

Netherlands Competition Authority
Contribution to the public consultation on the
review of the competition rules applicable to vertical agreements
28 September 2009

On July 28th, 2009, the European Commission published draft versions of a revised Block exemption Regulation, and of Guidelines on Vertical Agreements. The Commission is particularly interested in comments regarding the current regulations' general functioning, the level of influence recent market developments should have on the Regulation, and the approach as suggested by the Commission with regard to the buyers' market power and to the restrictions regarding web retailing.

In this contribution, the Netherlands Competition Authority (NMa) will elaborate on its thinking concerning the most important issues in the Block exemption Regulation and the Guidelines on Vertical agreements. This contribution is not a complete list of its comments on the Commission's proposed amendments, but is merely intended to highlight some aspects that the Netherlands Competition Authority considers to be relevant to the issue at hand.

Resale Price Maintenance as a 'hardcore' restraint

The Block exemption in its current form assumes that 'vertical restraints' are less damaging than 'horizontal restraints'. In most vertical agreements, competition problems are only expected when there is insufficient inter-brand competition, meaning when the supplier or the buyer has market power. An underlying assumption of the Block exemption Regulation (BER) is that there is no market power when market shares are below 30 per cent, thus exempting such agreements from the prohibition in Article 81, paragraph 1, EC, except for cases of hardcore restraints, as defined by the BER.

In the amended Block exemption, the Commission has maintained its policy with regard to treating individual vertical price-fixing agreements as hardcore restrictions. In the almost 12 years of its existence, the NMa has received numerous tips and signals as well as some formal complaints concerning such resale price maintenance agreements, for example the number of tips varied between 25-36 (per year) in the period 2004-2006. Almost all of these originated from consumers. In the vast majority of these instances the NMa has not been in a position to establish a theory of harm that would justify proceeding with such a case. In all of these instances there was evidence of ample interbrand competition and/or insufficient evidence to suggest that either resale price maintenance is being used to facilitate a horizontal cartel agreement, or had market consequences to the same effect. Therefore the NMa does not prioritise such cases.

In practice, it is the NMa's experience that resale price maintenance agreements by small producers often seem to be used as a marketing tool, and hence may facilitate the wider availability of branded products, which will not have negative effects on competition and may benefit the consumer. The Commission has indicated in the Guidelines that hardcore restraints in an agreement give rise to a suspicion that such an agreement could fall under the scope of Article 81, paragraph 1, and that it does not meet the requirements of Article 81, paragraph 3. The addition of a clarification that this is a suspicion that can be refuted, does not constitute any real policy change in relation thereto, as it is already open to undertakings in individual cases to claim efficiency gains under Article 81, paragraph 3.

The various economic theories showing that resale price maintenance can be harmful on the one hand or can be efficiency enhancing on the other are not repeated here. The NMa holds the view that there is little empirical evidence that resale price maintenance always or almost always tends to restrict competition. Of course, there are most certainly anticompetitive instances of resale price maintenance where damaging horizontal effects are present. However, the NMa holds that from an economic point of view, such incidents are insufficient to justify considering individual vertical price-fixing agreements in all cases as a hardcore restraint.

New restrictions in the proposed block exemption

The Commission's press release indicates that the Commission believes that, generally speaking, the regulations work well, and that there is no reason to have them fundamentally amended. The most important amendments proposed are meant, as the Commission explains, to respond to recent market developments, particularly the increased buyer power of the big retailers, as well as the growth of online retailing. The Commission therefore proposes to have a vertical agreement only become eligible for the Block exemption if not only the *supplier's* market share, but also the *buyer's* market share does not exceed 30 per cent, on any market either of them operates (currently, this is the case only when the agreement concerns an exclusive supply commitment). With regard to online retailing, the Commission proposes to prohibit restrictions by the supplier on a distributor's online sales.

For most agreements, it is the *supplier's* market share that is the main criterion. Only where there is an exclusive supply commitment does the *buyer's* market share determine eligibility for (current) Block exemption. The guidelines do not elaborate on the general extension of the 30%-threshold of the supplier's market share to the buyer's market share. Though there are possible scenarios where, in the case of market power of the buyer (apart from the case of an exclusive supply commitment, where the buyer's market share already determines eligibility for the Block exemption), commitments in vertical

agreements could lead to competition-law problems, it remains unclear exactly which of the Commission's experiences justify adopting a 'stricter' policy.

With regard to online retailing, the NMa believes that, in the absence of market power and where there is sufficient inter-brand competition, suppliers should be permitted as much freedom as possible in determining under which conditions they want their product to be sold. The NMa has seen no indications that online selling will disappear if competition authorities do not intervene on this issue. In principle, the NMa does not endorse a form-based approach with regard to supplier-imposed restrictions on online retailing by distributors.
