

Confcommercio comments on the Draft Commission Regulation on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

Preface

Confcommercio expresses an overall positive assessment on the proposed new Regulation related to the antitrust issue on vertical restrictions and the guidelines that accompany it.

This is an extremely important legal instrument for the commerce sector and in this regard it should be noted that the limited changes planned on this issue is the best proof of how well the same worked in the last ten years.

From this stems the need to make as little change as possible.

The regulatory framework should however bear in mind that the retail sector is characterized by an overwhelming majority of small and medium size enterprises for which transparent rules, easy to interpret and apply are essential to define agreements and to ensure the necessary legal certainty.

The function of guidelines is extremely important in this field.

This requirement was reinforced by the change in the general framework of antitrust issues on the coming into force of Regulation 1/2003, with the consequent abolition of the burden of prior notification and the decentralization of the competition rules (Articles 81-82) to national authorities.

Specific comments on the new Project Regulation

Article 2, paragraph 2: *Exemption*

With reference to the share of total annual turnover achieved by individual members of an association (EUR 50 million), it seems appropriate to anticipate an increase of this share to consider the level of inflation which occurred during the ten years of application of the Regulation.

Article 3: *Market share threshold*

The amendment made, designed to also take into account the share held by the buyer in defining the relevant market share, raises doubts and does not adequately explain the reasons behind this decision nor does it give evidence in the guidelines accompanying the new proposal.

Moreover, in the Notice on the definition of the relevant market to which the Commission refers, the share of the supplier is substantially taken into account.¹

In general, excluding rare cases found only at regional level - and absolutely not at EU or national level - the buyer's market share is usually below the threshold of 30%.

Furthermore, taking into account the market trend, the buyer's market share is objectively complex and uncertain.

¹ GU C 372 dated 9/12/1997, page 5.

For the sake of legal certainty, as is well known, the agreements based on self-assessment by companies, and their compatibility with the safety threshold of the relevant market quoted at 30%, it seems appropriate that the relevant market share should continue to refer only to the market share of the supplier.

Article 4 letter (b), indent 3: *Hardcore restrictions*

The integration to indent 3, letter (b), - "*in markets where such a system is operated*" – offers a new interpretation to the classical system of selective distribution as defined and so far confirmed by case law.

The essence of a selective distribution system is that the authorized dealers can only sell within the network and to final consumers and cannot sell to non-authorized distributors instead. The proposed integration would widen the possibility for the dealer to intervene in markets not covered by the selective distribution system and, therefore, theoretically, confront the activities which might be performed by distributors operating in other markets in an exclusive distribution system for the same product. Given this hypothesis, however difficult to find in commercial practices of the supplier, with the proposed change the qualitative investments of the distributor in a selective distribution system would be affected by forms of "free riding" when selling to unauthorized distributors who may in turn resell anywhere without restrictions to any client even with the help of the Internet. Such an approach would totally undermine the concept of selective distribution.

As a result, to safeguard the pattern of selective distribution, this integration to article 4 (b), indent 3, should be eliminated, and leave the system work as envisaged in the current wording of the Regulation in force.

Specific comments on the guidelines

Paragraphs 52 – 58

It is acknowledged with satisfaction that the orientation of the Commission is confirmed to consider Internet as a tool to advertise or sell products provided that such sales are made in the form of passive sales (**paragraph 52**). The restrictions imposed in an agreement must therefore refer to the use of Internet as an active sales tool which is operative when the targeted consumer is reached.

However, as regards the selective distribution system, as well specified in **paragraph 54**, "*under the block exemption the supplier may require quality standards for the use of the Internet site to resell his goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general*".

Paragraph 54 should, therefore, reinforce the notion that the off-line store should be effectively operational, not just demonstrative, and should be considered the pre-requisite needed before engaging in on-line sales.

Under paragraph 54, also referring specifically to outright ban to sell via the Internet or catalogue, such restrictions must be possible only if there is an objective justification, as specified under paragraph 51 of the guidelines of the current Regulation 2790/1999.

Moreover, the view expressed by the Commission under paragraph 52 – footnote 29 – seems totally reasonable, where the requirement to have an **appropriate relationship** between the sales of the off-line and on-line store is identified.

As regards **paragraph 57**, concerning the restrictions on retailers operating in a selective distribution system, – consistent with the suggestion in reference to the amendment of article 4 (b), indent 3 – the following portion should be deleted: “*within the territory where the supplier operates its selective distribution system(s)*”.

With reference to the use of the Internet, the criteria which may be imposed on authorized dealers, including quantitative standards should take into account the nature of distribution channels off-line and on-line and should be sufficient to ensure the validity of the selective distribution system and the required safeguard of tangible and intangible investments made by the authorized dealer in the brick and mortar store.

Confcommercio

The **Italian General Confederation of Enterprises, Professional Occupations and Self-employment** is the largest enterprise-representative in Italy, with more than 820,000 members from the trade, tourist, service and transportation sectors.