Athens, September 28th 2009
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SEV's Comments on Commission's public consultation on competition rules in distribution sector

1. INTRODUCTION

1.1 SEV, the Hellenic Federation of Enterprises ("**SEV**") welcomes the opportunity to comment on the Commission's proposed revisions to the current Block Exemption Regulation on vertical restraints,[1] which is due to expire in May 2010, and the current Guidelines on Vertical Restraints.[2] The following comments are based on the draft Block Exemption Regulation (the "**Draft VBER**") and draft Guidelines on vertical agreements (the "**Draft Guidelines**") which are available on the Commission's website.[3]

1.2 SEV is the foremost employers' organization in Greece, aiming to facilitate competitiveness and boost economic growth at national and at EU level both by leading entrepreneurship in Greece and by promoting business ethics. SEV represents its members interests both at national and at EC level (including as a member of BUSINESSEUROPE), facilitating a two-way dialogue between its members and political institutions.

1.3 The comments provided hereby reflect the views of the representatives of SEV's members and do not necessarily reflect the position of any particular member of SEV.

1.4 Distribution agreements are critical to the effective functioning of the market therefore a clear analytical framework and detailed guidance for the analysis of these agreements are of paramount importance; particularly in the context of a regime that requires companies to "self-assess" the extent to which their agreements are competition law compliant. Clear guidance at European level also provides a welcome steer for the competition and regulatory authorities of Member States, creating a level playing field for all enterprises across the EC.

1.5 In this regard, whilst agreeing with the Commission's view that the current regime has worked well in practice, SEV broadly welcomes the additional guidance and clarifications provided in the Draft Guidelines and the

[1] Commission Regulation (EC) No. 2790/99 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, 1999 O.J. (L 336) 21.
[2] Guidelines on Vertical Restraints [2000] OJ C 291/1 (the "**Vertical Guidelines**")
[3] At http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.

Commission's efforts to update the key principles to reflect evolving regulatory and business practice.

1.6 For present purposes, our comments focus on three key areas of the Draft VBER and Draft Guidelines, namely:-

1.6.1 the introduction of a "buyer" market share threshold for application of the block exemption regulation;

1.6.2 restrictions of online sales; and

1.6.3 agency agreements.

1.7 Detailed comments on each of these issues are set out under the relevant headings below. **In summary,** however, we would note the following:-

1.7.1 Whilst we acknowledge the importance of taking into consideration buyer power in the assessment of vertical restraints, in our view the introduction of a "buyer" market share threshold has the potential radically to reduce the number of agreements capable of benefiting from the block exemption. An important knock-on effect is likely to be a significant increase in the regulatory burden on companies. In our view, **the Commission should consider carefully whether there is evidence that so radical a change will give rise to material benefits to competition.**

1.7.2 The online marketplace has evolved significantly since the introduction of the current vertical guidelines. As such, and whilst we warmly welcome the additional clarifications on issues relevant to online sales provided by the Draft Guidelines, **further guidance** (and, in particular, illustrative examples) **on several issues would be very welcome.**

1.7.3 A clear, commercially realistic and unambiguous definition of agency agreements is particularly important, given that the provisions of such agreements are to a material extent outside the scope of Article 81. In our view, **the Commission should give careful consideration to the practical impact of the very narrow definition adopted in the Draft Guidelines and the extent to which such an approach is supported by economic and legal theory and case law**.

1.8 Notwithstanding these comments on certain specific issues, SEV wishes more generally to emphasise its support for the Commission's approach to vertical agreements in the Draft Guidelines. In particular, whilst SEV acknowledges that it is important to ensure that provisions in vertical agreements are not employed to the detriment of consumers or market integration, it welcomes the explicit acknowledgment that "*vertical restraints*

are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies".[4]

1.9 The reference to "efficiencies" is a welcome reminder that the Commission will adopt an "economic" approach to the assessment of vertical restrictions which is in line with the Commission's general move towards an economic, effects-based approach in all areas of its competition policy (for example in its recent guidance on unilateral conduct). In this context, SEV welcomes the Commission's acknowledgment that even "hardcore" restrictions may be capable of exemption under Article 81(3).[5] This focus on the practical effects of an agreement strikes a helpful balance between an overly restrictive "per se" approach and the even more permissive attitude to vertical restraints adopted in other jurisdictions.[6] Moreover, SEV welcomes the safe harbour and legal certainty created by the Block Exemption Regulation and supports its renewal for the future. A Block Exemption Regulation is a useful tool for companies as it is applicable automatically throughout the EU, and thus creates a level playing field and certainty for companies with regard to their operations across the EU.[7]

2. THE "BUYER" MARKET SHARE THRESHOLD

2.1 Article 3 of the Draft VBER introduces a new provision, according to which any vertical agreement will be deprived of the benefit of the block exemption where the buyer's share exceeds 30% (previously, the buyer's share was relevant only in the context of exclusive supply obligations). For these purposes, the Commission proposes that the relevant share be calculated by reference to the buyer's share of the market(s) on which it resells the contract goods or services, or any products produced with the help of the contract goods or services.[8] Under the current regime, the buyer's share is calculated by reference to the market on which it purchases the goods or services in question and then only in exclusive supply situations.[9]

2.2 SEV agrees that, whilst their influence should not be overstated, power buyers can in certain circumstances have an important impact on competition and that they may use their power to foreclose rivals' access to important sources of supply, for example by imposing exclusivity obligations on their suppliers. We would further note that imposition of restrictions by suppliers

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[4] Draft Guidelines, paragraph 6
[5] Draft Guidelines, paragraph 47
[6] For example, recent U.S. case law (*Leegin Creative Leather Prods v PSKS, Inc*, 551 US 877 (2007)) indicates that minimum resale price maintenance should not be presumed to be anticompetitive.
[7] See, in this regard, Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Article 3(2)
[8] Draft Guidelines, paragraph 23
[9] Vertical Guidelines, paragraph 21

on the most important distributors in a particular territory can have an important impact on rival suppliers' route to market.[10]

2.3 Nevertheless, in our view, the introduction of a blanket 30% market share threshold applicable to buyers should be considered carefully, in particular as it could substantially reduce the number of agreements that qualify for exemption in practice. Whilst it is clear that inapplicability of the block exemption does not automatically imply that an agreement breaches Article 81(1), the requirement to conduct a more detailed antitrust analysis in such cases imposes a significant burden on the companies involved, in particular on small and medium-sized entities.

2.4 We would note, in this regard, that in some Member States there may be relatively few suitable distributors for any given product. As such, those that exist will almost always have a share exceeding the 30% threshold, leaving any distribution agreement incapable of benefiting from the block exemption. This could make it more difficult for a supplier to operate an EU-wide distribution system, as most arrangements will fall outside the block exemption somewhere in the EU.

2.5 This is compounded by the fact that downstream markets are often defined more narrowly (in either their product or geographic scope) than their upstream equivalents, with the result that distributors that represent a relatively small proportion of overall purchases on the input market might have a share of 30% or more on one or more of the downstream markets on which the product is ultimately sold.

2.6 More generally, we would note that market definition is frequently a difficult and controversial topic and can require the parties to conduct substantial legal and economic analysis. For many smaller and medium-sized firms, this can be an onerous burden, one which is potentially doubled by the inclusion of a "buyer" market share threshold. For suppliers the burden of assessing each of its buyers' relevant market shares – particularly when complex distribution arrangements involving many different products are concerned – is likely to be particularly significant.

2.7 Overall, in our view, the Commission should consider carefully whether there is sufficient evidence that the current lack of an explicit "buyer" market share threshold has allowed a large number of potentially harmful agreements to benefit from the block exemption before proceeding to introduce such a potentially far-reaching change to the regime.

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[10] In practice, however, significant distributors are unlikely to be willing to accept restrictions that would unduly restrict their sources of supply. As such, potentially harmful agreements of this type would almost inevitably be excluded from the benefit of the block exemption by virtue of the supplier's share.

3. ONLINE SALES

3.1 Mirroring the approach of the current regime, the Draft Guidelines emphasise the importance of maintaining open and unencumbered access to the internet as a route to market. SEV broadly agrees with this approach, which reflects the importance of internet sales in achieving greater integration of the European market more generally. The internet can be a useful tool for companies based in smaller Member States, such as Greece, to reach consumers across the EU and thus benefit from the internal market. SEV, however, agrees that in certain situations restrictions on internet sales may be justified, *e.g.* in order to protect brand image or to safeguard efficiencies.

3.2 In particular, the Draft Guidelines make clear that, in the context of exclusive distribution arrangements maintenance of a website will normally be considered as "passive", rather than "active" selling. As such, restrictions on a distributor's ability to sell online outside its allocated territory will generally be considered "hardcore" restrictions, liable to lead not only to disapplication of the block exemption, but also to a presumption that the agreement breaches Article 81.[11]

3.3 The Commission has, however, acknowledged that certain online activities can be considered "active" selling and, as such can legitimately be restricted. Given the important practical implications of the classification of activities as "active" or "passive" selling, further practical guidance on how these activities will be defined would be very welcome.

3.4 For example, it would be useful for the Commission to define more clearly (perhaps by reference to examples) in what circumstances e-mail marketing will be considered to be "*unsolicited*" (and therefore to constitute "active" selling). For example, are e-mails sent to customers who have expressed an interest in receiving information on "related products and services" to be considered "unsolicited" for these purposes?

3.5 Similarly, the Draft Guidelines do not make clear whether (or in what circumstances) publishing prices on a website in a currency other than that used in a distributor's allocated territory might be considered "active" selling (for example, could a Greek distributor operate a website that offered items in British pounds?). Nor do they clarify in what circumstances language options might be relevant,[12] when a website would be considered to be "*targeted*" at specific customers or an online advertisement be considered "*specifically addressed to certain customers*".[13] As drafted, each of these concepts is

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[11] Draft Guidelines, paragraph 47

[12] Paragraph 52 of the Draft Guidelines merely notes that "*The language options used on the website or in the communication play normally no role*"

[13] Paragraph 53 of the Draft Guidelines states simply that "*a website is not considered a form of active selling to certain customers unless it is specifically targeted at these customers*" and that "*the*

3.6 The Draft Guidelines also include certain specific provisions that are relevant to selective distribution systems (*i.e.* those where the number of distributors is limited not by the number of territories but according to selection criteria linked to the nature of the product) are in place. Again, SEV submits that further clarification of several of these points would be extremely helpful.

3.7 For example, the Draft Guidelines make clear that obligations imposed on appointed dealers' online sales that are not "*equivalent*" (in the sense that they "*pursue the same objectives and achieve comparable results*") to those imposed on offline sales will be considered "hardcore" restrictions.[14] Whilst the examples set out in footnote 31 are useful, it would be helpful to receive further clarification on the types of obligation that might be considered "*equivalent*" given the very different sales channels concerned.

3.8 In addition, whilst the Commission appears to accept that a supplier operating a selective distribution system can require its distributors to operate a bricks-and-mortar outlet before engaging in online distribution, it is not entitled to impose any further restrictions on the customers to whom that distributor may make online sales. This appears to lead to a situation in which a distributor could open an outlet in one Member State (*e.g.* France) and make unrestricted online sales throughout the Community, actively targeting customers in other jurisdictions. If this is the Commission's intention, we would note that there may, in some cases, be genuine arguments in favour of permitting suppliers to impose territorial restrictions on internet distribution in the context of a selective distribution network to avoid any risk that unrestricted internet sales usurp the rationale for instituting selective distribution in the first place.

3.9 The online marketplace is one which has developed rapidly and, as such, only limited guiding principles can be drawn from judicial pronouncements to date. In these circumstances, it is particularly important for the Commission to take this opportunity to provide clear and unambiguous guidance on the key issues. Any areas of doubt not only give rise to material uncertainty for companies but also raise the risk that national authorities and courts will adopt differing interpretations of these issues, creating an uneven playing field throughout the EC and, potentially, inhibiting market integration.

4. AGENCY AGREEMENTS

Commission considers online advertisement specifically addressed to certain customers a form of active selling to these customers".

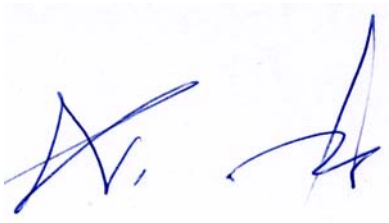
[14] Draft Guidelines, paragraph 57

4.1 Agency agreements are commercially important to many SEV members. Their antitrust analysis is particularly important as various provisions of genuine agency agreements are excluded from the scope of Article 81(1). As such, all efforts to provide greater legal certainty as to the proper definition of an agency agreement are welcome. Nevertheless, SEV is concerned that the approach adopted in the Draft Guidelines is unduly restrictive and, accordingly, exposes a large number of legitimate arrangements to increased antitrust risk.

4.2 In particular, we note that paragraph 16 of the Draft Guidelines specifies certain activities that are indicative that a particular arrangement is not a genuine agency agreement. For example, the fifth bullet suggests a "direct or indirect" obligation to invest in sales promotion militates against the classification of an agreement as a genuine agency arrangement. In our view, however, it is to the benefit of every agent to invest in this type of activity. As such, defining this type of investment as a characteristic of a non-genuine agency agreement seems a step too far.

4.3 Similarly, the seventh bullet point specifies that inclusion of an obligation to operate after-sales services or warranty services will mean that an arrangement is not considered a genuine agency agreement. We would note, however, that the Court of First Instance appeared to accept that such obligations could be consistent with a genuine agency agreement in its judgment in *DaimlerChrysler v Commission*.[15]

4.4 We would urge the Commission to consider carefully the potential practical impact of expanding the already broad category of non-genuine agency agreements, mindful of the risk of discouraging the legitimate use of commercial agents as an efficient way to bring products to market.



Dionissis Nikolaou
Director General

[15] Judgment dated 15 September 2005 in Case T-325/01 *DaimlerChrysler v Commission*, [2005] ECR II-3319 paragraphs 110-111