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Vertical Agreements -position paper

1. New market share threshold on the buyers side

The Danish Chamber of Commerce (DCC) opposes the introduction of an extra threshold on the buyer's side. Requiring that the buyer's market share also be below 30% would greatly restrict companies' ability to rely on the regulation's safe harbour and is an unwelcome development. Should the Commission introduce this new requirement to prevent certain retailers from exercising a pressure on their suppliers, the 30% market share threshold would be a completely inadequate tool to deal with the anticompetitive effects of demand-led vertical restraints.

Buyers' more powerful market positions can sometimes produce anti-competitive effects but this can be dealt with by using art. 82 of the Treaty or withdrawing the benefit of the block exemption (this possibility was noted in Recital 13 of Regulation 2790/99 but has been deleted in the draft) or apply it in a particular sector.

2. Subcontracting agreements

DCC recommends that the subcontracting notice from 1979 will be incorporated in the guidelines. In relation to this, it is important to clarify, to what extent the "producer" (buyer) can use a **competition clause** in the subcontracting agreement. In daily life not only technology or equipment provided to the subcontractor seems to be "secret information", but also the fact, that the producer has a list of customers he would like the subcontractor not to contact within a certain period after the subcontract has been terminated.

3. Retail price management (RPM)

DCC agrees with the guidelines' statement that RPM may sometimes lead to efficiencies that can be taken into account under Article 81(3). One of these situations are short term low price campaigns whereby fixed prices may be necessary.

Independent small and medium-sized retailers compete with large companies operating chains of stores. Most of them can only survive by joining a chain. The success of these multiple chain retailers is due to a large extent to their national advertising of aggressive prices, which grab the consumer's attention. In order to withstand the competition from these large integrated firms, cooperating retailers must use the same marketing strategies. That means that if they operate under a common brand name, they have to find ways, also through appropriate advertising messages, to make consumers understand that besides their familiar but professional advice and service provision, they also offer their goods for sale at an attractive price.

This can only succeed if the retailers operating under a common group name in joint advertising campaigns sell the products advertised at the same price during the campaign period. For the consumer, it is usually impossible to tell whether a branch system or an independent retailer is behind these groups. The corporate image that a group tries to establish through advertising is destroyed immediately if the consumer assumes that the advertising message is wrong, because a certain number of outlets in the same group are selling – or have to sale – the same goods at a different price from that of the best offer from the advertisement.

The consequence for the groups who do not use these marketing measures with an imposed sale price could be a further loss of market share. This would mostly lead small businesses to cease trading. The market strength of integrated chains will continue to grow, and they will decrease interbrand competition. In other words, the benefit for the consumer of a fixed price being imposed lies in

- better protection of the common identity and of the reputation of the network keeping small and medium-sized firms competitive ;
- enabling consumers to have certainty that they can shop in their region and at local shops ;
- maintenance of service-oriented firms that provide advice ;
- maintenance of a long-term diversity of goods characterised by competition, at low price levels that are dictated by competition.

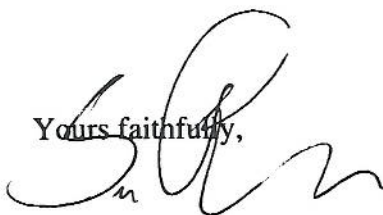
Overall it seems somewhat unsatisfactory to regard a restriction as hardcore, meaning that the entire agreement loses the benefit of the block exemption, yet list exceptional situations in the guidelines when the restriction may be pro-competitive. DCC would have preferred to see the exceptions reflected in the language of the regulation (like is the case for Article 4(a)).

Consequently, in order to ensure legal certainty as well as harmonized application of the competition rules across Europe, the DCC calls for the introduction of the possibility of fixed prices for short promotion campaigns within the Article 4a) of the Regulation. As a consequence the DCC propose the following wording, for Article 4a):

*"the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties, or to **fix resale prices necessary to organize in a franchise or similar distribution system a coordinated short term low price campaign.**"*

In this connection I would like to stress, that in our view *franchising* is not the only way of organised independent commerce and the guidelines should not distinguish between franchise and groups of retailers branding their group name.

Yours faithfully,



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