Lee / DE ▼ SCA Hygiene Products ▼ SC Johnson ▼ Unilever

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