

September 28, 2009

CONSULTATION OF THE EUROPEAN COMMISSION ON THE REVIEW OF THE COMPETITION RULES APPLICABLE TO VERTICAL AGREEMENTS

In response to the Commission's invitation of July 28, 2009, to all interested third parties to comment its new draft regulation on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices (the "Draft Regulation") and the draft notice on guidelines on the vertical restraints (the "Draft Notice"), Kesko Corporation would like to state the following.

First of all, we appreciate the Commission's view not to abolish the regime of a block exemption regulation and guidelines on vertical agreements and concerted practices. Also, we appreciate that the Commission has approached the extension of the regime by way of amending the regulation in lesser extent only but at the same time giving more guidance on how to interpret it. In addition, we may not forget that many of the changes made to the Draft Regulation and the Draft Notice are advantageous to both the European consumers and the distribution network serving their needs. Just to name a few, it is worth noticing with please that also in the Commission's view the presumption that an agreement (or a concerted practice) may not benefit the exemption of Article 81(3) of the Treaty in case it contains any of the hardcore restrictions mentioned in Article 4 of the Draft Regulation is a rebuttable one, the introduction on the market of a new brand or of an existing brand on a new market may justify, for a limited period, a behaviour on prices which might be considered anti-competitive in other circumstances (see also below) and that in case substantial know-how is transferred with the same agreement certain kinds of non-compete obligations can be justified.

However, there are also proposed changes that raise great concern and things that should be changed while no change is proposed. In the first category belongs first and foremost the 30 % market share threshold in Article 3 of the Draft Regulation which has been changed in such a way that the exemptions provided in the Draft Regulation shall apply on the condition that the market share held by each of the undertakings party to the agreement does not exceed 30% on any of the relevant markets affected by the agreement. Going by the Draft Regulation and the Draft Notice it is to be feared that in practice, many retailers will no longer benefit from the application of the Commission's regulation and thus the introduction of a market share threshold for the buyer side should be deleted without substitution. This is all the more true since the Commission does not give any reasons, case law etc. justifying the change. On the contrary, it considers, quite rightly, that the current regime has worked well overall and should not be fundamentally modified. The introduction of the threshold to buyer side also would be such a fundamental modification.

The EU law can tackle the issue of buyers' powerful market position in many other ways than issuing the second market share threshold. For example, the Commission and the national authorities may withdraw the benefit of the block exemption. Further, for example buying alliances may be analysed as horizontal arrangements under article 81 of the Treaty. These

September 28, 2009

are more proportionate ways to handle buyer's powerful market position in a given circumstance than introducing a 30 % market threshold for all. On the contrary to the introduction of the second market share threshold, one could think of removing the market share threshold entirely since (i) it brings in various practical problems, not only because the market shares of the supplier and the buyer may be defined differently but also the actors like wholesalers may be active on both the supplier and buyer market and it is difficult for a retail operator, for example, to obtain relevant information that would allow to calculate its market share, (ii) the market shares are naturally higher in countries like Finland with just over 5 million inhabitants scattered on a relatively large geographical area this leading into small population centres calling for strong, resourceful suppliers in various sectors of trade able to provide for the population's needs, and (iii) the more recent economic analysis has shown that anticompetitive effects cannot be excluded even in cases where the market shares are well below the level of the current regulation.

To the second category - things that should be changed while no change is proposed – belong, for example, the EUR 50 million ceiling on the total turnovers in Article 2(2) of the current and the Draft Regulation. Besides the fact that it has been left to the same nominal level as in the current regulation dating back to year 1999 we do not see much point in keeping it at all. To our understanding, the purpose of the Article to bring associations of undertakings within the scope of the Draft Regulation (and the current one) and it is unnecessary in the light of the market share threshold. The rule is also unbalanced. If only one member of an association of undertakings exceeds the ceiling, this leads to the regulation being inapplicable to the relationship as a whole, also with the other members of the association. Thus the ceiling should be abandoned or, if it is not possible for a justifiable reason we do not see yet, it should be raised considerably to take into account of the general economic development of the business and changed in a way that the fact that a member or members of an association exceed the ceiling should not be detrimental to the other parties of the relationship and not even those exceeding the ceiling if they account for up to a limited portion of the total turnover of the association.

Another thing of great concern is that according to point 25 of the Draft Notice, in case of unilateral coercion applied by a supplier to impose its policy on distributors, the Commission would assume tacit consent of the distributor to the measures demanded by the supplier. We consider this to be peculiar and incomprehensible. The fact that one market participant forces another to act in a certain way cannot be construed as tacit consent. There may be circumstances in which the other party has no alternative but to assent to this coercion but this should not be considered consent but unauthorised coercion by the party doing it only. Thus this interpretation requires urgent review and should be dropped.

We are also concerned about the fact that in giving examples and guidance on franchise the Draft Notice does not explicitly state that the same applies to agreements with the same or similar characteristics (transfer of know-how, IPR licences, technical advice and services etc.). The same should apply regardless of, for example, the name of the agreement and it would be beneficial to all if the Commission made an explicit clear notion of it in its final notice, although we note a reference to it in point 221 of the Draft Notice on resale price maintenance. It would be logical and beneficial to all to add the same notion to at least point 45, 144 and 186.

September 28, 2009

On the resale price maintenance, we acknowledge that the changes made to the Draft Notice, especially point 221, are a step forward. However, the Commission might not go far enough when referring to new products to a market and entry to new markets. Within groups (or associations) of retailers operating under the same brand or group name resale price maintenance applied to short campaigns beyond these two circumstances is necessary. Only in this way is it possible for groups of retailers to remain competitive with large chains having complete sovereignty to decide and enforce prices. Therefore, such groups of retailers must also have the possibility of maintaining prices for products for a short period without tying it to the circumstances mentioned above and, in order to ensure legal certainty and harmonized application of the competition rules across Europe, it would be advantageous to introduce the possibility of fixed prices for short promotional campaigns within Article 4 a) of the final regulation also and not just in the notice.

The above said, we should, however, be absolutely clear that resale price maintenance by the manufacturers should be refused, especially when separated from the distributors' right to reasonable compensation for their efforts made to serve the end-users needs, and the Commission's final notice should be absolutely clear on this. To our understanding this has nothing to do with ensuring effective competition, even if it concerns prevention of loss-leaders.

We have studied the Commission's view on internet with much unease. Whilst we see that it might have some merit in connection with the relationship between the manufacturers and the distribution network on certain conditions, it doesn't seem to be right within a group (or association) of retailers, for example. In these structures controlling the use of internet among the members may lead into efficiencies and the final Commission's notice should take clear note of that. In addition, one's operations over the internet might be detrimental to the whole brand or group name since the other retailers to the group operating under the same name might not be obliged to do the same. For example, one's promotional campaign over the internet might lead to disappointments and costs to consumers if they went after such a campaign in another retailer's shop under the same brand or group name with no comparable campaign in place.

In addition, in countries like Finland an internet site may not be considered mere passive sales. The consumers actively seek information on products and their prices over the internet and taking into account various ways of delivery the distance has lesser effect to this. Also, the internet technology and services have made it all the more difficult to state when internet sales could be argued to be passive or active and the Draft Notice does not give any practical tools to analyze it. For example, one might try to take advantage of the Commission's view by just putting up a site while knowing that with clever site optimization and other techniques the consumers will end up to its site since the internet search engines will lead them onto it. And of course, internet marketing is developing quite rapidly and there will be new techniques available we know nothing about today but which will be easily available shortly.

Thus the Commission should explicitly allow in its final regulation a central organisation of a group of undertakings (like franchisor), if and when necessary, to protect his know-how, image and uniformity of the network, even through the possibility of imposing restraints on its

September 28, 2009

members on the use of the Internet, including actively preventing the possibility of active sale for their own brand (private label) products.

On the upfront access payments and the Commission's view that they are generally likely to make market access more difficult, we are not sure if one may make such a general assessment. Such payments in a form or another are a widely used phenomenon within trade and may be justified for several reasons, not just the reasons the Commission acknowledges in the Draft Notice. In addition, assessing the terms that a retailer negotiates with a supplier and determining which of those could be classed as "upfront access payments" should not be regarded as an issue of vertical restraints in the framework of Article 81 of the Treaty but Article 82 of the same providing the appropriate legal framework to regulate the abuse of buyer power and to impose the necessary sanctions. Thus, points 199 to 204 should be deleted from the final notice without substitution.

The same analysis that it might not relate to the supply of goods or services in the meaning of the regulation goes with points 205 to 209 on category management agreements and thus they should be deleted from the final notice also. At least point 209 should be deleted (or revised to large extent) since it seems to refer to category management agreements on a single supplier's product or products, not a wider category management applying to a product category with different suppliers.

Finally, reference is made to the positions of Union des Groupements de Détaillants Indépendants de l'Europe A.I.S.B.L (UGAL) which we very much concur and support.

Please do not hesitate to contact Corporate Counsel Mr Jarkko Karjalainen, tel. +358 1053 22602 and e-mail jarkko.karjalainen@kesko.fi, if you need any further information.

KESKO CORPORATION

[signed]

Anne Leppälä-Nilsson
General Counsel

[signed]

Jarkko Karjalainen
Corporate Counsel