

**RESPONSE TO**

**The Commission of the European Communities**

**Proposals for a revised Block Exemption Regulation for Vertical  
Agreements and Guidelines on Vertical Restraints**

 **Herbert Smith Gleiss Lutz Stibbe**

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The Alliance (Herbert Smith, Gleiss Lutz and Stibbe) is grateful for the opportunity to comment on the Commission's proposals for a revised Block Exemption Regulation for Vertical Agreements and Guidelines on Vertical Restraints. Please note that the comments contained in this submission are those of the Alliance and do not represent the views of any of our individual clients.

## **1. GENERAL**

- 1.1 We welcome the Commission's proposals for renewing the Block Exemption and Guidelines for vertical agreements. A clear analytical framework that provides guidance on the Commission's approach to vertical agreements is particularly important in the post-notification era where businesses need to assess by themselves the compatibility of their agreements with the competition rules. The regime is also important for national competition authorities and national courts by providing them with a common framework which contributes to a European wide level playing field.
- 1.2 We agree with the Commission that the current regime has worked well in practice and should therefore not be fundamentally modified. We understand why the Commission would want to refine the evaluation of the approach to assess vertical restraints and welcome many of the clarifications and updating amendments which reflect both the Commission's experience and changes in commercial practices.
- 1.3 The Commission states that it is in particular seeking comments on its suggested approach to market power and restrictions on on-line sales. Our comments in respect of these are set out in more detail under the relevant sections below, but we would like to make the following general observations on these important proposed amendments.
- 1.4 The introduction of a new market share threshold on the buyer is likely to have the greatest impact on the applicability of the Block Exemption and many agreements which currently benefit from the Block Exemption will no longer do so once the proposed changes come into force. Whilst we understand and agree with the Commission's reasoning that the increased buyer power of large distributors should be taken into account in the assessment of vertical restraints, we are concerned that the blanket introduction of a 30% market share threshold for all buyers is too radical an approach which may have undesired side effects. For example, it will make it much harder for an EU-wide supplier to operate a uniform

distribution system, as most EU-wide arrangements will fall outside the Block Exemption Regulation somewhere in the EU. There will be instances, in particular in the newer Member States, where there will be few suitable distributors and the distributor will therefore have a large market share. This will bring the distribution agreement for that country outside the scope of the Block Exemption, simply because of the distributor's market share, and will force the supplier to operate under a different regime for those countries. In line with the aim to introduce a more effects-based analysis, an alternative and less radical approach could be for the Commission to limit the application of the 30% market share threshold on the buyer to those agreements where restrictions are imposed on the supplier.

- 1.5 In respect of online sales, we welcome the additional guidance included in the new draft Guidelines in relation to the ability of suppliers to restrict the possibility of online sales by their distributors. Online sales and advertising have evolved significantly since the entry into force of the current Block Exemption, and the expansion of the Commission's guidance is therefore helpful and timely.
- 1.6 In general, we support the Commission's proposed approach to this question. We believe that online sales and offline sales should as far as possible be treated in the same way. Having said this, a balance should be sought between protecting consumers' ability to purchase goods online across borders, and limiting/preventing free-riding and allowing suppliers to ensure that their products are distributed in an appropriate manner. We also recognise the importance of market integration considerations and wider e-commerce policy objectives, in addition to "pure" economic theory, when determining precisely how this balance should be struck.
- 1.7 However, we consider that the new draft Guidelines do not, as currently drafted, sufficiently address a number of important questions which arise in the context of restrictions on online sales in vertical agreements. Clearly the new draft Guidelines cannot (and indeed in our view should not seek to) provide precise guidance on every potential issue which may arise in practice. However, we consider that there is scope to provide additional guidance which would help reduce the potential for uncertainty and confusion. In particular, as discussed further below, it would be helpful if the Commission would provide additional clarification of restrictions on internet sales which will be considered to fall within the scope of the Block Exemption in the context of exclusive and selective distribution systems, by including further illustrative examples in the new draft Guidelines.

1.8 As a further general comment, we welcome the Commission's new emphasis in the draft revised Guidelines, in the context of the framework of analysis for individual cases, that there is no presumption that vertical agreements that fall outside the scope of the Block Exemption Regulation are caught by Article 81(1) or fail to satisfy the conditions of Article 81(3). In order to reflect this approach more generally in the language used, it would be helpful if the Commission would refer to 'restrictions which remove the benefit of the Block Exemption' rather than using the terminology of 'hardcore restrictions' which has strong negative implications and could lead companies to believe that their agreements will not benefit from the exception rule. Although recital 10 reflects this softening of the definition of hardcore restrictions, it is unlikely that national courts will feel that they can allow hardcore restrictions to benefit from Article 81(3).

## **2. VERTICAL AGREEMENTS OUTSIDE ARTICLE 81(1)**

### **a. Agency Agreements**

2.1 Paragraph 13 of the draft Guidelines states that neither "the qualification given to their agreements by the parties" nor "national legislation" is material for defining an agency agreement for the application of Article 81(1) EC. While it is true that agency agreements may differ, we nevertheless wonder whether the implicit assumption of a wide disparity between national rules is not somewhat misleading. We recommend that the Commission clarify in this point that there is actually a Community measure that defines the main characteristics of a commercial agency agreement, thereby creating a certain degree of uniformity (Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents).

2.2 Paragraph 15 of the draft Guidelines makes the qualification of an agreement as a "genuine" agency agreement conditional on the agent bearing no or only "insignificant" risks. We are concerned that this wording may be unduly restrictive. Indeed, the term "insignificant" constitutes a very low threshold. We recommend that the Commission follow the case law of the CFI, which has stated in its *DaimlerChrysler* judgement that only activities giving rise to "exceptional risks" or "meaningful economic risks" do matter.<sup>1</sup> Furthermore, we recommend that the Commission reiterate the same principle (according to which only exceptional and meaningful economic risks matter) in paragraph 16 of the

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<sup>1</sup> Judgment of the Court of First Instance of 15 September 2005, *DaimlerChrysler v. Commission*, Case T-325/01, § 111.

draft Guidelines. Indeed, paragraph 16 could be understood to mean that any risk is sufficient to trigger the application of Article 81(1), when this paragraph is read in isolation.

- 2.3 Turning to the individual bullet points of paragraph 16, we wonder whether it is correct to state in the first bullet point that an agent may only carry out the transport service when the costs are covered by the principal. The CFI accepted in its *DaimlerChrysler* judgment that an agent may cover the transport costs<sup>2</sup>. The fact that the agent has the possibility to conclude a separate contract with the customer for the transport of the vehicle provides him with an additional source of income.
- 2.4 The second bullet point of paragraph 16 states that the agent should not maintain at his own cost or risk stocks of the contract goods. The fifth bullet point then goes on to say the agent should not, "directly or indirectly", have to invest in sales promotion, such as contributions to the advertising budgets of the principal. The sixth bullet point states that the agent should not make market-specific investments in equipment, premises or training of personnel. The seventh bullet point of paragraph 16 finally provides that the agent cannot be obliged to create or operate an after sales service "unless these services are fully reimbursed by the principal or unless these services are not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal".
- 2.5 We recommend that the Commission reproduce here the wording of the CFI in the *DaimlerChrysler* judgment, according to which it is sufficient if the obligation is not "commercially inadequate", does not constitute a "genuine financial risk", and is not disproportionate. In this judgment the CFI acknowledged that a principal may oblige his agent to acquire contract goods<sup>3</sup>, set up a repair shop and carry out after sales and warranty services, and acquire stocks of spare parts<sup>4</sup>. We also believe every agent has an interest to invest in sales promotion to increase the number of sales. Therefore, it is inherent in the role of any agent that he is "directly or indirectly" obliged to invest in sales promotion.
- 2.6 In paragraph 18 we propose that the Commission clarify that an agent does not "sell or purchase" goods or services, because otherwise this wording could be misleading. It should be emphasized that the agent concludes or negotiates contracts on behalf of the principal.
- 2.7 Paragraph 21 of the draft Guidelines concludes that where an agent bears some or all of the relevant risks, the agreement between agent and principal will not qualify as an agency

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<sup>2</sup> *DaimlerChrysler v. Commission*, op. cit., §§ 105 and 106.

<sup>3</sup> *DaimlerChrysler v. Commission*, op. cit., § 108.

<sup>4</sup> *DaimlerChrysler v. Commission*, op. cit., §§ 107, 111.

agreement for the purpose of Article 81(1) EC. The Guidelines go on to say that in that situation the agent will be treated as an independent dealer and the agreement between agent and principal will be subject to Article 81(1) EC "as any other vertical agreement".

2.8 No doubt, the principle stated in this paragraph is of crucial importance for market operators. However, the current wording is in our opinion much too broad and vague. It could be understood to mean that all restrictions, some of which are addressed in paragraph 18 above, could be caught by Article 81(1) EC. It would seem to us that the principal may always reserve the right to determine the sales price, given that he is the one who owns the goods and services and who concludes the contract for the sale of said goods and services. We therefore strongly recommend that the Commission elaborate on the wording in paragraph 21 to provide clear guidance.

#### **b. Subcontracting Agreements**

2.9 The Commission clarifies in paragraph 22 of the draft Guidelines that the notice concerning the assessment of certain subcontracting agreements remains applicable. This is an extremely helpful clarification, as this question often arises in practice.

### **3. SAFE HARBOUR CREATED BY THE BLOCK EXEMPTION REGULATION**

#### **a. Market share threshold**

3.1 One of the fundamental innovations of the new draft Regulation and Guidelines concerns the introduction of a second market share threshold. The draft Regulation only applies "*on condition that the market share held by each of the undertakings party to the agreement does not exceed 30%*" on the market. Therefore, the Commission has decided to take into account also the buyer's market share as a universal<sup>5</sup> "ceiling" for applying the Regulation.

3.2 We recognize that the draft Regulation needs to contain a market share threshold in order to block exempt vertical agreements that can reasonably be expected to meet all the conditions of Article 81(3) EC. Indeed, the use of a market share threshold is very helpful for undertakings and their legal advisers when assessing an agreement's compatibility under Article 81 EC.

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<sup>5</sup> Under the current regime, the buyer's market share is relevant only when the vertical agreement contains exclusive supply obligations.

- 3.3 The introduction of a market share threshold in the current Block Exemption Regulation was a key reform of the rules applicable to vertical agreements. Since then, the use of thresholds has been generalised for the purpose of competition assessment and this was certainly seen by undertakings as a positive development.
- 3.4 However, for the reasons set out below, we would advocate not to generalise the use of a double market share threshold before a vertical agreement can benefit from the safe harbour provided by the draft Block Exemption.
- 3.5 First, the use of two market share thresholds will inevitably limit the scope of the draft Block Exemption. Indeed, all buyers having a market share exceeding 30% will, as from the date on which the draft Block Exemption enters into force, lose the benefit of the Block Exemption. This also raises a serious problem of legal certainty in view of the lack of any transitional measures<sup>6</sup>.
- 3.6 Second, a market share threshold brings with it the inherent uncertainties as to market definition. Although many markets have been defined by the Commission in the past, mainly in the area of merger control, in principle any party to a vertical agreements has to go through this exercise again<sup>7</sup>. This will be less cumbersome when precedents exist, although market definitions may have to be updated. The more difficult issues of course arise when there are no precedents. This may be less problematic when one is confronted with a sophisticated competition authority willing to accept good faith and well reasoned market definitions adopted by the parties *in tempore non suspectu* (i.e., when the agreement was entered into). However, as also national courts can examine these agreements, legal certainty is less prevalent: not all judges confronted with these cases are specialised or willing to accept market definitions reached on the basis of reasonable grounds. Hence, an agreement which on the basis of perfectly reasonable market definitions was covered by the block exemption could find itself outside the scope of the Block Exemption's protection. These uncertainties, which already existed beforehand, are now exacerbated by the introduction of the second market share threshold. This also appears to run counter to paragraph 22 of the current Guidelines, "*only having to consider the market between supplier and buyer makes the application of the Block Exemption Regulation easier and enhances the level of legal certainty.*" However, as it is currently drafted, the new Regulation will force the undertakings to analyse two or more markets. This will greatly

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<sup>6</sup> We will come back to this later, at point 15.

<sup>7</sup> Judgment of the Court of First Instance of 22 March 2000, *The Coca-Cola Company, Coca-Cola Enterprises Inc. v Commission of the European Communities*, Joined cases T-125/97 and T-127/97, § 82.

reduce the level of certainty provided by the Regulation. It also imposes a heavy burden on the supplier for whom it will not always be easy, particularly when complex distribution arrangements involving many different products are concerned, to assess for each of its buyers the relevant market share.

- 3.7 Third, while any proper competition assessment of vertical agreements must take into account the buyer's power, the importance of this aspect should not be overstated so as to jeopardise the certainty provided by the Regulation to undertakings and practitioners. The Regulation currently applicable does actually contain satisfactory provisions to take the buyer's power into account. Indeed, the instrument of withdrawal enshrined in article 6 is much more appropriate and provides a much more balanced approach for this problem.
- 3.8 Fourth, introducing this second market share threshold also constitutes a step back for the effects based approach promoted by the Commission. Market shares always introduce a degree of rigidity into the assessment of agreements. Where this can be justified on the grounds of legal certainty, this reasoning cannot be accepted for the introduction of a second 'universal' market share threshold. Indeed, the relevance of the first market share threshold was questioned in the past by economists promoting a case-by-case analysis of the anti-competitive effects of vertical agreements. The introduction of a second market share threshold while at the same time the Commission continues to declare its willingness to apply a more effect based approach appears to be contradictory.
- 3.9 Finally, the new market share threshold relating to the buyer will make it much harder for an EU-wide supplier to operate a uniform distribution system, as most EU-wide arrangements will fall outside the Regulation somewhere in the EU. This will force a supplier to operate under a different regime for those countries where the buyer's share exceeds 30% (even if this is the case simply because there are no other suitable distributors for a particular territory). As mentioned in above paragraph 1.4, we would urge the Commission to adopt a less radical and more targeted approach in order to deal with potential buyer power issues, for example by limiting the application of the market share threshold on the buyer to those agreements where restrictions are imposed on the supplier.

**b. Calculation of market share**

- 3.10 Another important change relating to market shares concerns the market on which the buyer's market share must be calculated. The current block exemption, when discussing the buyer's market share, indicates that it is the buyer's market share on the market on which it

purchases the contract goods or services. The draft Guidelines change this approach: for the buyer the relevant market will be its selling market (or markets) and not its purchasing market. This modification is likely to lead to a further reduction of the draft Regulation's applicability: if there is a distinction between the buyer's purchasing and its selling market, the latter is likely to be smaller in size than the former. As a consequence, the buyer's market share will more easily exceed the market share threshold on the selling market than on the purchasing market. Neither the draft Regulation nor the draft Guidelines provide any explanation as to why this approach has been modified.

- 3.11 Since undertakings have to assess themselves the compatibility of their vertical agreements, it is important to create analytical tools which render such an assessment as easy as possible. Moreover, it is crucial not to reduce the level of legal certainty provided by the current Regulation. Therefore, a second market share threshold relating to the buyer's selling power should not in our view be inserted in the final version of the Regulation.

#### **4. DEFINITION OF VERTICAL AGREEMENTS**

- 4.1 According to paragraph 25 of the draft Guidelines the Block Exemption Regulation only applies to agreements and concerted practices, but not to unilateral conduct of the undertakings concerned. The draft Guidelines draw conclusions from the case-law of the ECJ and the CFI adding a new element to the definition of vertical agreements. The draft Guidelines state in short that in the absence of an explicit acquiescence, the Commission has to show the tacit acquiescence of one party to the unilateral policy of the other party in order to establish the existence of an agreement. We agree that in such a case it is necessary to show first that one party requests the cooperation of the other party and that the other party complied by implementing the unilateral policy in practice. However, we strongly disagree that the tacit acquiescence may simply be deduced from the level of coercion exerted by one party on the other party to impose its unilateral policy in combination with the number of distributors who are actually implementing in practice the unilateral policy of the supplier. This would also mean that a unilateral conduct that is not communicated at all but that is – for whatever reason – complied with by a certain number of distributors could be considered an agreement.

- 4.2 This contradicts what is said earlier in the draft Guidelines, i.e. that the Commission has to prove the request of one party for cooperation of the other party or parties. It is also not

supported by the case-law. It follows from the *Adalat* judgment of the CFI<sup>8</sup> (confirmed by the ECJ<sup>9</sup>) that an agreement on an export ban shall only exist if (1) the supplier requests the wholesaler to abandon his exports, and if (2) the wholesaler agrees. Hence, the supplier has to communicate the measure. In the *Adalat*-case, the supplier did not communicate the unilateral measure to the wholesalers. Consequently, the wholesalers could not acquiesce to the supplier's unilateral policy. The CFI confirmed the *Adalat*-jurisprudence in its subsequent judgments *Volkswagen*<sup>10</sup> and *Opel*<sup>11</sup>.

- 4.3 The current wording of the draft Guidelines would broaden the notion of 'agreement' decisively and reduce the requirements imposed on the Commission to prove a concurrence of wills. This is not in line with the case-law of the CFI and the ECJ. We therefore suggest that in the final version of the Guidelines the Commission adapt the first element of the definition of vertical agreements accordingly.

## **5. AGREEMENTS BETWEEN COMPETITORS**

- 5.1 The draft Regulation has modified article 2(4) of Regulation 2790/99 by eliminating one of the situations in which a non-reciprocal vertical agreement between competitors is exempted. The Commission has removed the exception for the buyer with a total turnover not exceeding 100 million Euro for non-reciprocal vertical agreements between competitors in cases where the companies are also competing on the upstream market. As a result, for vertical agreements between competitors to benefit from the draft Regulation, it is required at all times that the parties to the agreement are not competing on the upstream market. We regret the loss of this exception, which is not explained anywhere in the draft Regulation or in the Guidelines.

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<sup>8</sup> Judgment of the Court of First Instance of 26 October 2000, *Bayer AG v. Commission*, case T-41/96.

<sup>9</sup> Judgment of the European Court of Justice of 6 January 2004, *BAI and Commission v. Bayer AG*, Joined Cases C-2/01 P and C-3/01 P.

<sup>10</sup> Judgment of the Court of First Instance of 3 December 2003, *Volkswagen AG v. Commission*, case T-208/01, § 45.

<sup>11</sup> Judgment of the Court of First Instance of 21 October 2003, *General Motors Nederland and Opel Nederland v. Commission*, case T-368/00, § 88.

## **6. EXCLUSIVE DISTRIBUTION**

### **a. Clarification of whether a restriction of active sales is permitted when the supplier is also free to make sales (either active or passive)**

6.1 It is clear from the wording of the first exception to article 4(b) of the Block Exemption Regulation that the restriction of active sales into the exclusive territory:

- (i) reserved to the supplier; or
- (ii) allocated by the supplier to another buyer

is not a hardcore restriction of competition law (where such restriction does not limit sales by the customers of the buyer).

6.2 It would be helpful if either the Block Exemption Regulation itself or the Guidelines could expressly state whether or not the exception allowing a restriction of active sales into an exclusively reserved or exclusively allocated territory is also intended to apply where the territory into which active selling is being restricted has been allocated by the supplier to only one buyer but where the supplier itself is also free to make active sales (i.e. where there is a sole distribution arrangement in relation to the territory, rather than a completely "exclusive" arrangement). If the exception is not intended to apply in this situation, it would be helpful if the Commission could explain why the lack of a restriction on the supplier has the effect of making the restriction of sales into the territory by other distributors a "hardcore restriction" in circumstances when it would not be regarded as hardcore if there was an active sales restriction on the supplier.

### **b. Requirement for active sales restrictions to be imposed on the whole network**

6.3 Under both the current and proposed Guidelines (paragraph 51) active sales restrictions can only be imposed if they are imposed on the whole network. This requirement should be removed, as it places an unnecessary burden on the supplier (it will be difficult for a supplier to ensure that the active sales requirement is imposed on all buyers) and the requirement makes it impossible for a supplier to operate under mixed distribution systems.

### **c. Combination of exclusive distribution and single branding**

6.4 We welcome the more positive approach in paragraph 157 of the draft proposed Guidelines in respect of the combination of exclusive distribution and single branding, namely that it is said to be unlikely to lead to anticompetitive foreclosure of other suppliers except possibly

when single branding is applied to a dense network of exclusive distributors with small territories or in case of a cumulative effect.

**d. Restrictions on exclusive distributors in territories outside of the EU making sales outside of their allocated territories**

6.5 We note that it is often the case that suppliers allocate exclusive territories to distributors outside of the EU and wish to impose restrictions on those distributors from selling outside those territories into territories reserved to another distributor. Although the intention behind such a restriction may not be to have any effect on trade as between Member States, according to the case-law of the ECJ and the *Commission's Guidelines on the effect on trade concept*<sup>12</sup> such a restriction could potentially be held to have an effect on trade, and therefore to the extent that such restrictions have the effect of restricting passive sales, could be held to infringe Article 81.

6.6 We would welcome the Commission taking the opportunity to clarify how it would apply the principles in *Javico* to such an arrangement, and in particular whether it regards such an arrangement as capable of affecting patterns of trade between Member States.

**7. ONLINE SALES RESTRICTIONS**

**a. Restrictions on online sales in the context of exclusive distribution systems**

7.1 Under the Commission's proposed approach to restrictions on online sales in the context of exclusive distribution systems, the classification of online advertising or sales as "active" or "passive" selling will remain a key question.

7.2 We note that the Commission proposes to continue to generally classify online sales as "passive" sales on the basis that advertising and selling goods on the internet is a reasonable way to reach every customer, and so will not generally constitute "actively" targeting customers located in a particular territory or a particular customer group exclusively allocated to a particular distributor.

7.3 We support the view that where a customer visits the website of a distributor and contacts the distributor, and such contact leads to a sale, including delivery, this should be deemed

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<sup>12</sup> Judgment of the ECJ of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, Case C-306/96; Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004/C101/07, paragraphs 107 – 109.

to constitute a "passive" sale.<sup>13</sup> We also agree that there may, however, be certain circumstances where online advertising/sales should be considered to constitute "active selling".

- 7.4 We feel that the new draft Guidelines do not, however, currently include sufficient guidance to assist suppliers in determining whether restrictions on online advertising/sales will fall within the scope of the Block Exemption in practice.
- 7.5 For example, whilst it makes sense that a supplier should be permitted to restrict a distributor from sending unsolicited e-mails to individual customers located in a territory or within a customer group which has been exclusively allocated to another distributor (on the basis that such e-mails would constitute active selling), it is not clear from the new draft Guidelines how this principle would be applied in practice. If a customer selects to receive offers/promotions from other companies associated with a particular company, in the context of an online transaction, would an e-mail which was subsequently sent to that customer by an associated company be considered to be an unsolicited e-mail which amounted to active selling?
- 7.6 The new draft Guidelines also state that "*online advertisements specifically addressed to certain customers*" should be deemed a form of active selling to those customers. However, it is not clear how it could be demonstrated in practice that an online advertisement was specifically targeted to certain customers. We note in this regard that the current guidance regarding the possible use of "*banners or links in pages of providers specifically available to exclusively allocated customers*"<sup>14</sup> has been deleted from the new draft Guidelines, and the Commission has retained its current position in relation to the (ir)relevance of the language used on a website. This results in a situation where there is no real guidance on this issue beyond the basic statement that "online advertisements specifically addressed to certain customers" will be considered as active selling which makes it difficult for the suppliers to assess the compatibility of their conduct with Article 81(1) in practice.
- 7.7 Given the critical importance of the passive/active sales distinction in this context, we would welcome additional guidance on this point, and invite the Commission to explain in the new draft Guidelines how it could be established that an online advertisement is specifically addressed to certain customers. It would also be helpful to clarify on whom the burden of proof falls of showing that this is / is not the case.

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<sup>13</sup> Paragraph 52 of the New draft Guidelines, replicating part of paragraph 51 of the Current Guidelines.

<sup>14</sup> Paragraph 51 of the Current Guidelines.

7.8 For example, would an obligation on a distributor to exclude certain territories from its internet advertising reach be considered as an active or a passive sales restriction where that is technically possible? In particular, as regards advertisements on online search engines, such as Google, would a supplier be permitted to impose an obligation on a distributor not to make its advertisements available on Google in territories allocated to other distributors in an exclusive distribution system?

7.9 Also, if a distributor published a price list on its website which listed prices in currencies used in other territories which had been exclusively allocated to another distributor (for example, a distributor in France listing prices in GBP), would this be deemed to amount to active solicitation of sales from those other exclusively allocated territories?

7.10 It would also be helpful if the Commission could provide some examples of circumstances in which the language used on a website or in communications with customers will be a relevant factor when determining whether an internet sale is active or passive – the new draft Guidelines maintain the existing position that "*The language options used on the website or in the communication play normally no role in that respect*"<sup>15</sup> (emphasis added), but do not offer any further guidance on the sort of exceptional circumstances when this may not be the case.

**b. Specific concerns regarding the examples of hardcore restrictions of passive sales provided in the new draft Guidelines**

*(i) Requiring a distributor to limit the proportion of overall sales made over the internet*

7.11 Paragraph 52 of the new draft Guidelines states that requiring a distributor to limit the proportion of overall sales made over the internet will be considered to be a hardcore restriction of passive selling, which will fall outside the scope of the Block Exemption.

7.12 We note that the Commission has sought to provide additional guidance on this point in footnote 29, which provides that "*this does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products off-line to ensure an efficient operation of its brick and mortar shop, nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model. This*

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<sup>15</sup> Paragraph 52 of the New draft Guidelines, paragraph 51 of the Current Guidelines.

*absolute amount of required off-line sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location."*

7.13 We interpret footnote 29 to be a carve out to this hardcore restriction of passive selling. If this is the Commission's intention, we feel that the use of the phrase "*does not exclude*" may cause some confusion in practice and potentially lead to the opposite interpretation, namely, that footnote 29 is also part of the hardcore restriction. Although the wording "*nor does it preclude*" in footnote 29 mitigates this to some extent, for the sake of absolute clarity we suggest the use of "*preclude*" instead of "*does not exclude*".

7.14 In addition, it is not entirely clear from the wording of footnote 29 how this carve out would operate in practice and what proportion of sales can be restricted safely within the safe harbour of the Block Exemption. Is the reference to an absolute value intended to refer to the absolute value of *net* sales by the supplier to the buyer, or the absolute value of retail sales by the buyer to its customers? It would be helpful if the Commission could make its intentions more expressly clear in the new draft Guidelines, to avoid potential confusion.

7.15 We also note that it is not clear what a supplier would be able to do if the buyer did not meet the offline target which had been set, and we would welcome further guidance from the Commission in this regard. For example, if the buyer does not meet its offline sales target, would the supplier be able to require the buyer to cease trading online altogether, or restrict the online sales of the buyer until the offline sales target is met?

**(ii) *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***

7.16 Paragraph 52 of the new draft Guidelines also states 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 offline constitutes a hardcore restriction of passive selling.

7.17 We note that footnote 30 provides that "*this does not exclude the supplier offering the buyer a fixed fee to support its off-line or online sales*". We interpret footnote 30 to be a carve out to this hardcore restriction of passive selling. If this is the Commission's intention, we feel that the use of the phrase "*does not exclude*" may cause some confusion in practice and potentially lead to the opposite interpretation, namely, that footnote 30 is also part of the hardcore restriction. Therefore, for the sake of absolute clarity we suggest the use of "*preclude*" instead of "*does not exclude*".

7.18 Further, if our interpretation is correct, it is not clear how payment of a fixed fee to the buyer specifically to support its offline sales is different in effect from charging a lesser price for products intended to be resold offline than for those that can be sold online (particularly if the fixed fee is combined with an absolute amount that must be sold offline, as discussed above). It would be helpful if the Commission could clarify this issue, as the proposed approach appears to be inconsistent and, in our view, is likely to cause confusion in practice.

**c. Restrictions on internet sales where a distributor is the first to sell a new brand or the first to sell an existing brand on a new market**

7.19 We note that the new draft Guidelines contain a new paragraph 56 which provides that if a distributor is the first to sell a new brand or the first to sell an existing brand on a new market, *"where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group ...generally fall outside Article 81(1) during the first two years that this distributor is selling the contract goods or services in that territory or to that customer group."*

7.20 We understand this to mean that in such circumstances, a supplier could impose restrictions on internet sales by other distributors into the territory in question / to that particular customer group for a 2-year period, without falling outside the scope of the Block Exemption. Assuming that this is correct, we consider that it would be helpful if this were to be made expressly clear, for example by amending the wording to refer to *"restrictions of passive sales (including, for the avoidance of doubt, internet sales) by other distributors"*.

7.21 In addition, whilst a 2-year period is likely to be sufficient in most cases, we consider that there may be circumstances where restrictions on passive sales lasting for more than 2 years could potentially fall outside Article 81(1) or alternatively be justified under Article 81(3). It would be helpful if guidance could be provided as the permissibility of longer periods of restrictions in exceptional cases.

**d. Restrictions on internet sales in the context of selective distribution systems**

7.22 We note the debate surrounding the extent to which restrictions on internet sales should be permissible in the context of selective distribution systems which has taken place in the context of the Commission's Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing.

7.23 In our view, suppliers who have chosen to adopt a selective distribution system should be permitted to impose restrictions on their distributors relating to internet sales in order to protect brand image, combat counterfeiting or limit the effect of free-riding. We consider that allowing such restrictions may also be beneficial to consumers by helping to ensure that offline retailers are not dissuaded from investing in the provision of specialised customer services, such as personalised technical advice, product demonstrations, and after-sales support.

7.24 We also support the Commission's approach in paragraph 54 of the new draft Guidelines in relation to the permissibility of an outright ban on internet selling in certain limited circumstances, where such a restriction may be justified and either falls entirely outside Article 81(1) (because it is objectively necessary) or benefits from Article 81(3) on the basis of an efficiency justification.

7.25 However, whilst we agree with the Commission that objectively justifiable restrictions on internet sales should not be considered "hardcore" restrictions when imposed in the context of a selective distribution system, we feel that it would help minimise the potential for uncertainty and confusion if further clarification / illustrative examples of when such restrictions on internet sales can be imposed were provided in the new draft Guidelines.

*(i) Dissuading appointed dealers from using the internet by imposing criteria for online sales which are not "equivalent" to those for off-line sales*

7.26 We note the "hardcore" restriction classification of any obligation which dissuades appointed dealers in a selective distribution system from using the internet by imposing criteria for online sales which are not "equivalent" to the criteria imposed for the sales from the brick and mortar shop.<sup>16</sup> However, whilst the illustrative examples provided in footnote 31 of the draft Guidelines are helpful, there is still considerable potential for uncertainty when trying to apply this general principle in practice. For example:

- could a supplier operating a selective distribution system who requires offline dealers to provide an after-sales support team at each store require its "online-only" dealers to offer an after-sales helpline?

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<sup>16</sup> Paragraph 57 of the New draft Guidelines.

- could the same supplier also require online-only dealers to cover the costs of sending a faulty product to an after-sales support team for the product to be checked/repaired if the problem cannot be dealt with over the phone?

- could a supplier impose more onerous security requirements on online resellers in relation to processing of payments, given the greater security risks associated with online purchases (perceived or actual)?

7.27 It seems to us that all of the above examples should fall within the scope of permissible restrictions within the Block Exemption in the context of selective distribution systems. However, this conclusion is not entirely clear from the current drafting of the draft Guidelines.

7.28 We also wish to point out that some of the criteria which may be appropriate for an online dealer may not have any real "equivalent" in the offline world, which could potentially make the proposed general principle difficult to apply in practice. For example, a supplier may reasonably wish to impose on its online distributors criteria relating to response and downloading times for a website, use of an automatic recognition function, the quality of text and images used on a website, and the quality of any search engines embedded within the site. It would be helpful if the Commission clarified the extent to which such restrictions can be imposed by suppliers on their online dealers in a selective distribution system, given the likely difficulties of pointing to a clearly "equivalent" set of criteria for offline retailers.

**(ii) *Requiring appointed dealers to have a "brick and mortar" shop or showroom before engaging in online distribution***

7.29 We understand from paragraph 54 of the draft Guidelines that a supplier would be permitted to require its distributors to have a brick and mortar shop or showroom before engaging in online distribution (following the approach adopted by the Commission in *B&W Loudspeakers*<sup>17</sup>).

7.30 However, the draft Guidelines appear to leave open the possibility that a dealer in a selective distribution system could operate a bricks and mortar shop or showroom in one

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<sup>17</sup> COMP/37.709 - *B&W Loudspeakers*, IP/02/916, Commission clears *B&W Loudspeakers* distribution system after company deletes hard-core violations, 24 June 2002 – in that case, the Commission concluded that criteria which entirely exclude internet sales go beyond what is necessary but a requirement that dealers have a brick and mortar presence is sufficient to protect the luxury nature of the brand and otherwise satisfy the requirements for face-to-face service.

Member State, and then engage in both active and passive online sales to customers located in a number of different Member States. Under the proposed rules, the supplier could not include the territorial restrictions permitted in the context of exclusive distribution systems if it chose to pursue a selective distribution system, and therefore could not restrict the ability of the dealer to sell to end users either actively or passively. It appears that this would mean that a dealer could, for example, open a small shop in say, Paris, and then actively target customers located in Edinburgh, Rome and Madrid via the internet, even if those customers would be very unlikely to actually visit the dealer's shop/showroom and/or be able to properly benefit from the "additional" customer services offered by the brick and mortar shop.

- 7.31 We consider that it would be helpful if the Commission could expressly confirm whether this is its intended position. In our view, it may in certain circumstances be preferable to allow suppliers who have chosen to adopt a selective distribution system to also impose certain restrictions on the territorial extent of online sales by its appointed dealers, provided that any such restrictions can be objectively justified.

***(iii) A website as a "place of establishment" for the purpose of article 4(c) of the new draft Block Exemption***

- 7.32 We note that the Commission proposes to retain the current wording of article 4(c) of the Block Exemption, so as to exclude the restriction of active or passive sales to end users by members of a selective distribution network, without prejudice to the possibility of prohibiting a member of the network from operating out of an "*unauthorised place of establishment*".
- 7.33 The statement in both the current and draft Guidelines that "*within a selective distribution system, the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet*"<sup>18</sup> appears to indicate that the Commission does not consider a website/the internet to be a "*place of establishment*" in this context, such that the internet cannot be classified as an "*unauthorised place of establishment*" so as to prevent all online sales within a selective distribution system. However, assuming that this interpretation of the Commission's position is correct, we consider that it would help avoid confusion if this could be made expressly clear in the new draft Guidelines.<sup>19</sup>

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<sup>18</sup> Paragraph 57 of the New draft Guidelines

<sup>19</sup> The Sections note that in paragraph 58 of the New draft Guidelines the Commission states that the use of the internet cannot be assimilated to the opening of a new outlet in a different location. However, the

**(iv) Restrictions on sale of competing goods or services over the internet in the context of non-compete obligations**

- 7.34 We note the addition of the following sentence in what is now paragraph 62 of the new draft Guidelines, in the context of non-compete obligations: *"A prohibition to sell competing goods or services over the internet will be considered as a non-compete obligation if it practically causes the buyer to limit its purchases of competing goods or services to less than 20% of its total purchases"*.
- 7.35 It is unclear to us what this additional wording adds in practice, given that a provision which prevents the buyer from purchasing competing goods or services or limits such purchases to less than 20% of its total purchases is already stated to constitute a non-compete obligation (regardless of whether the competing goods or services are intended to be sold online or offline).
- 7.36 Furthermore, the additional wording seems to imply that a buyer can be expressly restricted from selling competing goods/services over the internet, provided that this restriction is limited to a 5-year duration where the buyer's purchases of competing goods/services are limited to less than 20% of its total requirements. If this is the Commission's intention, then this appears to result in a rather odd position, whereby a supplier is expressly allowed to prevent a buyer from selling any competing products over the internet, notwithstanding that a supplier is not permitted to limit a buyer from selling the supplier's own products over the internet (the supplier only being allowed to require the buyer to sell at least a certain amount offline).
- 7.37 It would be useful if the Commission would make clear in the new draft Guidelines whether the buyer can be expressly restricted from selling competing goods/services over the internet, provided that this restriction is limited to a 5-year duration where the buyer's purchases of competing goods/services are limited to less than 20% of its total requirements.

**(v) Restrictions on online sales into the EU by a distributor located outside the EU**

- 7.38 We note that the new draft Guidelines do not expressly deal with the question of how the Block Exemption would be applied in the case of a supplier who wanted to impose a

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Sections submit that this is not the same as making expressly clear that the internet cannot be deemed an unauthorised place of establishment in the context of article 4(c).

restriction on a distributor located outside the EU, for example, in the US or Australia, preventing online sales of the relevant goods to the EU via a US or Australian website.

- 7.39 If a supplier imposes a restriction on its non-EU distributors preventing them from selling a particular product over the internet to customers in the EU, this could arguably be considered to have an effect on trade within the EU. It is however not currently entirely clear how the Commission would approach such a case.<sup>20</sup> In our experience, this issue often arises in practice, and we consider that the draft Block Exemption and related Guidelines provide an opportune moment for the Commission to clarify its position, and to explain how the Block Exemption could potentially be applied in such circumstances.

## **8. OTHER COMMENTS ON ACTIVE/PASSIVE SALES RESTRICTIONS**

### **a. Efficiency defence and objective justification**

- 8.1 We support the Commission's approach in paragraph 50 of the draft Guidelines in relation to the permissibility of a restriction on distributors selling to certain end users in certain limited circumstances, where such a restriction may either fall entirely outside Article 81(1) (because it is objectively necessary) or benefit from Article 81(3) on the basis of an efficiency justification.
- 8.2 However, whilst we agree with the Commission that objectively justifiable restrictions on sales to certain end users should not be considered "hardcore" restrictions, we feel that further clarification / illustrative examples would be helpful in applying the new draft Guidelines in practice. In particular, whilst we find helpful the example cited by the Commission of a restriction, which operates in the circumstances of "*a public ban on selling dangerous substances... for reasons of safety or health*", we consider that other justifications such as, for example, national laws on decency/obscenity, ownership of relevant intellectual property by others in some Member States, and tax rules which make it

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<sup>20</sup> Whilst the *Javico* case and the *Commission's Guidelines on the effect on trade* provide some guidance, it is often difficult in practice to apply the principles of that particular case to other scenarios, and additional clarification on this issue would be welcomed. In particular, in situations where the supplier is located in the EU and the distributor is not. We note that in the case of *Javico*, both the supplier and the distributor were located in the EU. (*Javico International and Javico AG v Yves Saint Laurent Parfums SA*, Case C-306/96; *Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, 2004/C101/07, paragraphs 107 – 109).

necessary to know the location of customers, could also be expressly included in the new draft Guidelines.<sup>21</sup>

8.3 More generally, as explained above, we consider that the Commission's stance in this respect supports the recasting of terminology, in particular, the word "*hardcore*" in the new draft Block Exemption and the new draft Guidelines.

**b. The combination of exclusive and selective distribution agreements**

8.4 In addition to the points raised in respect of online sales in a selective distribution system (above at paragraphs 7.22 seq.), the wording of paragraphs 57 and 58 of the new draft Guidelines could be further clarified. Paragraph 57 makes clear that active and passive sales (other than to unauthorised dealers) cannot be restricted "*within the territory where the supplier operates its selective distribution system(s)*". This seems to suggest that if the supplier has chosen a selective distribution system in e.g. France and Germany but decides to appoint an exclusive distributor in the UK, the French and German distributors could be prevented from making active sales into the UK since the UK is not "within" the territory in which the selective distribution system is operated.

8.5 However, the beginning of paragraph 58 states that "*this also means that selective distribution may not be combined with exclusive distribution if that would lead to a restriction of active or passive selling by the dealers, with the exception that (...)*". This seems to contradict what is said in paragraph 57 unless the wording of paragraph 57 is replicated, i.e. the sentence is rephrased as follows: "*this also means that selective distribution may not be combined with exclusive distribution if that would lead to a restriction of active or passive selling by the dealers, **within the territory where the supplier operates its selective distribution system(s)**, with the exception that (...)*".

8.6 In short, it needs to be clarified whether the VBER allows a supplier that operates different types of distribution models within the EU to benefit from the protection afforded to each different type of distribution model in respect of that territory where that model is operated.

8.7 We would also ask the Commission to clarify how to determine whether a sole dealer appointed for a particular territory should be classified as an exclusive distributor or a sole

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<sup>21</sup> This comment is also relevant to paragraph 54 of the New draft Guidelines which refers to outright bans on internet or catalogue selling satisfying the efficiency defence / being objectively necessary in certain limited circumstances.

distributor under a selective distribution agreement (especially since the nature of the product is irrelevant for the product to be able to benefit from selective distribution where the supplier's and buyer's market shares remain below 30%). A supplier would in practice consider qualitative criteria in terms of both types of agreements. The difference seems to simply be the name that the supplier decides to give to the agreement, i.e. whether the supplier includes that territory within the territory where it operates a selective distribution system or carves it out. The classification of the agreement as exclusive or falling under the selective system is of course determinant in relation to the right to prevent active sales into the territory and the right to prevent sales to unauthorised distributors. If there is no difference in practice apart from what the supplier decides to call it (depending on the effects the supplier wishes to procure by the agreement), it would be helpful for the Commission to clarify that.

- 8.8 Finally, in respect of selective distribution in general, the Commission should clarify its position regarding the application of the selective criteria. We understand that the Commission takes the view that a supplier is not required to appoint all applicants who satisfy the criteria to its selective network. We welcome this approach but would ask the Commission to expressly state this in the Guidelines as we are concerned that, in the light of the requirement to apply the selective distribution criteria in an objective and non-discriminatory way, there appears to be a presumption that all dealers who meet the criteria must be given access to the selective network. National courts are likely to form the view that this presumption exists unless the Commission expressly states otherwise in the Guidelines.

## **9. FRAMEWORK OF ANALYSIS UNDER ARTICLE 81(3) EC TREATY**

- 9.1 We agree with the statement in paragraph 93 of the draft Guidelines, according to which appreciable anticompetitive effects are only likely to occur when at least one of the parties has or obtains some degree of market power. We recommend that the Commission clarify that agreements concluded by undertakings with market shares above 30% may not give rise to competition concerns.
- 9.2 The draft Guidelines underline in paragraph 115 the importance of distinguishing between the level of trade. It is acknowledged that restrictions relating to intermediate goods and services are less likely to cause harm. The existing Guidelines contain the same or similar wording. We recommend that the Commission elaborate on this distinction, and in

particular, address the question whether it makes still sense to use the term "hardcore" restriction in the context of the sale of intermediate goods and services.

- 9.3 Paragraphs 118 seq. discuss relevant factors for the assessment under Article 81(3) EC. Paragraph 121 addresses the criterion of indispensability. According to the draft Guidelines, the parties must compare alternatives. They should *"explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient"*. While the Commission clarifies that "undertakings invoking the benefit of article 81(3) are not required to consider hypothetical and theoretical alternatives" we nevertheless wonder whether such a comparison of alternatives is practicable and indeed, necessary. It can indeed be argued that what matters is a comparison with the counterfactual, that is the situation in the absence of any restriction.

## **10. SINGLE BRANDING**

- 10.1 We welcome the alignment of the concept of "single branding" under the draft Guidelines with the definition of non-compete in article 1(1)(b) of the draft Regulation.
- 10.2 We also note that the Commission appears to be softening its stance on single branding engaged in by dominant companies. Indeed, point 129 of the draft Guidelines states: *"Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies."* In the current Guidelines, the Commission indicates that single branding by dominant companies should be objectively justified in the context of Article 82 EC. This was taken by many to imply that single branding obligations entered into by a dominant company are a no-go area under Article 81 EC. The wording of point 129 in the draft Guidelines now leave room for single branding by a dominant company to benefit from Article 81(3). However, the presumption about single branding by a dominant company still appears to be a negative one. We encourage the Commission to also adopt a neutral and full effects-based approach on this type of restrictions by indicating that single branding by dominant companies is likely to be caught by Article 81(1) EC, while at the same time stressing that the Commission is neutral as to the assessment under Article 81(3) EC. The Commission, in its draft Guidelines, could put more emphasis on the pro - competitive *rationale* for single branding, even for dominant companies. Such an evolution would also be consistent with the more effects based approach advocated by the Commission in the Article 82 Guidance Paper.

## **11. EXCLUSIVE CUSTOMER ALLOCATION**

### **a. Clarification of whether a restriction of active sales is permitted when the supplier is also free to make sales (either active or passive)**

11.1 As indicated above in respect of exclusive territories, it is clear from the wording of the first exception to article 4(b) of the Block Exemption Regulation that the restriction of active sales to an exclusive customer group:

- (i) reserved to the supplier; or
- (ii) allocated by the supplier to another buyer

is not a hardcore restriction of competition law (where such restriction does not limit sales by the customers of the buyer).

11.2 It would be helpful if either the Block Exemption Regulation itself or the Guidelines could expressly state whether or not the exception allowing a restriction on active sales to an exclusively reserved or exclusively allocated customer group also applies where the customer group to which active selling is being restricted has been allocated by the supplier to only one buyer but where the supplier itself is also free to make sales to that customer group (i.e. where there is a sole distribution arrangement in relation to the customer group rather than a completely "exclusive" arrangement). If the exception is not intended to apply in this situation, it would be helpful to explain why the lack of a restriction on the supplier has the effect of making the restriction of sales to the customer group by other distributors a "hardcore restriction" in circumstances when it would not be regarded as hardcore if there was an active sales restriction on the supplier.

### **b. Risk of foreclosure of other distributors**

11.3 Paragraph 164 of the draft proposed Guidelines includes a statement that exclusive customer allocation may lead to foreclosure of other distributors and therewith reduce competition at that level. It would be useful to include more details about the circumstances in which such exclusive customer allocation could lead to foreclosure of other distributors.

## **12. EXCLUSIVE SUPPLY**

### **a. Market share**

12.1 The proposed removal of the current definition of "exclusive supply obligation" is welcomed. This definition, which under the current Block Exemption Regulation determined whether the market share of the buyer would need to be taken into account, has often been difficult to apply in practice.

12.2 However, as indicated in the section relating to "Market Share Threshold", not only does the new proposed Block Exemption Regulation require the market share of the buyer to be taken into account in all cases (even if the agreement contains no restrictions on the supplier), it also changes the basis on which the market share of the buyer should be calculated for determining whether the Block Exemption Regulation applies. As indicated above, where the buyer's market share needs to be taken into account under the current Block Exemption Regulation (because of the inclusion of exclusive supply obligations), it is the buyer's market share on the market on which it purchases the contract goods or services that needs to be considered. However, in respect of the proposed draft Block Exemption Regulation, the draft Guidelines indicate that it is the buyer's market share on the "*market(s) where it (re)sells the contract products*" that needs to be taken into account in determining whether the proposed draft Block Exemption Regulation will apply.

### **b. Combination of exclusive supply obligations and non-compete obligations**

12.3 It would also be helpful if the Commission could explain an apparent hardening of approach towards the justification for the combination of exclusive supply obligations and non-compete obligations below the level of dominance. The draft Guidelines note in paragraph 194 that this combination "*may often be justified, in particular below the level of dominance*" rather than the current version which states that this "*is usually justified below the level of dominance*". The change from "*is usually justified*" to "*may often be justified*" in respect of such combination below the level of dominance suggests a slight hardening of approach on this issues, which it would be useful to understand through the inclusion of examples.

### **13. UPFRONT ACCESS PAYMENTS AND CATEGORY MANAGEMENT AGREEMENTS**

#### **a. Upfront access payments**

- 13.1 As a general point we note that the terms "distributors" and "retailers" appear to be used interchangeably (for example within paragraph 200 when compared with paragraph 202). If it is the intention to treat all downstream customers, whether distributors or retailers, the same, this should be made explicit. If this is not the intention, the position should be clarified.
- 13.2 Paragraph 202 of the Guidelines seems to say that if suppliers' costs - and, hence, prices – rise as a result of having to pay upfront access payments, distributors/retailers might have a reduced incentive to compete on price. It is not exactly clear which mischief this intends to address. If the concern is "*collusion between distributors through the cumulative use of upfront access payments*" this appears to be more of a straightforward horizontal issue between the distributors/retailers.
- 13.3 Paragraphs 202 to 204 do not give as much guidance as they could on when up-front access payments could facilitate collusion and when they could bring about benefits. It would be helpful to include more guidance on the factors that might help distinguish when up-front access payments could facilitate collusion and when they have beneficial effects.

#### **b. Category management**

- 13.4 We welcome the inclusion of a section on category management in the Guidelines.
- 13.5 In respect of paragraph 208 of the Guidelines, we note that the role of category captain implies getting certain information about competing suppliers and the nature and extent of this information should be kept to a minimum and may need to be quarantined. The Guidelines do not provide any clear guidance on this, but this may be because it is impossible to lay down hard and fast guidance that would cover all scenarios. Nevertheless, the more detail that can be given in the guidance as to what would be permissible, the more useful this would be in practice.

## 14. RESALE PRICE MAINTENANCE

- 14.1 Notwithstanding the numerous criticisms made against the Commission's policy and ignoring the recent *Leegin* judgement of the United States Supreme Court<sup>22</sup>, it appears from the modifications made to the Guidelines in the draft that the Commission is not willing to abandon its very strict and formal approach of resale price maintenance. The Commission still considers resale price maintenance as a hardcore restriction resulting in the entire agreement being caught by Article 81(1) EC.
- 14.2 A softening in the Commission's stance can be found at paragraph 221 of the draft Guidelines where it is acknowledged that resale price maintenance "*may also sometimes lead to efficiencies.*" Therefore, undertakings in the future will be given the possibility to plead an efficiency defence under Article 81(3) EC. Examples of pro and anti-competitive effects are provided in the Guidelines itself, although the list of accepted pro-competitive effects is limited.
- 14.3 Since resale price maintenance can be both predominantly pro and anti-competitive, the Commission could adopt a more neutral approach. In view of the history of resale price maintenance, it seems fair that resale price maintenance is not automatically covered by the Block Exemption Regulation, since its competitive analysis very much hinges on the facts of the case. However, paragraphs 47 & 219 of the Guidelines, introducing a rebuttable presumption of illegality, appear to invert the rules of the burden of proof enshrined in article 2 of Regulation 1/2003<sup>23</sup>, without providing any good justification.
- 14.4 The inversion of the burden of proof is particularly worrying in a system where undertakings have to engage in self-assessment and have to face competition authorities and national courts where they still have to bear the heavier burden of rebutting a presumption that the agreement does not fulfil the conditions of Article 81(3) EC.

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<sup>22</sup> US Supreme Court, *Leegin Creative Leathers Products, Inc. v PSKS, Inc.*, 127 S Ct 2705 (2007).

<sup>23</sup> "*In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81 (1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81 (3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.*"

## **15. TRANSITIONAL PROVISIONS**

- 15.1 If the Commission keeps the two market share thresholds (buyer and supplier), it is inevitable that a number of vertical agreements that currently benefit from Regulation 2790/99 will fall outside of the scope of application of the revised Regulation. As legal certainty is one of the main drivers for Block Exemptions, we would strongly urge the Commission to include transitional provisions allowing for agreements previously covered by the block exemption, but not under the new system, to benefit from an exemption for a period of time (e.g., one year after the entry into force of the current draft Regulation).
- 15.2 Second, in view of the reduced scope of applicability of the draft Regulation for non-reciprocal vertical agreements between competitors, a transitional period also needs to be provided for here.