

EUROPIA Contribution on Draft Amendments to the Vertical Restraints Block Exemption Regulation & Guidelines

25th September 2009

General

The Commission is to be commended for its effort to clarify the Regulation and the Notice by taking into account recent case law and including examples.

The greater emphasis given to an economic-based approach is also welcome. However, this economic emphasis need not be at the expense of a reduction in legal certainty, and the comments below are intended in part to reflect this view.

Draft Commission Regulation

1. The proposal that the 30% market share threshold would now apply to both supplier and buyer (Paragraph 8 and Article 3) is of substantial concern.

This introduction of a double threshold is a material change, which will reduce legal certainty and is therefore somewhat inconsistent with the Commission's objective to improve legal clarity.¹

Given the draft's mention of the "*overall positive experience*" with the current VRBE (Paragraph 2), it would have been helpful for the Commission to provide the (economic-based) reasoning behind such a change.

Specifically, it will in practice be difficult for a supplier to determine what the relevant downstream market is, particularly where the buyer is using standard commodities that could be used in numerous applications. This will be even more difficult in circumstances where buyers are themselves present in numerous downstream markets, many of which may not be familiar to the supplier.

A further difficulty is that national competition authorities sometimes consider the distribution market to be narrower than the market for the good itself.

¹ In any event, the use of the term "markets affected by the agreement" in Article 3 of the draft Block Exemption itself would appear to be potentially broader in scope than simply the markets on which either party sells the contract goods or services, adding a further degree of uncertainty.

Among the practical questions that will arise for undertakings seeking to comply with the block exemption are:

- How is the supplier expected to have a precise understanding of the buyer's market share, particularly if there are multiple markets to assess?
- What if the buyer's market share is greater than 30% in one local geographical market but not in the others?
- What if the buyer's market share is greater than 30% for one of the several applications for which the contract product is sold under the distribution agreement?
- How is the supplier expected to keep track of the buyer's fluctuating market share over time, in order to remain at all times within the 30% threshold?
- How can the supplier seek distribution market share information from its buyer in order to perform the assessment, in situations where supplier and buyer are potential or actual competitors (for example in case of dual distribution)? How reliable must the market share information be, general assumptions should be sufficient so to avoid parties need to exchange sensitive information for such assessment?

Overall, the proposed introduction of this double threshold is deeply troubling in that it would in effect substantially reduce the scope of the block exemption, leaving for all practical purposes a great number of common situations, currently covered by the block exemption, to the (inevitably) legal uncertainty of an Article 81(3) assessment, which can be expensive and time-consuming.

In addition, under the current Guidelines, if the Commission wanted to deny exemption in situations where a Buyer would have a market share greater than 30% it would have to apply the withdrawal procedure and the Commission would bear the burden of proving that the Buyer has "significant market power" and that Article 81(1) applies. The proposed addition of the 30% threshold for the buyer would in effect relieve the Commission's burden of proving this and automatically deny the benefit of the block exemption.

Incidentally, we note that the various translations do not seem fully consistent. For example, Paragraph 8 of the English draft version mentions "*where the share of the relevant market accounted for by the supplier **AND** the buyer does not exceed 30%...*" – while the French ("*le fournisseur ou le client...*") and Spanish version ("*del proveedor o del comprador...*") provides "*where the share of the relevant market accounted for by the supplier **OR** the buyer does not exceed 30%...*"

2. The proposed elimination of the EUR 100 million threshold for buyer annual turnover removes a possibility for small undertakings to benefit from the exemption and is an unwelcome restriction (Art. 2.4(a)).
3. It is regrettable that the Commission has renounced its original language and chose not to implement its initially contemplated improvement of Article 4(b), which would have removed the requirement that restrictions on active sales to non-contractual territories be no longer conditioned by the existence of exclusive territories reserved to other buyers or to the supplier.

In our view suppliers should remain free to choose the most appropriate distribution system for each territory in which they are active.²

4. Draft Articles 1(b) and 5(a), read together, leave unchanged the current rule that an exclusive supply agreement is exempt under Article 2 if its duration does not exceed 5 years and it covers less than 80% of the buyer's purchases.

To improve predictability, it would have been welcome for the draft to provide that such purchase obligations be calculated on the basis of volume (calculation on the basis of value being used only when volume data are not available).

A definition of a purchase obligation on the basis of value makes it impossible to predict what the purchase obligation will be in terms of volume if the price fluctuate during the year (e.g. index based price), as is the case in many sectors and types of agreements. However, in order for both supplier and buyer to plan orders, it is indispensable to know what a purchase obligation will mean in terms of volume.

Substantial fluctuation in prices during the year can increase or decrease significantly the buyer's purchase obligations in terms of volume versus the previous year, depending of the evolution of the price.

In sectors with considerable price changes (such as the oil sector), it is in practice very difficult to conclude contracts with upfront volume commitments beyond a duration of 5 years, even below the thresholds, since it cannot be predicted with certainty whether the volume commitment will or will not at some point amount to a purchase obligation in value equivalent to a non-compete obligation, depending on the evolution of price

A change from a calculation in value to a calculation in volume would be all the more appropriate that the Regulation itself acknowledges in Article 8(a) that "market sales volumes" are "reliable market information" for the purpose of the calculation of the 30% market share threshold.

A further benefit of such a change would be to avoid the difficulty of adjusting the gross sales value to exclude excises, taxes and levies (which varies among members states).

In addition, it would have been welcome to reinsert the former Regulation 1984/83 allowance for an extension of the exemption beyond the 5 years exempted duration for contractual goods or services sold by the buyer from "*premises or land owned by the supplier*" (instead of the current "*premises and land owned by the supplier*).

² Companies may operate mixed distribution systems that can include up to 30 EEA countries with thousands of resellers. Indeed, if (as currently proposed) the ban on active sales is only block exempted in those situations where exclusivity can be guaranteed in the target territory or customer group concerned, the undesirable result follows such that, if a supplier wishes to grant territorial protection from active sales to a particular reseller in a particular territory, it must eliminate all non-exclusive resellers anywhere else in the entire Community. Similarly, in a dynamic distribution network a territory that was exclusively reserved or exclusively allocated may cease to be so and this may require amending other distribution contracts to keep them within the block exemption. The current rule is unnecessarily prescriptive and economically inefficient, in that it requires suppliers to impose more restrictions on active sales than they would wish to do so absent the formalistic drafting of Article 4(b) of the Block Exemption (and paragraph 51 of the Guidelines). EUROPIA would therefore strongly recommend the removal of these limits on the block exemption of active sales restrictions; it is noteworthy that this requirement did not exist under Regulation 1983/83.

5. The revised Article 8(c) provides some assistance in the market share calculation for suppliers noting that “goods and services supplied to vertically integrated distributor” shall be included in the supplier’s market share. Should the Commission finally decide to keep the application of the 30% market share threshold for both the supplier and the buyer, a similar clarification with respect to the buyer’s market share would be helpful.

6. Surprisingly, the draft Regulation fails to include any transitional period – contrary to the current Regulation Article 12. In case it is adopted in the wording proposed today, this oversight is of particular concern given the likelihood that numerous contracts in different sectors that currently satisfy the conditions for exemptions may not longer meet the new conditions.

The proposed effective date of 1st June 2010 leaves an unreasonably short period for undertakings to assess all their agreements in light of the other party’s market shares (and this for all contracts whereby the buyer purchases more than 80% of its needs from the supplier).

It is all the more surprising that, in the comparable case of the new regime for motor vehicle block exemption currently under consultation, the Commission has proposed a transitional period of up to 3 years (see paragraph 48 of the motor vehicle proposal).

We would then welcome a transitional period of at least 18 months, similar to what had been provided when the current Regulation was enacted.

7. Recital 14 – which deals with the uniform application of Community Competition Law - of the Block Exemption has been amended to remove reference to the obligation upon the Member States to ensure that the Block Exemption is applied in an uniform and consistent manner throughout the community. EUROPIA believes that it is important for the Commission to stress in the Block Exemption the Member States’ obligations under Articles 3 and 11 of Regulation 1/2003 in respect of both withdrawal decisions and enforcement decisions where the benefit of the block exemption is not available. Europia therefore recommends to reinsert such reference into the draft Regulation.

8. Article 2(4)b of the draft Regulation appears to limit application of the block exemption for services provided on a non-reciprocal basis between competitors to those situations where the buyer is active on the retail level. The draft Regulation suggests that a buyer active at the wholesale level would no longer benefit from the exemption as previously (see also, paragraph 28 of the draft Guidelines in this regard). Europia would like to understand the rationale behind this amendment.



Draft Guidelines on Vertical Restraints

1. We welcome the fact that the 1979 notice on Subcontracting is expressly confirmed to remain applicable (Paragraph 22)

With respect to the types of risks that might disqualify parties from being treated as genuine “agents”, Paragraphs 14-17 introduce new types of risks related to “*other activities*” that are required by the principal and “*indispensable to engage in the selling or purchasing of the contract goods or services.*” We cannot support this change. This change would appear to go beyond current case law, which does not require such an analysis of this third type of risk related to “*other activities*”.

Indeed, as the CFI ruled in 2005 in the Case T 235/01 *Daimler Chrysler* (§113) :

*“It follows that the categorisation of the status of the German Mercedes-Benz agent under Article 81(1) EC set out in paragraph 102 above is not undermined by the fact that the German Mercedes-Benz agents are required to undertake certain activities and assume certain financial obligations under the agency agreement. **It should also be noted that the activities are carried out on markets other than the market at issue in the present case.** Even if it must be recognised that those obligations expose the agent to certain limited risks, **they do not of themselves operate to affect the relationship between the applicant and its agents** under competition law **as regards the market at issue** in these proceedings.”*

And subsequently, in 2008 the ECJ confirmed in Case 279/06 *CEPSA* (§36) that:

*“The decisive factor for the purposes of determining whether a service-station operator is an independent economic operator is to be found in the agreement concluded with the principal and, in particular, **in the clauses of that agreement, implied or express, relating to the assumption of the financial and commercial risks linked to sales of goods to third parties.** The question of risk must be analysed on a case-by-case basis, taking account of the real economic situation rather than the legal categorisation of the contractual relationship in national law (CEEES, paragraph 46). (...)*

2. The fourth sub-paragraph of paragraph 16 of the draft Guidelines affirms that an agent must be protected from the risk of non-payment from a customer in order not to lose agency status for the purpose of Article 81. EUROPIA submits that such an allocation of risk may effectively be brought about if a principal provides reasonable upfront financial compensation to cover for non-payment by customers (e.g., as a separately declared “fair provision”). Such a compensation model would provide administrative efficiency and certainty and should be expressly acknowledged in the Guidelines as a means of managing non-performance risk.

3. The sixth sub-paragraph of paragraph 16 of the draft Guidelines should be amended to allow an agent to make investments in the site from its own account provided that any risks and costs associated with the investment are fully indemnified by the principal. The effect of such an indemnity would be that the agent would bear no commercial or financial risks in connection with the investment, in the same way as if the principal had paid for the investments itself.
4. It would be desirable to clarify the concept of *“tacit acquiescence”* and in particular the proposed test relating to *“the number of distributors who are actually implementing in practice the unilateral policy of the supplier”* (Paragraph 25).
5. Europia members query whether the language in paragraph 47 is to be considered an extension of the procedure for the assessment of efficiency defences by the Commission by including for the Commission the need to decide whether efficiencies are “substantiated” before it undertakes a full assessment.
6. The acknowledgement that “the use of a particular supportive measure” would not be considered in itself as leading to RPM (Paragraph 48) is a welcome addition. Europia believes that for RPM to exist there must be evidence of pressure to implement the price recommendations.
7. The Paragraph 50 carve-out for the *“general ban”* on selling dangerous goods to certain customers for safety or health reasons is replaced by a *“public ban”* – which appears more stringent without defining what is meant by “public”.

In addition, a further condition is introduced that *“it does not restrict competition that would take place in its absence”*. It is unclear how a prohibition imposed on distributors to sell actively and passively to certain end users could “not restrict competition”. We are concerned that this would be impossible to prove so that this legitimate safety and health exception could not be used in practice.
8. In Paragraph 52, footnote 29 regarding online sales is a welcome addition although it would be desirable to include it in the draft Regulation itself, rather than in a footnote to the Guidelines, to provide more legal certainty.
9. The new Paragraph 56 would allow the restriction, for the first 2 years, of passive sales into a territory where a distributor has to engage into substantial investments to launch a new brand or enter a new market, which is a welcome improvement.

However, the further condition that there should be previously, in that territory, “no demand for that type of product in general or for that type of product from that producer” appears unnecessarily restrictive (Paragraph 56)



10. The notion of “*implicit restraints*” (Paragraph 109) is vague and would need definition or example.
11. We note that the exemption of “*Upfront Access Payments*” is a positive development – even though it is limited to the 30% threshold. (Paragraph 199-204)
12. The recognition and exemption of “*Category Management Agreements*” –although limited to the 30% threshold– (Paragraph 205-209) is a welcome addition.
13. We welcome the recognition of the possibility to plead an efficiency defense under Article 81(3) with respect to RPM and the provision of examples where RPM leads to efficiency.

For further information please contact:

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