

Response to the Consultation of the European Commission on the "Review of the competition rules applicable to vertical agreements"

I. General

The Swatch Group Ltd, with main offices at Seevorstadt 6, 2501 Biel, Switzerland, welcomes the possibility to provide its view on the Draft of the Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ("the Regulation") and the Draft Guidelines on Vertical Restraints ("the Guidelines").

With affiliates in 13 member states of the EU distributing 19 watch brands, as well as jewelry, in all major European markets, 196 corporate retail stores and approximately 30'000 selected retail partners in Europe, The Swatch Group Ltd and its brands would like to emphasize the importance of the Regulation and Guidelines for the selective distribution of its products throughout Europe. To maintain this selective distribution system for the benefit of European consumers it is essential that the Regulation and the Guidelines be renewed and improved.

The Swatch Group Ltd has limited its comments to the new or revised parts of the Regulation and the Guidelines which will affect its activities.

II. Market share threshold

The introduction of a market share threshold for each of the parties to a vertical agreement in Article 3 of the draft Regulation, and consequently the extension of the market share threshold to buyers, will be almost impossible to implement in practice, as it would require that the buyers (i) have a good understanding of their market share and (ii) are willing to disclose this market share to their suppliers. Both is hardly ever the case, since retailers will not have knowledge of, or invest to establish, their market share and retail organizations or big retail chains will never provide such information to their suppliers. Furthermore, in most cases no reliable market figures and data exist. In practice this makes it extremely difficult for a buyer to define its market and calculate its market share. Existing information, figures and data are mostly fractional and not differentiated, so that they cannot be used without additional studies and expensive market research being conducted by external specialists. This new market share threshold will therefore impose an additional burden on suppliers to monitor their buyers, which in our opinion is not justified, since, if done thoroughly and continuously, it will increase the costs of the suppliers and therefore contradicts the interests of the consumer.

III. Internet Sales

The Swatch Group Ltd welcomes that the draft Guidelines have kept several important factors when providing guidance on the sale of products through the internet. Most important the possibility to require the retailers of a selective distribution system to operate a "brick and mortar" store before they engage in selling products online. As outlined in the response to the consultation on "The Opportunities in Online Goods and Services", this criterion allows limiting the "free riding" problem and is absolutely in the interest of the consumer. The Swatch Group Ltd can only reiterate that it is of utmost importance for the selective distribution and sale of watches and jewelry products that this criterion remains in item (54) of the Guidelines.

Similarly, it is important to extend the possibility to restrict active sales into other distributor's exclusive territories, as well as outside of the European Union, to the sales through the internet. The Swatch Group Ltd furthermore supports the view that item (51) of the Guidelines should not limit the restriction of active sales to territories which have been reserved for an exclusive distributor or which the supplier has reserved for itself. Especially in new European markets which are currently being developed by a few non-exclusive distributors the restriction of active sales into such territories would provide such non-exclusive distributors the possibility to receive a better return on their initial investments. This would not only make the development of such markets more attractive, but also benefit the consumers of such European market.

The Swatch Group Ltd welcomes the clarification that online advertisement specifically addressed to certain customers is considered a form of active selling to these customers in item (53) of the draft Guidelines. We would appreciate if this clarification would also extend to the shipment terms offered, since in practice a lot of online retailers explicitly offer delivery of products into other distributor's exclusive territories. This practice in fact is nothing else than an offer addressed specifically to customers in such territory to buy products from such online retailer. It would be contra productive, if the mere fact how such shipment offer is presented, e.g. in a very prominent way or in a rather subdued context, would be decisive in determining whether such offer is to be considered as "active" selling.

In this context the statement that the language options used on the website or in the communication play no role in item (52) seems incoherent and should be revised in our opinion. In every communication, and especially in advertising, addressed to specific consumer groups language plays a vital role. Several national courts of the member states have held what is an important principle in marketing and communication: that a website presented in the language of a member state is primarily addressed at consumers of this member state. Therefore, the language should be taken into consideration when determining if an online retailer is actively selling into a territory reserved to an exclusive distributor. If a German website features a text in polish stating that shipments are now also offered into Poland, it is evident that the language used is a determining factor which needs to be taken into consideration. We would therefore suggest clarifying in item (52) that the fact that a website offers a translation of its content into various EU languages

does not constitute an active sale per se. In item (54) it should be clarified that the language used in such advertisements and communications should be taken into consideration.

Last but not least, we welcome that the possibility to require quality standards for the use of an Internet site to resell goods has been maintained. The benefits of selective distribution systems for consumers are undisputed. It is therefore fundamental that the selective distribution can also be extended to online sales. Only through selective criteria applicable to online sales the brands of The Swatch Group Ltd can ensure that the image, message and environment created over years with high investments, not only in marketing, but mainly also in product innovation and technology, as well as customer service, be similarly conveyed through the online presence of retailers.

IV. Enforcement Policy in individual cases

The description of the positive effects of vertical restraints in the item (103) (1) of the draft Guidelines falls too short in our opinion and should be revised, especially in view of the new guidelines regarding internet sales, discussed above.

Experience shows, that the "free-rider" problem does in fact also exist in the after-sales service sector and is not limited to the pre-sales services and other promotional activities as the Guidelines suggest.

Typically high end, technically complex products which have been bought online are brought to retailers or distributors for after-sales services, such as change of straps and bracelets, checking of the rate of a mechanical watch, demagnetization, overhaul services, complex repairs, as well as all types of guarantee repairs. For guarantee repairs the retailer or distributor cannot charge its customers at all. The customers which have bought the product online rely on the training, expertise and know-how of the retailers and distributors regarding these products. This training, expertise and know-how is acquired by sending sales staff or customer service personnel regularly to trainings provided by the manufacturers of the respective products, investing in after-sales equipment and adequate facilities to provide such services. Therefore, specifically in the context of internet sales the problem of "free riding" is also common in the after-sales services sector. The restriction of the "free riding problem" in the Guidelines to pre-sales services and other promotional activities should therefore be updated to include after-sales services.

V. Conclusion

In summary, The Swatch Group Ltd welcomes the fact that important key factors have remained in the draft of the Regulation and the Guidelines.

The introduction of new market thresholds for the other parties of an agreement, in particular the buyer, seems an unnecessary burden with no benefit to the consumers and should be excluded.

The revision of the Guidelines with regard to internet sales have upheld important factors, which are necessary to ensure that a selective distribution system can also be introduced in an online environment. The Swatch Group Ltd wishes to reiterate the importance of keeping the requirement of a "brick and mortar" store for retailers wishing to sell products online and the possibility to restrict active sales also in the online environment outside the European Union and into other distributors' exclusive territories.

The suggestions made would facilitate the implementation of the Guidelines and the Regulation in our field of activities, and their consideration by the Commission would be highly appreciated.