



Submission on Review of the Competition Rules Applicable to Vertical Agreements

ISFE, the Interactive Software Federation of Europe¹ represents the European videogame industry which produces entertainment and educational software for use on personal computers, game consoles, portable devices and mobile phones. The videogame industry is the fastest growing ‘content’ sector in Europe and is a major employer within the Union.

ISFE member publishers distribute videogames for consumer enjoyment both on and off line and the European videogames market is now estimated to be worth €12 million² annually. ISFE has been asked by its members to comment on the Commission’s planned changes in the Regulations associated with the Draft Block Exemption.

We note that there are in fact few changes made from the existing Regulations and the most significant changes proposed by the Commission relate to the issues of online distribution and the market power of buyers. We propose to deal with these issues in turn.

1. Online Distribution

We see that the Commission has now included more extensive provisions on online selling within the Draft Guidelines and that it has also sought to set a clearer distinction between ‘active’ and ‘passive’ selling specifically in relation to online distribution. ISFE agrees that the distinction between ‘active’ as opposed to ‘passive’ sales remains somewhat blurred but also questions whether the distinction now serves any purpose at all. Today “passive” online sales are a minority and there are many online retailers, big and small, whose sole business is ‘active’ online sales.

The distinction should be reconsidered if not abolished. ISFE suggests that the real question is now whether online sales should be treated in the same way as ‘brick and mortar’ sales, given that the current definitions of ‘active’ and ‘passive’ are not in line with market realities.

¹ **ISFE** Membership consists of the following: **Associations** - AESVI (Italy), ADESE (Spain), BIU (Germany), BEA (Belgium), ELSPA (UK), FIGMA (Finland), MDTS (Sweden), MUF (Denmark), NVPI (The Netherlands), NSM (Norway), OVUS (Austria), SELL (France), SIEA (Switzerland), SPIDOR (Poland). **Companies** – Activision, Atari, Eidos, Electronic Arts, Konami, Microsoft, Nintendo, SCEE (Sony Computer Entertainment Europe), SEGA, Take 2, THQ, UbiSoft, VUG (Vivendi Universal Games), The Walt Disney Company.

² According to the 2009 Price Waterhouse Cooper report the total end user spending on video games in 2008 in EMEA was 12.08 million Euro.

If the distinction is not at this stage to be deleted further clarity should be given both on the distinction itself and on where 'passive' sales can be prohibited such as at (56) in the Guidelines. i.e. that a two year protection from 'passive sales' would be permissible 'where substantial investments by the distributor to start up and/or develop [a]new market are necessary' they are not 'passive' resellers in any way.

We also note that under the Guidelines a supplier may still require a retailer to operate a 'bricks and mortar' shop. We understand the origin of this requirement may be in light of the specific requirement of some suppliers who do not principally trade on line. However we wish to state that as several of our members have multiple distributors which are either pure retailers or pure e-tailers or have a presence in both off and online worlds, such a 'bricks and mortar' requirement in the Regulations is not be considered by those members to be essential and could in future be deleted from the Guidelines.

2. Market Power of Buyers

We see that the Draft Block Exemption now provides the benefit of exemption only where the market share of the supplier **and the buyer** for the relevant goods/services does not exceed 30 per cent. Previously only the supplier's market share was generally taken into account.

We understand that this change has apparently been made to reflect growing concentration in retail markets within the Union. However, its inclusion causes problems for some of our members. It is already increasingly difficult to calculate the suppliers' market shares by geography and product in developing or local markets. Indeed we are informed that this problem of defining market share is already the single most difficult problem some of our members face in the area of competition law. Introducing this, in effect, new lower threshold and the need to calculate buyers' market share only exacerbates the issue and creates a heavier burden in carrying out business in the Union. We therefore suggest that the requirement be reconsidered and redrafted as in its current form it may well become unworkable for industry.

Please contact this office should you require further information consequent on the above submission.

**ISFE Secretariat
Rue Guimard, 15
1040 Brussels
+32 2 5138816**

www.isfe.eu