

REVIEW OF THE COMPETITION RULES APPLICABLE TO VERTICAL AGREEMENTS
CONTRIBUTION BY UNIPRO – ITALIAN ASSOCIATION FOR COSMETIC INDUSTRIES
TO THE COMMISSION CONSULTATION

Foreword

Unipro is the Italian Association for Cosmetic Industries that groups and represents over 500 enterprises in Italy which, taken all together, make up more than 90% of the turnover in this market. The cosmetics market has a sensitive meaningful role in our economy, producing a yearly turnover of over 8,300 million Euro and engaging some 200 thousand (direct and indirect) workers.

The abovementioned relevance of the cosmetics market in Italy and the impact thereon of European competition rules in the distribution field, which are currently being revised, are the grounds for today's contribution by Unipro to this public consultation.

Comments on the previous regulatory experience

The market data briefly mentioned above prove that the ten-year application of Regulation 2790/1999 has been very positive; this substantially confirms the soundness and appropriateness of the current system.

The Regulation has demonstrated that the system of block exemptions can nonetheless guarantee a high competition level, to the benefit of consumers: in fact, the market reveals a harmonious co-existence between extended distribution policies (large-scale retail stores, store chains, independent points of sale) and those grounded on the selective channel (specialized perfumeries, pharmacies, parapharmacies, herbalist's shops) that are typical of the cosmetics world.

In short, the system has proven to be able:

- to favour access to the market by new enterprises, among which the increasing number of small-medium sized companies, even coming from rising markets (showing that globalization is also possible); the selective channel has been able, *inter alia*, to foster precisely the new operators' access to the market, the latter being able to adhere to the articulated and consolidated network system that is grounded on product quality and certification;
- to offer consumers a significant variety of always new, innovative products, easily available in the different market channels at equally diversified prices, thus satisfying their needs and possibilities.

For these reasons, Unipro believes that the experience acquired so far must not only be taken as a more than efficient basis for future regulations, but should also be given special value when extending its principles to the most recent distribution modes, which the revision is rightly centred on (Internet).

Comments on the Commission's proposal

Unipro has examined the Commission's proposed revision of the Regulation and of its Guidelines and appreciates the fact that the revision substantially "validates" the key principles of the current system, albeit simplifying and clarifying them in an efficient manner.

Notwithstanding this, Unipro hopes that the following points of the current draft Regulation and Guidelines will be revised.

i) SELECTIVE DISTRIBUTION

Selective distribution is both characteristic and essential in the cosmetics market, as confirmed by the following figures pertaining to the Italian market: in 2008, cosmetics were sold in the top selective channel, i.e. perfumery, for over 2,300 million euro (more than a quarter of the entire consumption of cosmetics in Italy), not to mention the cosmetics sold at beauty and hairdressing salons which, in 2008, reached 950 million euro (over 10% of the entire cosmetics market).

Quite obviously, the selective nature of distribution channels has a significant influence on the aggregate number of personal items, which goes hand in hand with the need to offer consumers qualified assistance, in line with their specific needs.

In this scenario, Unipro believes that the extension of the black list of article 4(b) proposed by the draft Regulation - which circumscribes the (admissible) restrictions of sales, applied by the members of a selective distribution system to authorized distributors, to "*markets where such a system is operated*" - is worrying and may give rise to future contrasts.

If the territorial coincidence between selective channel and protection thereof were confirmed, there would ensue obvious, negative effects, since any distributor operating in a country where a selective distribution system is not applied would be allowed to buy products and resell them in any Member State.

This would frustrate the selective policy without entailing any corresponding advantages. Indeed, access to the market, especially by small-scale suppliers, would not benefit therefrom (these suppliers do not normally have widespread and rooted marketing structures across Europe) and neither would the consumer gain any benefit, the latter being already fully protected by art. 4 (c) which prohibits any restriction of active or passive sales to end users.

Unipro suggests the following solution: to remove the words "*market where such a system is operated*" from article 4(b) of the draft Regulation.

ii) RECOMMENDED AND MAXIMUM RESALE PRICES

When dealing with recommended and maximum resale prices, Paragraph 223 of the draft Guidelines introduces a new sentence that can give rise to serious ambiguities and uncertainties which may create paralyzing doubts - unless the sentence is cancelled - when applying the Regulation. In particular, the sentence underlines the need to "*investigate whether there is a monitoring mechanism and a possibility of retaliation in case a distributor deviates from the focal price*".

The so-formulated text seems to imply that the legitimacy of recommended or maximum resale prices depends on their application by distributors or on the existence of monitoring and sanctioning mechanisms. This is not the case in practice, being it well-established that:

- the purpose of recommended prices is for them to be adopted (their non-use does not mean that they are admissible);

- the suppliers' monitoring of prices is intrinsically linked to their role on the market (and may be enforced even where not envisaged and also by third parties engaged in collecting market data),
- the reference to potential retaliation in case the recommended prices are not applied cannot amount to an index of infringement of competition rules.

Unipro suggests the following solution: to cancel the references to the application of recommended prices and of monitoring mechanisms and to the mere existence of eventual sanctions as potential indexes of imposition of the sale price, from point 223 of the draft Guidelines.

III) ONLINE SALES

The cosmetics market favours the opportunities offered by Internet, both as a sales channel and as a means to foster contacts with consumers and increase the latter's access to services.

Precisely because Internet is a sales channel, there is no reason to lay down special rules that differ from the system applied to the brick and mortar shop.

In this respect, Unipro appreciates the fact that the Commission accepts forms of control of on-line sales, just like for the brick and mortar shop, and that it accepts the possibility of requiring the existence of a brick and mortar shop before starting on-line distribution: this provides a suitable protection of the consumer that is driven by the quality of the products and services offered and that can prevent or discourage frauds (which, unfortunately, are quite common on-line).

Yet, Unipro wishes to point out the following two issues, which give rise to two corresponding concerns.

a) Paragraph 57 of the Guidelines severely restricts freedom by qualifying as a "hardcore restriction" the imposition of criteria for online sales which are not equivalent to the criteria imposed for the sales from the brick and mortar shop.

We first wish to point out that quality control pertains to the supplier, the latter being the subject who can actually define the suitable criteria for such control; moreover, the physical and virtual store are intrinsically different by nature, so the application of "equivalent" criteria thereto opens the way for ambiguous and subjective evaluations, which do not consider the peculiarities of each system.

It would be fairer to lay down, as a limit to the freedom to impose criteria for online sales, the obligation not to make such sales objectively impossible.

Unipro suggests cancelling the sentence "... regards as hardcore restriction any obligation which dissuades appointed dealers 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" from point 57 of the Guidelines and establishing that "criteria that make online sales objectively impossible are not allowed"

b) The same applies to point 52 of the draft Guidelines which qualifies as a hardcore restriction of passive selling "requiring a distributor to limit the proportion of overall sales made over the Internet".

This so-formulated rule is extremely paralyzing – despite the tolerances mentioned in footnote 29; whilst confirming the rule that online sales are not to be made impossible, it would be more appropriate to allow the supplier to require the sale of a minimum quantity of products (expressed in absolute values or as a proportion, as chosen by the supplier) at the brick and mortar shop.

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Therefore, Unipro suggests cancelling the third paragraph of point 52 of the draft Guidelines and introducing a specific indication – in art. 54 – which, whilst confirming the rule that online sales are not to be made impossible, allows the supplier to ask the retailer to sell at least a minimum quantity of products (in absolute values or as a proportion) at the brick and mortar shop.

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