

European Commission
Directorate-General for Competition
Antitrust Registry
Ref.: HT.1171 – stakeholder input
1049 Bruxelles / Brussel
BELGIQUE / BELGIË

Corporate Executive Board
Peter Wakkie
Executive Vice President &
Chief Corporate Governance Counsel
P.O. Box 985, 1000 AZ Amsterdam
Piet Heinkade 167-173
1019 GM Amsterdam
The Netherlands
Phone + 31 (0)20 509 5306
Fax + 31 (0)20 509 5204

DATE September 28, 2009

RE HT.1171 stakeholder input;
comments regarding review block exemption
regulation and guidelines on vertical restraints

PAGE 1/5

Dear Madam, Sir,

Introduction

Koninklijke Ahold N.V. (“**Ahold**”) is an international group of quality supermarkets based in the United States and Europe. In Europe Ahold operates, directly or through franchisees, shops under the brands Albert Heijn (a leading food retailer in the Netherlands), Etos (a leading health and beauty care retailer in the Netherlands), Gall & Gall (a leading wine and liquor specialist in the Netherlands), and Albert (one of the best known food retail brands in the Czech Republic and Slovakia). In the United States Ahold is active in food retail with the brands Stop & Shop, Giant and Peapod (internet grocery). Ahold also has a 60% interest in ICA AB of Sweden, a joint venture with Hakon Invest AB (40% interest) operating retail stores in Sweden, Norway and the Baltics.

Ahold supports the Commission’s continuous review of its competition policy. A review of the 1999 block exemption regulation (the “**BER**”) and guidelines (the “**Guidelines**”) on vertical restraints is particularly welcome, since these instruments reflected an imported policy change at the time of their adoption and have now been in place for almost ten years. Generally, Ahold is of the view that the economic approach towards restraints in agreements works well in practice and deserves full support. Ahold is therefore of the opinion that changes should only be made if there is empirical evidence of shortcomings in the current regime. Ahold is not aware of such shortcomings.

Nevertheless, the Commission proposes changes to the current policy. The following topics have particularly caught our attention:

1. the proposed introduction of a new market share threshold in the BER;
2. online sales;
3. upfront access payments (slotting allowances);
4. category management; and
5. resale price maintenance.

Market share threshold for buyer

Ahold notes that the Commission proposes to include a provision in the BER to the effect that the benefits of the block exemption are only available if the market share of the buyer on the relevant market does not exceed 30%. The draft Guidelines clarify that the buyer's share on the downstream market will be relevant in this respect.

Supermarkets purchase multiple products from multiple suppliers. They enter into purchase agreements for their total product portfolio and are active on national and international purchasing markets. Normally their market shares on the purchasing markets are limited.

Supermarkets use the products bought to sell them from their retail stores on downstream markets. On these markets they compete with their full product portfolio on a retail market for daily consumer goods carried by retail outlets such as supermarkets, hypermarkets and discount stores. Competition authorities generally adopt the view that these markets have a local or regional geographic scope. On these local or regional markets the market share of the supermarkets often exceeds 30%. This is the result of economies of scale and does not indicate that supermarkets have market power. In fact, there is fierce competition between supermarkets in the areas where Ahold operates.

There is therefore no ground for withholding the benefits of the BER. Moreover, since supermarkets generally do not compete with individual products but with their full product portfolio, there is no reason to believe that restrictions in vertical agreements between supermarkets and their suppliers, which are currently covered by the BER, are even capable of affecting competition between supermarkets to any appreciable extent.

The Commission does not specify why it nevertheless proposes this important change to the BER. This change would result in supermarkets having to establish their local and regional market shares on a case-by-case basis. This should be repeated on a regular basis because these market shares vary from time to time (e.g. a market share may suddenly increase if a local competitor closes its shop). If the outcome of these time consuming and costly exercises is that on one particular market the market share exceeds the 30% threshold, the BER would no longer be available. Since supermarkets do not purchase their products per store, the practical effect would be that the relevant buyer loses the benefit of the BER for all its purchases. Such a result creates a lot of legal uncertainty and is therefore highly undesirable.

By introducing this new market share threshold the Commission would take away a lot of the benefits in terms of efficiency and legal certainty achieved by the introduction of the BER in 1999. Ahold therefore has strong objections to the introduction of the proposed new market share threshold.

Restrictions on online sales

The draft Guidelines contain expanded wording on restrictions on online sales. Ahold supports the Commission in its efforts to promote the use of internet for selling goods. Restrictions on the use of the internet to sell goods or services are generally not justified and cause harm to consumers.

However, in the context of franchise agreements the franchisor as holder of the intellectual property rights pertaining to the franchise concept has to impose certain restrictions on online sales in order to avoid confusion. For instance, a franchisor may grant a license to its franchisees to use its brand name to operate a physical outlet in a certain area and at the same time reserve the right to use this name to operate its own web shop. If franchisees have to be permitted in general to use the same name to operate their own web shops under the same brand name, confusion amongst customers and serious harm to the reputation and distinctive character of the brand would be imminent. It is the object of the intellectual property right that the franchisor has the right to avoid this by imposing appropriate restrictions on its franchisees. Although the current draft of the Guidelines does not preclude this, Ahold would welcome a clarification of this issue in the Guidelines.

Upfront access payments (slotting allowances)

Ahold is surprised by the fact that the draft Guidelines on vertical restraints contain detailed texts on *upfront access payments*. In the context of price negotiations numerous discounts, bonuses, fees, remunerations, allowances and the like occur. They form an integral part of the normal price negotiations between retailers and suppliers in which purchasers seek to obtain their products for the best possible prices and try to get a reward for their efforts to promote and sell their suppliers products. Ahold would not qualify these arrangements as payments "to get access". Moreover, it stresses that the instruments which are being used in practice, are in general not problematic and, unless there is clear evidence that they pose competition problems, the Commission should not suggest otherwise. From a legal perspective Ahold wishes to add that, since the arrangements to which the Commission refers constitute a normal instrument in pricing negotiations between suppliers and supermarkets, it is not correct to analyse access payments under the rules pertaining to anticompetitive agreements. If they pose competition problems, it is appropriate to analyse them under the rules for unilateral conduct (i.e. Article 82 EC).

Category management

Ahold also fails to see why category management deserves special attention in the Guidelines. Category management agreements are a proven method to optimise the return on shelf space and allow the category manager to optimise supply and demand. Ahold is not aware of any instances where category management agreements have been found restrictive of competition. In the absence of any clear evidence that category management agreements are in practice often problematic from a competition perspective, the Commission should in Ahold's view refrain from suggesting that they are by inserting specific wording addressing this issue in the Guidelines.

Resale price maintenance

Ahold takes the position that resale price maintenance is normally undesirable. As a matter of principle Ahold feels that it is the retailer's responsibility to set its own prices without any interference from its suppliers. It is difficult to conceive of examples where resale price maintenance is in the interest of consumers.

Ahold notes that the approach towards resale price maintenance in the draft Guidelines is somewhat more lenient than before. The Commission no longer excludes that resale price maintenance may be exempted under Article 81(3) EC in certain exceptional circumstances.

Ahold agrees that there can be situations where resale price maintenance helps manufacturers to introduce new products. It is questionable though whether there is any market failure which necessitates a deviation from normal market principles in these instances and whether resale price maintenance therefore benefits consumers.

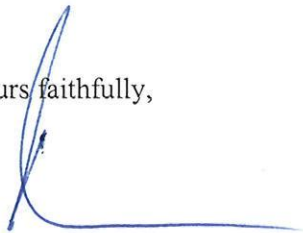
Ahold does not agree that resale price maintenance ever satisfies the conditions of Article 81(3) EC, where it is used to prevent large retailers from using a particular brand as a loss leader. The Commission's assumption that these practices will in the long run lead to a delisting of products and a reduction of inter-brand competition is not substantiated and – in Ahold's view – definitely wrong. The products which may be used as a loss leader – Ahold does not have the impression that this occurs on a large scale - have to be popular amongst consumers. Therefore, other retailers cannot afford themselves to delist these products. Their normal reaction is either to also give discounts on the relevant products or to use other popular brands to attract customers.

Discounting certain products, sometimes even to prices below cost, is part of the normal competitive process between supermarkets on the market for daily consumer goods and often results in fierce competition between retailers. It does not come as a surprise that suppliers dislike this practice. Fierce competition between retailers obviously also increases the pressure on their suppliers, which affects their margins. Consumers benefit from this situation.

Suppliers have tried to put pressure on Ahold not to use certain products in their competitive pressure. In the Netherlands this even resulted in a situation where an important supplier of Albert Heijn discontinued supplying an important product to Ahold because Ahold was unwilling to commit to a minimum resale price for this product. This was clearly an attempt to reduce competition between supermarkets, who were at the time engaged in a price war. In court proceedings a civil court judge ruled that the supplier's action was legally justified and not contrary to competition law, which prompted a fierce response from the Dutch Competition Authority (NMa). In a public statement published on its website, the NMa made crystal clear that resale price maintenance remains prohibited under Dutch competition law.

Ahold is of the opinion that the Commission should do the same. In any event, it should not pay lip service to the suppliers' lobby by suggesting that they may try to avoid their products becoming part of the competitive product by imposing resale prices. Therefore, Ahold strongly urges the Commission not to include a reference to loss leadership as potential justification for resale price maintenance in the Commission's Guidelines.

Yours faithfully,

A handwritten signature in blue ink, consisting of a large, stylized initial 'P' followed by a horizontal line extending to the right.

Peter N. Wakkie