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COMMENTS ON THE REVIEW OF THE COMPETITION RULES APPLICABLE TO VERTICAL AGREEMENTS

Confederation of Finnish Industries EK (hereinafter “EK”) appreciates the opportunity to give a contribution to the review of the competition rules applicable to vertical agreements and takes note with great interest of the draft Regulation and draft Guidelines on Vertical Restraints. The regulation on the application of Article 81(3) has a very great importance to business life in Europe. As an organisation representing companies at every level of the production and distribution chain, EK does not go very deep into specific issues, but rather raises general questions concerning the most significant issues of the Commission’s proposals.

EK is in the understanding that the current rules have been functioning quite well and that companies have been relatively satisfied with them, so there is no need for major changes in legislation. Therefore EK supports giving a new Block Exemption on vertical restraints to continue the soon expiring current one. EK considers the most important task of the current Block Exemption to be the fact that it removes the legal uncertainty which companies would otherwise have when entering to agreements covered by the Block Exemption. This safe harbour benefits companies as well as consumers and competition authorities. At the same time it has to be born in mind that not all vertical agreements which do not fall under the Block Exemption are necessarily forbidden restrictive business practices.

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EK sees as the most remarkable change to existing regulation the proposition that the Block Exemption would only apply on the condition that the market share held by each of the undertakings party to the agreement does not exceed 30 % on any of the relevant markets affected by the agreement. In current regulation, only the supplier's market share is relevant at this point, not the buyer's.

EK understands the Commission's worry about a distortion of competition by buyers exercising a strong market power on suppliers. However, EK considers that the existing legal framework already gives quite strong measures to solve those kinds of problems and that there is not necessarily a need to create new measures.

Moreover, EK invites the Commission to consider very carefully what kind of effects this change might have on the market. It is clear that a great number of vertical agreements, which now benefits from the Block Exemption, would fall out of the Block Exemption because of this new rule. Although an agreement, to which the Block Exemption does not apply, is not necessarily restricted by Article 81 (1) and may still fall under article 81 (3), this would naturally cause legal uncertainty and administrative burden to parties of that agreement. Also, a need to estimate the market share of the buyer could lead to difficult situations in practice, because it is not easy for the supplier to know the position of the buyer on a different market than that where the supplier itself operates.

Another very important issue in the Commission's proposition concerns the restrictions of active and passive sales, especially internet sales. EK agrees on the main rule that a distributor must be free to use the internet to advertise or to sell products. However, EK believes that there is no need to see internet sales categorically as passive selling. Similarly, limiting a distributor's right to internet sales should not be seen as categorically prohibited. In some situations there is a strong need to give a right to a supplier to prohibit a distributor's activities in internet sales, even in passive sales. Restricting distributor's internet sales could be justified for example in order to prevent free-riding and to protect other parties' significant investments, as well as in order to facilitate launching new products, especially branded luxury products.

As the role of internet sales is undoubtedly increasing all the time, it would be very important to have unambiguous rules on how it is going to be treated and estimated in practice. There should be legal certainty about what kind of restricting of internet sales will be allowed or prohibited. Therefore EK invites the Commission to give more practical examples and guidelines on this, by which the suppliers could understand whether their behavior benefits from the Block Exemption or not. The Commission should at least describe what are the types of efficiencies that it might take into account while considering a supplier's restrictive acts.

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In general, EK sees that the Commission should always look at the agreements and arrangements as a whole, paying attention to both pro-competitive and anti-competitive factors. Naturally there are some hard-core restrictions, which cannot be accepted in any circumstances, but there should not be too many of them. Just to give one example, even a supplier's restrictions to a buyer's ability to determine its sale price could in some occasions be justified and lead to efficiency and benefit to consumers, as also the Commission has recognized in its proposition for guidelines.

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The Confederation of Finnish Industries EK is the leading business organisation in Finland. It represents the entire private sector, both industry and services, and companies of all sizes. EK's member companies represent more than 70 percent of Finland's gross domestic product and over 95 percent of exports from Finland. EK has 35 different branch federations with a membership of 16.000 companies in all, which employ about 950 000 employees.