

## DRAFT COMMISSION NOTICE

### Guidelines on Vertical Restraints

#### FIAR CONSUMER ELECTRONICS Comments

28 September 2009

#### 1. INTRODUCTION AND SUMMARY

The Dutch Association consumer electronics (**FIAR CONSUMER ELECTRONICS**) welcomes the opportunity to comment on the Draft Commission Guidelines on the assessment of vertical agreements under Article 81 of the EC Treaty (**Draft Guidelines**). FIAR CE represents most of the Dutch manufacturers and importers of consumer electronics.

This contribution sets out FIAR CONSUMER ELECTRONICS's concerns with respect to paragraph 52 of the Draft Guidelines, in which it is stipulated that "requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold off-line" amounts to a hardcore restriction of passive sales in the sense of Article 4(b) of the Block Exemption Regulation.

In FIAR CONSUMER ELECTRONICS's view such a *per se* approach to this type of price differentiation cannot be based on the likely economic effects of such price differentiation and fails to appreciate the various legitimate objectives there may be for suppliers to offer discounts for products sold off-line, which are also in the consumer's interest.

#### 2. A PER SE APPROACH IS ONLY JUSTIFIED IN CASE OF A RESTRICTION BY OBJECT

For a measure to constitute a *hardcore restriction* in the sense of Article 4(b) of the Block Exemption, it must have as its direct or indirect object the restriction of the territory into which, or the customers to whom, a buyer party to the agreement may sell the contract goods or services.<sup>1</sup> The question whether a measure has such a restrictive *object* depends on the nature of the measure and the aims which it pursues in the light of the economic context in which the measure is applied.<sup>2</sup>

For example, the CFI has concluded that the imposition of higher prices for products intended for export, by excluding export sales from a bonus system, constitutes a measure with an object to restrict competition, based on the following considerations:

*"as bonuses were no longer granted for export sales, the margin of economic manoeuvre which dealers have to carry out such sales is reduced in comparison with that which they have to carry out domestic sales. Dealers are thereby obliged either to apply less favourable conditions to foreign customers than domestic customers, or to be content with a smaller margin on export sales. By withdrawing bonuses for export sales, the latter became less attractive to foreign customers or to dealers. The measure was therefore, by its very nature, likely to inhibit export sales, even without any restriction on supply. Moreover, it is clear (...) that the measures (...) were prompted by the increase in export sales and were designed to reduce them."*<sup>3</sup>

<sup>1</sup> This view is confirmed in the Draft Guidelines, paragraph 50.

<sup>2</sup> See for example Case C-551/03 *GM/Commission*, paragraph 66.

<sup>3</sup> Case T-368/00 *GM/Commission*, paragraphs 100 and 101 cf. in Case C-551/03 *GM/Commission*, paragraph 74 and more recently in Case T-450/05 *Peugot/Commission*.

In summary, the existence of a restrictive object was assumed, since the measures *clearly manifested* the will to treat export sales less favourably than national sales and would *inevitably* lead to a lower margin for distributors, or less favourable conditions for customers, thereby partitioning the market.

### **3. PRICE DIFFERENTIATION BETWEEN ONLINE AND OFF-LINE SALES DOES NOT NECESSARILY HAVE AS ITS OBJECT THE RESTRICTION OF COMPETITION**

#### **3.1 Charging lower net prices for products sold off-line cannot be considered a restriction by object**

It appears that the *per se* approach laid down in paragraph 52 of the Draft Guidelines is based on the above mentioned case law on the restriction by object implied in the charging of higher prices for products intended for export.

For the following reasons, one cannot apply this case law by analogy to cases in which higher net prices are charged for products sold online.

It is common ground in many sectors of the economy that off-line sales, i.e. sales in "brick and mortar" shops, provide significant added value from a suppliers' perspective. "Brick and mortar" shops provide various additional facilities and services to their customers, which are not provided in the case of sales via Internet. Examples of such services are physical demonstration of the products concerned ("feel and touch"), point of sale display and in-person sales assistance and advice. These services are of great importance for the reputation and marketability of a brand of product, and therefore represent considerable added value for suppliers. In addition, they are of clear benefit to the customer.

In its recent report on Internet sales, the Dutch Competition Authority (NMa) in this regard referred to the so-called *showroom effect* or *free-riding effect*<sup>4</sup>, describing that in a market characterised by increasing online sales of products such as household appliances, consumers increasingly explore their options in "brick and mortar" shops (thereby benefiting from the pre-sales services these shops have to offer) and subsequently purchase the products concerned via the Internet.

The provision of the additional facilities and services in the context of off-line sales brings about a considerable number of additional costs (showroom, training of personnel, pre-sales and post-sales costs). In order to sufficiently incentivise distributors to continue investing in off-line sales and the various additional facilities and services to their customers, suppliers may wish to compensate distributors for such additional costs. The most appropriate and accurate way to do so, and to reflect the added value of off-line sales from the perspective of the supplier, is to grant higher rebates to distributors for products sold off-line than for products sold online.

In view of the above, it is clear that such price differentiation cannot be considered to have as its object the restriction of competition.

#### **3.2 The difference in cost structure between online and off-line sales and corresponding margins**

In addition, it is far from evident that charging lower net prices for products sold off-line will *inevitably* lead to a lower margin for distributors when selling products online than when selling off-line. Such a conclusion would only be justified if costs related to sales off-line would be equal to the costs of online sales.

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<sup>4</sup> Sectorscan "Signalen internetverkoop".

Also in this regard, an analogy with the above mentioned case law on restrictions to parallel trade is not justified. If anything, the costs involved in exporting products would be *higher* than those for domestic sales. By contrast, in the case of off-line versus online sales the opposite holds true. As explained above, the costs involved with online sales are considerably lower than the costs involved with off-line sales. As a result, even if a supplier charges a higher net price for products resold online, the distributor's margin on these sales may still be higher than that on off-line sales.

Therefore, it cannot be upheld that any difference in price charged for online sales and off-line sales amounts to a *de facto* restriction of passive sales, as is now suggested in paragraph 52 of the Draft Guidelines. In the view of FIAR CONSUMER ELECTRONICS, a price differentiation could only lead to such restriction if it would substantially decrease the margins related to online sales and render online sales commercially unattractive compared to off-line sales.

This can only be assessed on a case-by-case basis, taking account of the actual amount of the price difference concerned and the costs of online sales compared to the costs of off-line sales. In the view of FIAR CONSUMER ELECTRONICS, this should be reflected in the final version of the Guidelines.

#### **4. OFFERING A FIXED FEE TO SUPPORT OFF-LINE SALES IS UNSUITED TO ADEQUATELY REFLECT THE COSTS AND ADDED VALUE OF OFF-LINE SALES**

The possibility of offering distributors a fixed fee to support their off-line sales, as provided for in the Draft Guidelines, does not suffice to adequately compensate for the additional costs related to off-line sales and to properly reflect the added value of off-line sales from the perspective of the supplier.

Reason for this is that the additional costs related to off-line sales and the added value for suppliers are largely dependant on the number of products sold off-line. The more products sold off-line, the larger the showroom necessary, the more personnel required to supply pre- and post-sale services, and the higher the costs related to these pre- and post-sale services.