



**European Retail
Round Table**

**COMMENTS ON
VERTICAL AGREEMENTS / VERTICAL RESTRAINTS:
30% MARKET SHARE BUYER THRESHOLD**

28 SEPTEMBER 2009

The European Retail Round Table (ERRT) welcomes the opportunity to comment on the Commission's draft Regulation on the application of Article 81(3) of the Treaty to categories of Vertical Agreements and concerted practices (the "Draft Regulation") and Draft Guidelines on Vertical Restraints (the "Draft Guidelines").

We concentrate our comments on the introduction of the 30% market share buyer threshold.

The introduction of the market share threshold of 30% on the buyer side will mean that many traders may no longer benefit from the regulation, triggers high legal uncertainty for the trade sector, appears to be entirely at odds with the ambition and rules of the internal market, may generate significant additional cost and does not appear justified.

Many traders will no longer benefit from the Regulation

According to the draft guidelines, in order to determine whether the 30% threshold is exceeded, the usual criteria for defining the relevant product market and for defining the relevant geographical market shall be applied.

This principle disregards the specifics of the trade sector. Sometimes the definition of the relevant product market is not fully clear. For example, in the department store sector, relevant product markets are normally defined according to certain product categories, and the market definition may differ from country to country. But more important is the issue of the definition of the relevant geographic markets. Given the fact that the relevant geographic markets in the retail and wholesale sector are normally defined quite narrowly, it is relatively easy for one trading group to exceed the 30% threshold in one relevant geographic market. Based on the wording of the draft guideline, that would mean that the whole trading group will no longer be able to benefit from the block exemption because it exceeds the 30% threshold in one (potentially even tiny) local market. This is not justified.

It would also not help to apply the principle (“block exemption no longer applicable”) only to the local market in question. As the Commission knows, both retailers and wholesalers normally negotiate agreements with their suppliers on a national level. Thus, the problems triggered by the current wording of the draft guidelines would require that the 30% threshold is applied on a national (rather than local) level. This would also have the desired result that the 30% threshold would be applied consistently for the up-stream procurement markets (purchase markets in the retail and wholesale sector are normally defined nationally) and the down-stream markets.

The Commission should also clarify in the guidelines that the fact that the 30% threshold (as defined above) is exceeded for one distribution channel of a given trade group does not mean that the other distribution channels of the trade group in question will also fall outside of the scope of the block exemption. Very often, different distribution channels within the same trade group negotiate their supply agreements independently from the other distribution channels, and there is no justification to withhold the benefits of the block exemption from all distribution channels if only one distribution channel exceeds the 30% threshold.

High legal uncertainty

Looking at past decision practice of the EU Commission and national antitrust authorities, there are very different ways of defining the relevant geographic market in the retail and wholesale sector. Furthermore, in the retail sector, local markets very often overlap, and it is thus always very difficult to clearly define where a regional geographic market ends. Thus, should the EU Commission apply the usual principles for

addressing the question of whether the 30% threshold is exceeded, this would create high legal uncertainty for the retail sector.

Out of sync with the Internal Market

ERRT member retailers depend on the internal market to grow, to expand, to employ – but they are also prime facilitators of the internal market, offering outlets to manufacturers across the EU who previously found it difficult to break out of their domestic markets. Neelie Kroes acknowledged this in Feb 08, replying to a question from the European Parliament when she stated: “The retail sector plays an essential role in the internal market by allowing suppliers to access non-domestic markets and therefore benefit from the internal market.”

In theory, the internal market should allow retailers to buy products centrally, in greater bulk and at lower cost, to sell across the EU at lower prices. This happens in part, but not yet fully: several manufacturers refuse to negotiate at a pan-European level, insisting instead to negotiate at national level only. Significant price differences can be observed across different countries as a result.

However, the introduction of the market share threshold of 30% on the buyer side may force negotiations to be even more localised than is the case at present. From a retailer’s perspective, the draft guidelines would suggest that a more compartmentalised approach to buying would make more sense. Breaking up the buying function – and any vertical agreements with suppliers - into smaller units may mean that the block exemption for most stores can be maintained, even if some stores in the group exceed the 30% threshold.

We do not believe this is the intention of the draft regulation and guidelines, but it may well be the outcome.

Additional cost

Data on market share are expensive and difficult to come by – even at national level. If retailers must now also seek to assess the market share of each store, or sub-group of stores within a particular country, in order to ascertain whether or not they exceed 30% local market share, the additional costs will be significant.

Ultimately, additional costs incurred that do not improve competitive position tend to get passed on to consumers by way of price increases.

No evidence of need

Finally, neither the draft regulation nor draft guidelines make a convincing case for the introduction of this threshold. What research has been conducted to ascertain the need for this measure? There is no reason to believe that vertical agreements between retailers and suppliers that are currently covered by the Regulation are capable of affecting competition between retailers, whatever their market share, and it is therefore not justified to withdraw the application of the Regulation to such agreements once the threshold is passed.

The proposed change brings much legal uncertainty, which the draft regulation and guidelines do not justify.