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Date
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Directorate- General for Competition
Antitrust Registry
Ref.: HT.1171 – stakeholder input
1049 Brussel
Belgium

Subject
Guidelines on Vertical Restraints

Dear Sir/ Madame,

Consumentenbond welcomes the opportunity to provide input on the guidelines on Vertical Restraints. As a consumer organisation we believe proper guidelines are crucial for the Single Market to deliver benefits for consumers.

Due to capacity restraints we are unable to comment on the guidelines in detail. Therefore we will focus on the specific provisions of the proposal that we are most concerned about: (1) backdoor restrictions on internet sales, (2) bricks and mortar requirements, and (3) protection for 'new' products.

1. Backdoor restrictions on internet sales - Paragraph 52

The Commission regards for instance the following as hardcore restrictions of passive selling:

- *requiring a distributor to limit the proportion of overall sales made over the internet (footnote 29)*

Footnote 29

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 (see paragraphs 54 and 57). This 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.

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Consumentenbond is alarmed by footnote 29. In our view it runs counter to the spirit and objective of the regulation. There is a real danger this footnote will undermine the beneficial restrictions mentioned in Paragraph 52. We fail to see why a supplier would need to ensure the efficient operation of the buyers brick and mortar shop, and regard it to be paternalistic. The wording of this footnote may be used as a backdoor to restricting sales over the internet to consumers in practice.

For example: a Belgian shop becomes popular among Dutch consumers as a reliable online provider of goods. The increasing number of Dutch customers leads the operator to concentrate on his internet section. However, the supplier uses the possibilities mentioned in the footnote to restrict supplies to that operator. This would limit the ability of the operator to sell using the internet to consumers both inside and outside the specified geographic market. We therefore urgently ask the Commission to remove this footnote.

2. Bricks and mortar requirements - Paragraph 54

Notwithstanding what has been said before, under the block exemption the supplier may require quality standards for the use of the Internet site to resell his goods, just as the supplier may require quality standards for a shop or for advertising and promotion in general. The latter may be relevant in particular for selective distribution, where under the block exemption the supplier may require its distributors to have a brick and mortar shop or showroom before engaging in online distribution.

We are worried about the potential anti-competitive behaviour that is made possible by this paragraph.

Quality standards for use of the internet

The reference to quality standards leaves too much room for (anti-competitive) interpretation. If these standards are that a product needs to be photographed in a certain way or that there needs to be a link to the official site, then there will probably be no problem for consumers. However, if these standards would require consumers to visit a specific physical store, the standard would in fact be a masked restriction aimed at stopping cross-border consumption. We urge the Commission to clarify what would be seen as a reasonable standard and what would not.

Bricks and mortar presence

We disagree with the idea that suppliers should be allowed to require a bricks and mortar presence before internet commerce can take place. This requirement will undermine competition, limit the ability of consumers to exercise their rights in the Single Market, and hamper innovation. The internet has as major advantages that it offers consumers easy access (other than the physical world) across the Single Market, and very low start up costs for e-tailers. E-commerce has changed the economics and face of many sectors over

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the last decade, driving change and innovation. The requirement for a bricks and mortar shop basically denies the operation and evolution of the marketplace: it deflects the signal send by consumers to retailers (and manufacturers) on the manner (where and how) they wish to purchase goods and services.

3. Protection for 'new' products - Paragraph 56

A distributor which will be the first to sell a new brand or the first to sell an existing brand on a new market, thereby ensuring a genuine entry in the relevant market, may have to commit substantial investments to start up and/or develop the new market where there was previously no demand for that type of product in general or for that type of product from that producer. Such expenses may often be sunk and in such circumstances it could well be the case that the distributor would not enter into the distribution agreement without protection for a certain period of time against (active and) passive sales into its territory or to its customer group by other distributors. 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 therefore 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.

We do not agree with the assumption that protection is an essential must for innovation: "[...]the distributor would not enter into the distribution agreement without protection [...]". We understand the logic behind this paragraph and the wish on the side of manufacturers (of totally new and innovative products and in general) to protect their investments. However, this is a commercial problem for the manufacturers rather than a policy issue for the Commission.

In addition we are worried about the vague wording. Does the Commission wish to protect manufacturers of totally new innovative products for a period of two years, or does it wish to extend this to all 'new' products from all manufacturers? We fear the vague wording will stimulate manufacturers to continually alter existing products to (keep) gaining protection as a 'new product'. This practice would seriously harm consumers and competition in the European Single Market.

We would like to thank the Commission for giving us the opportunity to comment on the guidelines on vertical restraints.

Yours Sincerely,
Consumentenbond



Michiel Karskens
Policy Advisor

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