



**" DRAFT COMMISSION REGULATION (EC)
ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY
TO CATEGORIES OF VERTICAL AGREEMENTS
AND CONCERTED PRACTICES" / " DRAFT COMMISSION
NOTICE - GUIDELINES ON VERTICAL RESTRAINTS"
- CONSULTATION -

- UGAL COMMENTS -**

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EXECUTIVE SUMMARY

→ For UGAL an expression more suggestive of business activities, such as, and preferably, "group" of undertakings should be used within Article 2(2) (comment 2.4).

→ UGAL considers that Article 2(2) of the BER – Block Exemption Regulation – and its Guidelines should include services in the range of business activities which might be pursued by the members of a group, and benefit from the block exemption in the same way as retail sale of goods (comment 3.9).

→ UGAL argues that the Guidelines should be modified, so that the scope of the Regulation should not be limited in a discriminatory way vis-à-vis groups of undertakings.

To achieve that, it would suffice to refer in Article 2(2) of BER to "*groups of trade, craft or liberal professions and undertakings*" (comment 4.4).

→ UGAL calls for the elimination from the Regulation of **the maximum turnover limit of EUR 50 million** which, being specific to groups, is discriminatory in comparison with other forms of vertical agreements applicable to organised independent commerce, which are exempt from it (comment 5.13).

Should the Commission not follow it, UGAL calls, as a minimum requirement, for the maximum turnover threshold to be revised upwards, and that the Guidelines in point (29) should contain additional explanations. Possible suggestions are :

1) "*Where only a limited number of the members of the association have a turnover not significantly exceeding the EUR X million threshold, this will normally not affect assessment under Article 81. The requirement of "limited number" is met when one or more members of a group exceed(s) the turnover threshold of X million EUR but at the same time its / their share do(es) not exceed 15% of the total turnover of the group.*"

2) "*Where only a limited number of the members of the association have a turnover not significantly exceeding the EUR X million threshold, this will normally not change assessment under Article 81. The "limited number" requirement is met when some members of the association have a turnover exceeding the EUR X million threshold but the average of total turnover of this association is below EUR X million.*"

3) "*In case of exceeding the EUR X million threshold, the BER will no longer apply to these retailers*" (comment 5.14)

→ For the sake of legal clarity and certainty, the general principle that all vertical agreements likely to involve some horizontal aspects should be subject to a dual control should therefore be enshrined in Article 2(1) and no longer be placed only after agreements between groups of undertakings and their members (comment 6.3).

Any analysis in the Regulation or the Guidelines which recommends that the scrutiny of activities of groups of undertakings / retailers should be carried out, first of all (see point 30) and a priori, from the horizontal viewpoint with regard to purchases, no longer appears to tally with the real situation (comment 6.9).

→ UGAL opposes the introduction of a **market share threshold** on the buyer side and calls for the deletion of this provision (comment 7.2).

→ If the provision for the **second market share threshold** is not deleted, UGAL calls for clarification of the provisions along the following lines (comment 7.11) :

- the relevant geographic market should be defined in national terms (in contrast to regional and local market assessments, national market shares provide sufficient conclusive evidence of market position) ;
- the relevant product market should be defined in relation to the products concerned (i.e. no 'contamination' of entire product ranges by one product with a market share of 30 per cent) ;
- in the case of retail undertakings with several distribution formats, one should take into account only the actual parties to the agreement and only those geographic and product markets affected by this agreement (i.e. no 'contamination' of distribution formats that are not concerned).

Furthermore a period of transition of minimum 18 months is necessary to allow the companies the time to assess their agreements according to the changes introduced.

→ UGAL is therefore of the opinion that point (25) of the Guidelines requires fundamental review in deleting the disposals relative to **tacit acquiescence** (comment 8.7).

→ UGAL is of the opinion that the Guidelines should stipulate that there is no condition relating to a minimal number of parties to the agreement which do not apply the maximum price so that it can be qualified as such.

UGAL therefore asks for more explanation in the matter to explain this to the NCA and to harmonise the application of competition rules in this field throughout the EU (comment 9.3).

→ UGAL fully agrees and keenly welcomes new provisions in the Guidelines in point (221) on **short-term low price campaign with fixed prices** and calls for them to be kept (comment 9.12.).

→ To ensure the legal certainty and harmonised application of the competition rules across Europe, UGAL proposes the following wording, for Article 4(a) :

"the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties, or to fix resale prices necessary to organise in a franchise or similar distribution system a coordinated short-term low price campaign"
(comment 9.15).

However, to make the text comprehensible, logical and well-structured, UGAL further proposes to mention this aspect within point (47) of the Guidelines (comment 9.14).

→ The UGAL members advocate introduction of provisions on the possibility of fixing resale prices for entry-level price assortment under point (103) of the Guidelines, as an example of positive effects of the vertical restraints.

Failing that, UGAL suggests raising this possibility in point (221), or after point (225), as a further example, the efficiency gains whereof could be assessed by reference to Article 81(3) (comment 9.19).

→ UGAL calls for the wording of the Guidelines to be supplemented by the addition of a clarification, which the Commission itself proposes in point (221) :

Point (45) : *"The following IPR-related obligations are generally considered to be necessary to protect the franchisor's or similar distribution system's intellectual property rights and are, if these obligations fall under Article 81(1), also covered by the Block Exemption Regulation".*

Point (144) : *"The transfer of substantial know-how (efficiency 5 in paragraph 103) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising or similar distribution system."*

Point (186) §2 : *"a non-compete obligation relating to the goods and services purchased by the franchisee, or members of a similar distribution system, falls outside Article 81(1) when the obligation is necessary to maintain the common identity and reputation of the network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 81(1), as long as it does not exceed the duration of the agreement itself."* (comment 10.5)

→ UGAL calls for a clear explanation and understanding of the approach relative to the "non-compete obligation" in the Commission Guidance document, more particularly as the Commission no longer considers all **purchasing obligations** limited to 5 years as acceptable – see point (62) (comment 10.6)

→ In UGAL's opinion, it is wrong to demand that a loan made by a group acting as supplier may be granted only if least restrictive as possible. Terms comparable to those usually applicable on the market must be possible, whatever the nature of the financial institution or business operator making the loan !

It would in any case be necessary to state in point (103)§ 8 that always where supplier (central office of a group) accords its member a credit arrangement, it should be possible to impose the latter purchasing obligation for the credit duration in order to protect the group from any risk related to this financial engagement (comment 11.4).

→ UGAL believes that the distinction between active and passive sales may also prove to be useful in the Internet context, although here technology blurs the boundaries between the two types of sales. The Guidelines could perhaps elaborate on the criteria used to distinguish between active and passive sales. In particular the

borderline between "general advertisement" and advertisement that is "specifically addressed" should be clarified (comment 12.2).

→ UGAL therefore urges the Commission explicitly to allow the head of distribution systems (central office of a group of undertakings or franchisor), if and when necessary, to protect their know-how, image and uniformity of the network, even through the possibility of imposing restraints on their members for use on the Internet the concept or own brand products of these networks, including active prevention of active sales (comment 12.5).

→ UGAL wants the Guidelines to provide additional clarification in point (52) about the term "requiring" in order to differentiate clearly between practices relying on an agreement between parties and those relying on a unilateral decision by an undertaking (point 12.8).

→ For UGAL upfront access payments should not be considered a vertical agreement restraining competition. On the contrary, Article 82 of the EC Treaty provides an appropriate legal framework to regulate the abuse of buyer power and to impose the necessary sanctions (comment 13.2).

By the same token UGAL calls for the deletion of points (205) to (209) from the Guidelines for the reason that it is possible to consider that category management agreements do not relate to the supply of goods or services in the meaning of the BER (comment 13.3).

→ In the considered opinion of UGAL, it would be more than desirable that the Commission provides the necessary clarifications as to the independency of the undertakings in the term of Article 81(1) of the Treaty to avoid any such discrepancy in the interpretation of competition law (comment 14.4).

I – GENERAL REMARKS

- a. As the Commission rightly points out, the BER and Guidelines have proven their worth. Although there is no requirement for fundamental change, certain areas might yet be improved and clarified.
- b. In this sense UGAL welcomes the Commission approach for revision which consists in developing the Guidelines with more examples without significantly changing the Regulation. This approach, obviously favourable to operators, gives more legal certainty for operators' activities.
- c. Furthermore, UGAL is pleased to note that point (3) of the Guidelines calls attention to the possibility of adapting to needs so as to take account of developments and the background science. This would allow a homogeneous interpretation of the national competition authorities – NCA, with their task of application and, on the other hand, an interpretation harmonised with the will of the Community authorities in the matter.
- d. Nevertheless, neither the BER itself nor the Guidelines are easily readable for businesses. This is particularly true of the provisions of the Guidelines relative to the short term low-price campaign. Indeed this topic is ruled down in section 2.10 "Resale price restrictions" which mainly deals with the negative effects of the RPM instead of being treated in point (102) as an example of positive effects of vertical restraints.
- e. Furthermore it appears clearly that the Commission Guidelines are focused on the producer-distributor relationships rather than wholesaler-retailer and other "downstream" relationships. The implied assumption from the Guidelines is that the same treatment should apply at whatever level of the supply chain the vertical agreement takes place. The UGAL position paper consequently seeks to present economic arguments to suggest that the effects of vertical restraints and, thus, their treatment in law, should depend on proximity of relationship. In point of fact, it is the closeness of the relationship that often determines the level of benefits from the vertical agreements. The key point of the UGAL position paper is therefore how vertical agreements amongst groups of independent retailers may be not necessarily desirable just on account of economic viability when competing against integrated retail chains obtaining the same benefits through formal the simple fact of integration (i.e. under common ownership).
- f. Finally, sad but true, certain analyses would seem to corroborate some concerns arising rather more from Article 82 than from Article 81.

g. Having said that, UGAL would like to emphasise that among all points presented below in the section II, 5 aspects are of particular importance (1) for its member organisations constituting their high priorities, namely :

- Introduction of **second market share threshold for retail level**
- **Maximum total turnover of EUR 50 million** for members of group of undertakings
- **Tacit acquiescence**
- **RPM** within and outside the scope of Regulation
- **Non-competition obligation** in the term of purchasing obligation

(1) For further economic analyses and explanations, see Report by Professor Paul Dobson and CRA International : "*Levelling the playing field – Competition policy to enable independent retailer groups to be efficient and competitive*", November 2006 available on the UGAL website www.ugal.eu

II – SPECIFIC COMMENTS

1) ARTICLE 2(1) - DEFINITION OF VERTICAL AGREEMENTS

1.1. UGAL would recommend that the Commission clarifies the core concept of "vertical agreement". The current criterion of undertakings acting for the purposes of the agreement at different levels of the production or distribution chain is not always easy to implement in practice. It is not always clear if the companies are in a vertical or a horizontal relationship.

1.2. This ambiguity is also reflected both in the structure of Article 2(2) and in point (30) of the Guidelines.

2) ARTICLE 2(2) – DESIGNATION : ASSOCIATION OF UNDERTAKINGS

2.1. Article 2(2) applies to agreements entered into between an "association of undertakings". UGAL is of the opinion that the Commission should propose an expression that is more linked to business activities. In UGAL's view the most appropriate term is "group" of undertakings.

2.2. It should be borne in mind that the Treaty, in its Article 81(1), covers "*associations of undertakings*" in general, whose decisions are incompatible with the common market. In the Commission's current Guidelines proposal, it mentions in many places a "special" form of association of undertakings whose behaviour contributes in particular to improve distribution. By using the term "franchise" for this, the Commission seeks to personalise this type of association which benefits from the BER. In point (221), the Commission considers that distribution systems similar to franchise can also benefit from one of its analyses. These similar distribution systems undeniably include "groups" of retailers, or groups of retail undertakings, which the Commission refers to, incorrectly in UGAL's opinion, as associations of retailers. This expression is too close to the general expression "associations of undertakings" and does not allow, as for franchises, to personalise a type of efficient organisational structure which safeguards particularly effectively its members' independence.

2.3. The term "group" is moreover used, for example, in France, in Article L.124-15 of the Commercial Code. This Article sets out the forms of legal entity that "groups of retail traders" must adopt under French law in order to be validly constituted. It is true that it is not a specific form of legal entity, but this concept of group is more

"differentiating" and representative than that of association. The latter is totally ambiguous because, in many countries, it has the connotation of a non-profit-making organisation whereas – in this case – what is being referred to is economic and commercial organisations.

2.4. → An expression more suggestive of business activities, such as, and preferably, "group" of undertakings should be used for UGAL.

3) ARTICLE 2(2) - RETAILERS OF GOODS

3.1. Article 2(2) applies if all the members concerned are "retailers of goods". In several countries, there are also very active groups of hoteliers or travel agencies or driving schools. Services should therefore also be included in the range of activities that can be provided by members of a group.

3.2. UGAL notes that in point (2), the Guidelines are careful to point out that *"the analysis applies to both goods and services, although certain vertical restraints are mainly used in the distribution of goods. Similarly, vertical agreements can be concluded for intermediate and final goods and services. Unless otherwise stated, the analysis and arguments in the text apply to all types of goods and services and to all levels of trade."*

Likewise, point (25) 4th indent states that *"this reflects the purpose of the Block Exemption Regulation to cover purchase and distribution agreements"*.

3.3. However, Article 2(2) BER and point (29) of the Guidelines are careful to stipulate that services are excluded, but only for groups of retailers. Thus, such a discriminatory restriction vis-à-vis the latter is not explained. No justification is mentioned explicitly or given otherwise to be understood. One wonders, justifiably, as to the reason for this exclusion, imposed only on groups, because such exclusion is not provided nor stipulated for the franchise system or other forms of organised independent commerce (selective distribution, exclusive distribution, etc.).

3.4. The activities and practices of members of groups produce no greater negative effects in terms of competition than the franchise system. It is true that these two systems are not based on exactly the same organisational structure as regards the ownership of the head of the system. However, similarities in terms of effect on the market are so obvious that the Commission itself speaks of *a franchise system or similar distribution system* (point (221)). The Commission itself stated during its reform of Article 81 of the Treaty that *it is felt that an economic, effects-based approach rather than a clause-based approach would be more suitable for dealing with a dynamic sector such as distribution* (2).

(2) *Communication from the Commission on the application of the Community competition rules to vertical restraints*, OJ, C 365 of 26.11.1998, page 5

3.5. Furthermore, it should be borne in mind that services are covered in the case of franchises, due to the assignment of intellectual property rights IPR (point (31) onward). However, it is absolutely undeniable that groups are also able to offer identical services (assistance, development, communication, product range, training, etc.) and to disseminate comparable know-how within their networks, in accordance with point (185). There is therefore every reason to grant a group comparable scope to that granted to franchises, since they produce the same positive effects on the market and there we find the same use of vertical agreements to benefit consumers.

3.6. Should the Commission have in a concrete case a suspect of horizontal character within the group of services, the Guidelines already make provisions for the procedure that should be followed. According to these the Commission has to undertake a prior examination with regard to the horizontal Guidelines whether its suspicion was founded.

As a consequence, since the "sanction" of a dual control (horizontal, then vertical) is already hanging over the heads of groups why then add any other criterion which constitutes a "dual sanction" by prohibiting only groups that sell services that benefit from the exemption ?

3.7. In the first instance, if the EUR 50 million threshold were to be considered as too high a figure for services, there would always be the possibility of setting a maximum specific turnover figure.

Secondly, the Commission already applies a maximum market share threshold – at supplier level – of 30%, which prevents the possible association of services from having any important position on the market. UGAL is of the opinion that these restrictions are sufficient to protect the market from anti-competitive effects.

3.8. Finally, in the context of the calculation of the ceiling of EUR 50 million turnover for each member of a group, which is a condition to be met in order for the agreement to benefit from the block exemption, the turnover to be taken into account is the "*total annual turnover*" of a member "*together with its connected undertakings*" (Article 2(2)). Turnover relating to services may and must already be taken into consideration via the concept of "connected undertakings". Moreover, Article 9 stipulates that "*the turnover achieved by the relevant party (...) to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services (...) shall be added together*".

The current situation therefore conceals a totally intolerable contradiction, since it requires that members of a group should engage only in retail sale of "goods", while accepting that their connected undertakings should provide services, for which the turnover must be included to examine whether the EUR 50 million ceiling has been exceeded.

3.9. → In closing, UGAL considers that the Community Regulation and its Guidelines should include services in the range of business activities which might be pursued by the members of a group, and benefit from the block exemption in the same way as retail sale of goods.

4) ARTICLE 2(2) - NATURE OF UNDERTAKINGS : ASSOCIATION OF RETAILERS

(29) GUIDELINES - RETAILERS SELLING GOODS... TO THE *FINAL CONSUMER*

4.1. Article 2(2) applies only to agreements entered into a group "if all its members are *retailers*".

There is no apparent reason why the future BER should be limited only to groups of "*retailers*". As a consequence, according to UGAL, the Regulation should also benefit different economic activities.

4.2. The Guidelines state in point (29) that "*retailers are distributors reselling goods to final consumers*".

It seems that here too, there is a clear discrepancy between the aim of the Guidelines in point (2) to be as broad as possible in order to cover all businesses, and the fact of providing in point (29) that groups can only have as members retailers reselling to the final consumer.

4.3. It seems that in the law of certain countries, there is no precise definition of retail trade. A merchant is therefore considered to be a retailer if he or she derives the majority of his or her turnover from the final consumers.

UGAL is also aware of situations where direct or indirect member groups have as members merchants who sell partly not only to final consumers but also to the trade, such as craft businesses. This is particularly the case in the do-it-yourself sector or builders' suppliers (construction materials).

Under these circumstances, it might also usefully be borne in mind that the majority of their turnover is generated from final consumers. This point is clearly in need of clarification. Indeed, with regard to a text providing for exemption conditions, one could consider that, in the absence of provisions, its interpretation will be restrictive. In that case, NCAs could consider that the sentence in point (29) "*retailers are distributors reselling goods to final consumers*" means that 100% of turnover must be derived from final consumers.

In the case of such an interpretation, which is far too restrictive in the opinion of UGAL, a large number of groups will be deprived of the benefit of the BER and therefore the associated legal certainty, for the simple reason that they have members who are professionals, even if they account for a small fraction of their turnover.

→ Proposed drafting

4.4. → UGAL argues that the Guidelines should be modified, taking account of the above-mentioned remarks, so that the scope of the Regulation should not be reduced in such a restrictive way in relation to groups of undertakings.

To achieve that, it would suffice to refer in **Article 2(2)** of the BER to "***groups of trade, craft or liberal professions and undertakings***".

5) ARTICLE 2(2) - MAXIMUM TURNOVER FOR RETAILER (29) GUIDELINES - ADAPTATION OF MAXIMUM TURNOVER

5.1. According to the Draft Regulation, Article 2(2) applies only to agreements entered into a group "*if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million*".

5.2. The UGAL member organisations do not see the need and logical reason for maintaining this provision. As a market share of maximum 30% is the main criterion to assess whether a given vertical agreement falls within the scope of the BER, there is neither rhyme nor reason for maintaining a limit for a maximum turnover for each member of a group.

5.3. UGAL therefore takes the view that this supplementary condition, exclusively applicable to groups of retailers **should be eliminated** on the grounds that, not being applied to other forms of organised independent commerce (point (186)), there is nothing that justifies such an additional condition applicable only to groups of retailers.

5.4. An argument that might be advanced to back up this specific threshold relies on spurious considerations about the potential negative effects that the use of vertical agreements could pose to set up horizontal practices. The dual control that UGAL proposes to make more apparent by introduction in Article 2(1) would settle this problem once and for all (see comments under paragraph 6).

5.5. A further argument that could be raised, incorrectly, is that, admittedly, the Commission seems to fear that the deletion of turnover threshold could lead the large firms, for instance the integrated chains, to join together in order to organise their common purchasing and marketing.

Nevertheless this argument absolutely misses the mark since it is still necessary to prove beforehand that these large enterprises represent vertical structure (i.e., are active at two different trade levels).

Secondly, even if a genuine vertical structure were to be created, in view of their current economic power, the 30% market share threshold would be reached automatically. There are therefore no objective reasons for wishing to combat this unlikely type of cooperation by placing an arbitrary turnover limit on retailers in a group ! Such concerns appear to relate much more to abuse of dominant position under Article 82.

5.6. Should the Commission in any case not accept the deletion of the threshold of EUR 50 million, the maximum amount of this turnover **should absolutely be reassessed** (adjusted upwards) taking account of what was proposed ten years ago and a comparable period should be taken into account for the revision of Regulation (EC) 2790/1999.

The data relative to the turnover of retailers of the UGAL member organisations clearly shows the increasingly frequent emergence of members exceeding this threshold. The economic evolution and inflation of the next 10 years will increase this phenomenon.

5.7. However, these undertakings are often leaders in terms of marketing and of update commercial brand concepts. On the other hand, their importance for purchasing realised by the central office of a group and thereby their importance for the "bargaining" power of the latter is decisive. For example, in one national group just 0,34% of all its retailers have a turnover over EUR 50 million, but they represent 8,6% of the total group turnover. In another example, given by an international group, only 0,25% of all its retailers have a turnover over EUR 50 million, but they represent 10% of the total group turnover. These figures show that a group cannot be successfully perpetuated without the existence – and without the maintenance – of such leaders within the group. Those figures also show the dramatic consequences of this inflexible threshold, as all smaller retailers are punished by the non-application of the BER because of a small number of members which are significant as regards the competitiveness of the whole group.

5.8. Furthermore, a maximum turnover does not encourage small undertakings to be more competitive or even stronger. Consequently, if any individual retailer member exceeds the threshold, the entire agreement of the association loses the benefit of the block exemption. This low threshold thus poses an obvious problem to UGAL in that it now excludes, and will continue to exclude, an increasing number of groups from the benefit of the block exemption. This threshold could in fact lead to a "success prevention threshold", in particular as regards the SMEs. If they become more competitive and stronger, either they cannot continue to be covered by Article 2(2) of the Regulation, or they will exclude all other members of the group from the protection that the Regulation otherwise offers.

This is surely not appropriate and does not fulfil the purpose of the Regulation that aims at including group of undertakings which are not in position to compete individually on the market, in its scope.

5.9. In addition, the sentence in point (29) which states "*Where only a limited number of the members of the association have a turnover not significantly exceeding the EUR 50 million threshold, this will normally not change the assessment under Article 81*" does not appear adequate to provide undertakings with the legal certainty that they need. A more precise explanation of the terms used here is absolutely necessary.

5.10. A possible example to be provided in the Guidelines in terms of explanation could be a situation where one or several members of a group of undertakings exceed the threshold, but their turnover do not exceed a certain proportion of the annual turnover of the entire group (e.g. 20%).

An alternative could be also the option that the average turnover obtained by all members should not exceed the new turnover threshold adopted.

Finally, it could be clarified that groups do not have to lose the benefit of the block exemption automatically once a number of their members, whose expansion is desirable and wanted, exceed the EUR 50 million threshold.

5.11. In order to provide greater transparency, it should be clearly stated that the explanation in point (29) of the Guidelines relative to "*not significantly exceeding the*

EUR 50 million threshold by a limited number of members" is an additional clarification – on top of Article 9(2) of the Regulation.

5.12. → UGAL calls for the elimination from the Regulation of this maximum turnover limit which, being specific to groups, is discriminatory in comparison with other forms of vertical agreement applicable to organised independent commerce, which are exempt from it.

5.13. → As a minimum requirement, UGAL calls for the maximum turnover threshold to be revised upwards, and that the Guidelines in point (29) should contain additional explanations. Possible suggestions are :

1) *"Where only a limited number of the members of the association have a turnover not significantly exceeding the EUR X million threshold, this will normally not affect assessment under Article 81. The requirement of "limited number" is met when one or more members of a group exceed(s) the turnover threshold of X million EUR but at the same time its/their share do(es) not exceed 15% of the total turnover of the group."*

2) *"Where only a limited number of the members of the association have a turnover not significantly exceeding the EUR X million threshold, this will normally not change assessment under Article 81. The "limited number" requirement is met when some members of the association have a turnover exceeding the EUR X million threshold but the average of total turnover of this association is below EUR X million."*

3) *"In case of exceeding by the members of group the EUR X million threshold, the BER will no longer apply to these retailers."*

6) ARTICLE 2(2) - DUAL CONTROL (30) GUIDELINES - GROUPS OF RETAILERS AS MIXED AGREEMENTS / DUAL CONTROL

6.1. Article 2(2) states that vertical agreements entered into by associations of retailers, shall be covered by BER *"without prejudice to the application of Article 81 to horizontal agreements concluded between the members of the association or decisions adopted by the association"*.

6.2. For UGAL, all vertical agreements likely to involve some horizontal aspects should be subject to a dual control and have to be also examined in this case from the perspective of Article 81(1) of the EC Treaty on horizontal agreements.

6.3. → For the sake of legal clarity and certainty, this general principle should therefore be enshrined in Article 2(1) and no longer be placed only after agreements between groups of undertakings and their members.

6.4. The placing of this general clause at the head of Article 2 will also avoid that the groups of independent retailers are always assessed as containing the mixed structure (vertical and horizontal agreements), which in practice is not the case.

6.5. UGAL believes that the Commission must take account of the evolution of most groups from a simple purchasing function – often the very reason for their creation – towards what is nowadays, in most cases, sales and services groups.

In this context, using their own assessment of developments, needs and opportunities on the market, the groups were able to develop, on an essentially vertical basis, concepts for brand names covering purchasing, marketing, sales and services which are offered to their members and to each new member wishing join the group.

6.6. UGAL wishes to stress more particularly that, in a group, the autonomy of the strategic management – exercised by the centre on the system it has created – does not disappear because the individual members of the group have legal status in this central office ; no more than a franchise disappears because of the participation of the franchised companies in the franchising undertaking. In both cases, no individual member can attack and change the uniform marketing system devised, proposed and defended by the management from the centre.

What is important here is the fact that the core of the group does in fact exercise its own steering management and behaves in a different manner – and at a different level of activities – from its members, autonomously.

6.7. In the view of UGAL and in most cases, it is very clear from the current practice of groups that the horizontal link is now ancillary if has not completely disappeared. Today the vertical link is indisputably omnipresent within groups, inasmuch as even for the purchases, relations between groups and member undertakings are clearly established at two different economic levels : the wholesale and the retail trade.

6.8. The result thus achieved is a factor in the improvement of competition rather than a restriction, as it permits the maintaining of a number of business operators and a variety of organisations. It is the reverse situation that would result in the risk of the creation of a monopoly favouring a single operator, or promote agreements between a small and limited group of operators, which would be detrimental to consumers and flout the objective of the Treaty.

6.9. In other words, point (30) of the document reveals an error in the Commission's analysis based on considerations that take account of the legal structures of groups more than their effects on the market. This is a step backwards from the Commission move towards the effect-based approach as developed in the *Communication on the application of the Community competition rules to vertical restraints* (see footnote 2).

6.10. → Bearing in mind the positive effects of this evolution, any analysis in the Regulation or the Guidelines which recommends that the scrutiny of activities of groups of undertakings / retailers should be carried out, first of all (see point (30)) and *a priori*, from the horizontal viewpoint with regard to purchases, no longer appears to tally with the real situation.

7) ARTICLE 3 - INTRODUCTION OF A SECOND MARKET SHARE THRESHOLD

(23) GUIDELINES - MARKET SHARE FOR THE APPLICATION OF THE BLOCK EXEMPTION REGULATION

7.1. Under the new provision proposed in Article 3, exemptions provided in the text shall apply on condition that the market share held by each of the undertaking parties to the agreement does not exceed 30% on any of the relevant markets affected by the agreement. Judging by the draft Guidelines it is to be feared that in practice, many retailers will no longer benefit from the application of the Regulation.

7.2. → UGAL opposes the introduction of a market share threshold on the buyer side and calls for the deletion of this strong restriction, which on its side is not justified by the Commission.

7.3. This new provision restricts companies' ability to rely on the Regulation's safe harbour and is an unwelcome development. Should the Commission introduce this new requirement to prevent certain retailers from exercising a pressure on their suppliers, the 30% market share threshold would be a completely inadequate tool to deal with the anticompetitive effects of demand-driven vertical restraints.

7.4. First, more recent economic analysis has demonstrated that anticompetitive effects cannot be excluded even in cases where the market share of the buyer is well below the levels at which supply-driven vertical restraints begin to raise concerns under the current Regulation (for example, dealers with relatively low market shares may still gain considerable leverage from their ability to substitute other brands).

7.5. Moreover, while buyers' (retailers') more powerful market positions can sometimes produce anticompetitive effects, EU law can approach this in other ways. For example, the Commission (or an NCA) could withdraw the benefit of the block exemption (this possibility was noted in Recital 13 of Regulation (EC) 2790/1999 but has been deleted in the draft).

In addition, if the buyer power is due to buying alliances, the Commission and NCAs can analyse these as horizontal agreements under Article 81. These would be more proportionate responses to potential buyer power.

7.6. The Commission for its part did not provide the consultation document with any case law in which the buyer's market position has caused significant problems in the context of applying the existing block exemption.

7.7. Secondly, this new restriction also gives rise to practical problems and the increase of existing legal uncertainty. All the more so since the current provisions do not specify how to assess market share in the sales market when, with different brands chains within a group, there is also, by definition, a different product mix sold on different terms. In point of fact, if the calculation of market share upstream is already difficult and subject to discussion, the calculation of market share in the sales market is even more complex and well nigh indefinable. It is also unclear whether – in retail undertakings with several different brands chains – the exceeding of the market share threshold by one channel would have any negative effect on the other chains by extension. Would the application of the Regulation be unjustifiably refused for the entire undertaking to the detriment of all its members ?

In a small regional market – for instance if a retailer is able to assure supplies in a structurally weak area with few competitors, the above-mentioned threshold would act to his disadvantage.

7.8. Wholesalers could also have particular problems because they generally act both as suppliers and as buyers. The definition of relevant markets (supplier and buyer market) is not used consistently in the Guidelines (see points (83) and (85)) and therefore provides no legal certainty.

In the food retail trade the relevant market in the EU member states is defined in geographic terms, both locally and regionally, whilst at purchasing level, the market is generally defined on a national scale. This means that the relevant market share of the supplier at national level will often remain well below 30%, whilst the buyer market at regional or local level will rise above this share. Especially, as far as the food retail trade is concerned, the introduction of a market share threshold on the buyer side is not appropriate, because in this sector the market definition is related to the product range. However, a buyer's market share is made up of a great number of products, so that the importance of the individual product and hence the agreed vertical restraint becomes relative.

UGAL wonders whether it might not be possible to remove this restrictive clause if the buyer's market share exceeded the threshold in only one of several relevant geographic markets. Another option would be that of applying the restrictive clause only in the relevant geographic market where the buyer's market share exceeds the market share threshold.

7.9. Considering the interpretation of Article 3 of the former Regulation thus far, the market share threshold should be applied separately to each relevant product market and each relevant geographic market. This would necessitate the conclusion of separate distribution agreements. However, in practice a supplier is unable to predict, when concluding a contract, the geographic market in which the product will be sold. Suppliers may find it difficult to map distributors' market shares with certainty. If, for example, the buyer is a retailer operating on numerous local markets, then it will be very difficult for the supplier to assess the retailer's market position in any comprehensive manner.

7.10. Finally, a further complication could arise if a supplier is also active downstream yet needs information on the distributor's market share ; exchanging such information could be anticompetitive. Besides the reduced legal certainty,

buyers may also be reluctant to share this type of information with their "suppliers" if that attracts the risk of potential antitrust liability.

Should the Commission maintain its approach, in spite of the foregoing facts, UGAL would request a minimum transition period of 18 months to allow the companies the time necessary to assess their agreements according to the changes introduced.

7.11. → If the provision for the second market share threshold is not deleted, UGAL calls for clarification of the provisions along the following lines :

- the relevant geographic market should be defined in national terms (in contrast to regional and local market assessments, national market shares provide sufficient conclusive evidence of market position) ;
- the relevant product market should be defined in relation to the products concerned (i.e. no 'contamination' of entire product ranges by one product with a market share of 30 per cent) ;
- in the case of retail undertakings with several distribution formats, one should take into account only the actual parties to the agreement and only those geographic and product markets affected by this agreement (i.e. no 'contamination' of distribution formats that are not concerned.

Furthermore a period of transition of minimum 18 months is necessary to allow the companies the time to assess their agreements according to the changes introduced.

8) (25) GUIDELINES - DEFINITION ON VERTICAL AGREEMENTS : "TACIT ACQUIESCENCE"

8.1. In point (25), the Guidelines introduce a new notion of "tacit acquiescence". Regarding this "controversy" DG COMP indicated that here, it has only taken up the case-law that has been developed in the absence of further clarification of the relevant text.

The concept of agreements as interpreted by this case-law focuses on the existence of a consensus of wills between at least two parties, and the form in which this manifests itself is irrelevant provided that it constitutes a faithful expression of those wills (3). A distinction should therefore be made between the hypothesis of an undertaking adopting a genuinely unilateral measure and therefore without the express or tacit involvement of another undertaking and the hypothesis where the unilateral character is all that is apparent. The former are not covered by Article 81(1) but may come under Article 82 (4). In the latter, it may be deemed that there is a consensus of wills. In that case, it is incumbent on the Commission or the NCAs to establish sufficiently in law whether or not consensus of will does in fact exist (5).

8.2. One has to question the relevance of such reasoning to cover a whole series of economic situations that are far more complex than the parallel imports that gave rise to the case law.

(3) Court of First Instance / Case T-41/96 point 69

(4) Court of First Instance / Case T-41/96 point 71

(5) Court of First Instance / Case T-41/96 point 77

UGAL considers that the enlargement of the notion of "*tacit acquiescence*", as developed in very specific situations, to a general rule covering all circumstances on the market is disproportionate and indeed unacceptable. There may in fact be situations in which the other party in a position of economic dependence has no alternative but to acquiesce to this coercion. In such cases (e.g. of must have product) the actions of buyers are not voluntary, but accepted under coercion. The fact that, in certain circumstances, the buyer is forced to accept the demands of a supplier is not suitable for establishing knowing, willing signature of an agreement, or to establish sufficiently in law the existence of a consensus of wills as required by the case law.

For UGAL, this blurs the borders between different problem areas : (i) concerted practices and (ii) unauthorised coercion or discriminatory practices in a dogmatically unacceptable way. But the one has nothing to do with the other.

8.3. Nevertheless, the current wording of point (25) of the Guidelines has the effect that the retailers, as victims of being economically-dependent customers or dependent customers for example for a must-have product, will infringe competition law.

UGAL considers that the existence of a vertical agreement between supplier and buyer presupposes that each party has entered into it freely and knowingly. The proposal for the Guidelines completely ignores cases where the supplier could exert commercial pressure on buyers concerning the application of vertical agreements. In these cases, the actions of buyers are not voluntary, but accepted under coercion. The fact that, in certain circumstances, the buyer is forced to accept the demands of a supplier is not suitable for establishing knowing, willing signature of an agreement, or to establish sufficiently in law the existence of a consensus of wills as required by the case law. There are cases where another party has no alternative other than to acquiesce to the coercion exerted.

8.4. Should the supplier of a must-have product pressurise a retailer to push through conditions that run counter to competition law, this would have the following legal consequences :

- In practice the supplier's unilateral anti-competitive conduct, which would have to be judged and sanctioned under Article 82 of the EC Treaty, would become a bilateral vertical agreement. This means that the victim, in this case the retailer, also "violates" competition law as an economically dependent buyer of the must-have-product.
- Experience shows that some competition authorities do not differentiate clearly enough between perpetrator and victim in a bilateral agreement and therefore also sanction the victim (6). Even though competition authorities argue that retailers should notify the authority about their supplier's conduct and the authority would then provide a remedy, this is neither feasible nor enforceable. In practice there is frequently not enough necessary evidence for such a remedy to work. There is also the danger of irreparable damage being caused to an already strained business relationship.

(6) Example : a dominant supplier imposes restrictions on parallel imports of a retailer. The retailer is not permitted and has no means to violate these restrictions, because he will otherwise no longer receive any supplies. The competition authority imposes a fine on both the supplier and the retailer.

8.5. For UGAL, there is no justification why such divergent issues as concerted practices and unjustified exertion of coercion or discriminatory practices should be mixed up under Article 81(1).

Unilateral practices should therefore not fall within the scope of Article 81 of the EC Treaty. It is solely the undertaking that is trying to enforce anticompetitive practices unilaterally that is at fault, acting wrongly and causing economic damage. If such practices were covered by Article 81 of the EC Treaty, this would grossly contradict the values of Article 82 of the EC Treaty.

8.6. This approach is neither coherent with some national legislations on wrongful repudiation of a commercial relationship which protect an undertaking that, due to its position of weakness, is liable to suffer the consequences of an undertaking in a position of relative dominance. How to explain the fact that the same operator will be punished by the Community provisions for not being strong enough to oppose himself to the unilateral behaviour of the supplier ?

8.7. → UGAL is therefore of the opinion that point (25) of the Guidelines should be reviewed in deleting the disposals relative to tacit acquiescence.

9) ARTICLE 4(a) - PRICES (223) (221) GUIDELINE

MAXIMUM PRICES

9.1. Article 4(a) makes provision for the possibility of "*imposing a maximum sale price or recommend sale price, provided that they do not amount to a fixed or minimum sale price*".

On its side, UGAL was informed about the tendency among NCAs requiring the proof that a certain number of retailers members of a group sells at prices lower than the fixed maximum price (7). This way of implementing the Regulation does not seem to be in line with the intention of the European Commission. According to the former, it is enough to prove that the central office does not prevent retailers from selling at lower prices than the indicated price.

9.2. This is why UGAL welcomes the further clarifications given, particularly of point (223) of the Guidelines, which should enable the proper harmonisation of the competition rules throughout the European Union as regards cases above the market share threshold imposed by the Regulation. Indeed, the Guidelines state that the important aspect of investigation on the risk of negative effects of recommended and maximum prices is the fact whether there is a monitoring mechanism and a possibility of retaliation in case a distributor deviates from the focal price.

(7) For example, see the approach of the French NCA in this regard : [Décision 06-D-04](#) of the "Conseil de la Concurrence" and related [arrêt du 26 juin 2007 de la cour d'appel de Paris](#), the [arrêt du 27 juillet 2007 de la cour d'appel de Paris](#), the [arrêt du 10 juillet 2008 de la Cour de cassation](#), and the [Décision 05-D-66](#) of the "Conseil de la Concurrence". We also refer to an [article](#) from Ms Isabelle Tricot-Chamard entitled "Prix conseillés : une nouvelle source de risque dans la distribution" in CEREBEM - Centre de REcherche de Bordeaux Ecole de Management, No. 101-06, September 2006

UGAL is of the opinion that the Guidelines should stipulate that there is no condition relating to a minimal number of parties to the agreement which do not apply the maximum price so that it can be qualified as such.

9.3. → UGAL therefore asks for more explanation in the matter to explain this to the NCA and to harmonise the application of competition rules in this field throughout the EU.

LEGAL CERTAINTY FOR AGREEMENTS OUTSIDE THE SCOPE OF THE REGULATION

9.4. UGAL welcomes the Commission's effort to provide some explanation in the Guidelines for the enterprises which exceed the 30% threshold or withdrawal of the BER. It is recorded fact that these undertakings are now confronted with a serious legal uncertainty as to the approach favoured by the Commission or by the NCA when assessing the case will never be clear.

9.5. However, UGAL is rather more concerned with how the provisions, as laid down in points (223) and (224), will work in practice. For example, as far as UGAL is concerned, the Guidelines should be more precise as regards the providing of proofs. In the case of maximum prices with market shares greater than 30%, will the NCAs have to prove that it is contrary to Article 81(1) and that it is no longer covered by the BER before undertakings are asked to prove the applicability of point (225) as provided for in Article 81(3) ?

RPM : SHORT TERM LOW-PRICE CAMPAIGN

9.6. Under the Commission's proposals, resale price maintenance (RPM) would remain a hardcore restriction in the draft Regulation. The draft Guidelines explain that including RPM in an agreement gives rise to a twofold presumption that (a) the agreement infringes Article 81(1) and (b) the agreement is unlikely to fulfil the criteria for exemption under Article 81(3). UGAL approves and supports this analysis.

9.7. UGAL, however, further approves the Guidelines' statement that RPM may sometimes lead to effective measures that can be taken into account under Article 81(3). One such situation might be a short-term low price campaign whereby fixed prices may be necessary.

9.8. This step forward is a recognition of an argument advocated for a long time by the UGAL members in order to compete on the European market (8). Particularly in the retailing of consumer goods (e.g., entertainment electronic sector) independent small and medium-sized retailers compete with large companies operating chains of stores. The success of these multiple chain retailers is due to a large extent to their national advertising of aggressive prices, which capture the consumer's attention. In

(8) See footnote 1

order to withstand the competition from these large integrated firms, cooperating retailers must use the same marketing strategies. That means that, if they operate under a common brand name, they have to find ways, also through appropriate advertising messages, to make consumers understand that – besides their familiar yet professional advice and service provision – they also offer their goods for sale at attractive prices.

9.9. This will succeed only if retailers operating under a common group name in joint advertising campaigns sell the products advertised at the same price during the campaign period. For the consumer, it is usually impossible to tell whether a branch system or an independent retailer is behind these groups. The *corporate image* that a group tries to establish through advertising is destroyed immediately if the consumer assumes that the advertising message is wrong, because a certain number of outlets in the same group are selling – or have to sell – the same goods at a different price from that of the best offer from the advertisement.

9.10. The upshot for the groups who do not use these marketing measures with an imposed sale price could be a further loss of market share. This would mostly lead small businesses to cease trading. The market strength of integrated chains will continue to grow, and they will weaken interbrand competition. In other words, the benefit for the consumer of a fixed price being imposed lies in :

- better protection of the common identity and of the reputation of the network keeping small and medium-sized firms competitive ;
- enabling consumers to be certain that they can shop in their region and at local shops ;
- maintenance of service-driven firms that provide advice ;
- maintenance of a long-term diversity of goods characterised by competition, at low price levels set by competition.

9.11. → This is why UGAL fully agrees and keenly welcomes new provisions in this regard in the Guidelines in point (221) and calls for them to be kept.

9.12. Nevertheless, while UGAL welcomes this recognition of RPM's potential efficiencies, the question remains as to how sympathetic an attitude the Commission, NCAs and the Court of Justice might adopt towards such efficiencies given that agreements containing RPM will still be hardcore restraints under the Regulation.

It is to be hoped that the above-mentioned bodies will not require an unattainable body of evidence before accepting that the presumption of RPM illegality has been rebutted. This is why UGAL would have preferred to see the exceptions reflected in the Regulation.

9.13. → To ensure the legal certainty and harmonised application of the competition rules across Europe, UGAL calls for the introduction of the possibility of fixed prices for short promotion campaigns within Article 4(a) of the Regulation. This provision should exist parallel to the explanations laid down in point (221) of the Guidelines which point out the benefits for consumers. However, to make the text

comprehensible, logical and well-structured, UGAL further proposes to mention this aspect within point (47) of the Guidelines.

9.14. → In view of the foregoing UGAL proposes the following wording, for **Article 4(a)** :

"the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties, or to fix resale prices necessary to organise in a franchise or similar distribution system a coordinated short-term low price campaign."

9.15. As an additional remark, UGAL would like to express its view that fixed prices should also be allowed as indispensable in horizontal agreements when they promote efficiencies in respect of joint purchasing (by improving the bargaining position of the group when producers are desiring retail promotions that expose their products widely to consumers) and joint commercialisation (by providing a consistent retail brand image), which cannot be achieved by maximum price obligations or other restraints alone, and when they relate to a limited number of short-term marketing campaigns where there is no prospect of this engendering collusion to raise prices amongst retail members or in retail markets more generally.

RPM : ENTRY- LEVEL PRICE ASSORTMENT

9.16. As explained, the groups of undertakings representing small and medium-sized enterprises have to face the aggressive price competition exercised by the big integrated chains. However, unlike their competitors, the latter cannot fight against this trend by fixing competitive prices which – of course – makes them significantly weaker but also prevents the consumer from benefiting from the same low prices in every sales outlet.

9.17. As the Commission rightly states in point (102), it is important to recognise that vertical restraints often have positive effects.

UGAL takes the view that one of the restraints which undoubtedly provides the consumer with benefits is entry-level price products. These products are sold at practically the lowest price on the market ; they represent a wide range of products highly attractive for consumers on a low income. However, to be competitive, and to advertise these products for a period beyond two to six weeks, members of systems similar to franchise distribution should have the possibility of continually fixing the prices. Even if this practice is clearly forbidden under Article 4(a) of the Regulation, it is clear that – In view of the positive effects of this RPM – it should be acceptable under Article 81(3) and, by extension, under (103) of the Guidelines as one of reasons justifying vertical restraints. All the more so since entry-level price products are almost always own-brand products, which are the property of the given group of undertakings.

9.18. → The UGAL members therefore advocate introduction of provisions on the possibility of fixing resale prices for entry-level price assortment under point (103) of the Guidelines, as an example of positive effects of the vertical restraints.

→ Failing that, UGAL suggests raising this possibility in point (221), or after point (225), as a further example, the efficiency gains whereof could be assessed by reference to Article 81(3).

10) ARTICLE 5(A) - NON-COMPETE OBLIGATION : PURCHASING OBLIGATIONS (62) AND (186) §2 GUIDELINES - EXCLUDED RESTRICTIONS UNDER THE BER

10.1. UGAL regrets the characterisation of non-compete obligations as excluded restrictions under Article 5 of the draft Regulation. In the absence of market power, non-compete obligations should be treated in the same way as all other obligations not falling within the scope of Article 4. More particularly, if both the supplier's and the buyer's market shares must be below 30%, it is difficult to see how a non-compete obligation can be more damaging to competition than any other common obligation in distribution agreements.

Treating non-competes in the same way as other obligations would also remove the need to make provision that the duration of such clauses does not exceed five years. Non-competes should be valid throughout the agreement's duration unless, exceptionally, a complainant can demonstrate significant anti-competitive effects.

10.2. As a general rule, Article 5 of Regulation (EC) 2790/1999 currently limits purchasing obligations for more than 80%, known as non-compete obligations, to a duration of 5 years. In fact, this limitation also applies to groups.

However, even if the Regulation does not provide detailed explanation on this point, the Guidelines reveal in points (144) and (186) §2 that franchised operators are not subject to such limitation, since the non-compete obligations for the franchise may exceed the 5-year period on the grounds that "*the transfer of substantial know-how usually justifies a non-compete obligation for the whole duration of a supply agreement, as for example in the context of franchising*".

UGAL states clearly once again that franchising is only one form of organised independent commerce among others and, for that reason, does not exercise a monopoly on transfer of substantial know-how.

10.3. UGAL therefore sees no reason for this discriminatory treatment of groups of undertakings (9). The initial goal of the limitation of purchasing obligation was the

(9) Even if it is agreed that this 5 years limitation is not a "hardcore" restriction, the simple fact of exceeding this period excludes only the application of the BER but does not in any case prejudice the purchasing obligations under Article 81(1). To this end the Commission or NCA have to demonstrate an infringement according to Article 81(1) of the EC Treaty. The enterprise then has the possibility to justify its agreement in the light of Article 81(3).

prevention of foreclosure of the market and was more addressed to the manufacturer-supplier relationship.

UGAL is of the opinion that in the context of the current vertical structures of almost all groups of undertakings, their transfers of know-how are completely in line with the considerations set out in point (103) § 5 of the Guidelines.

10.4. If, therefore, a group of retailers is transferring know-how / Intellectual Property Right – IPR – to its members, then the designation of its legal structure is quite beside the point. The provisions of the above-mentioned paragraph (144) and (186) §2 must be applicable. As a consequence, in this case, all provisions of the Regulation related to the transfer of IPR and know-how could cover products being subject of brand contract between a central office and its retailers from "*similar distribution system*" as franchising. The reason is clearly because, in a group of retailers, the transfer of know-how / IPR is also necessary to maintain the common identity and reputation of the network and, also, because the transfer of know-how contributes to enhancing the member's competitive position particularly in improving his results or in helping it to open up or penetrate new markets.

10.5. → UGAL calls for the wording of the Guidelines to be supplemented by the addition of a clarification, which the Commission itself proposes in point (221) :

Point (45) : *The following IPR-related obligations are generally considered to be necessary to protect the franchisor's or similar distribution system's intellectual property rights and are, if these obligations fall under Article 81(1), also covered by the Block Exemption Regulation".*

Point (144) : *"The transfer of substantial know-how (efficiency 5 in paragraph 103) usually justifies a non-compete obligation for the whole duration of the supply agreement, as for example in the context of franchising or similar distribution system."*

Point (186) §2 : *"a non-compete obligation relating to the goods and services purchased by the franchisee, or members of a similar distribution system, falls outside Article 81(1) when the obligation is necessary to maintain the common identity and reputation of the network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 81(1), as long as it does not exceed the duration of the agreement itself."*

10.6. → UGAL calls for a clear explanation and understanding of this approach in the Commission Guidance document, more particularly as the Commission no longer considers all purchasing obligations limited to 5 years as acceptable – see point (62).

11) (143) AND (103) § 8 GUIDELINES - LOANS TO UNDERTAKINGS

11.1. Point (143), states that "*The instance of capital market imperfection, whereby it is more efficient for a supplier of a product than a bank to make a loan, will be limited.*"

UGAL finds this claim suspect beyond words, at a time when the extravagances and difficulties of the banking world have led in most countries to a rise in the cost of bank lending, if not a point-blank refusal to lend to SMEs.

11.2. On the other hand, UGAL agrees about the fact that, according to point (103) §8 and in the context of capital market imperfection, "*the usual providers of capital (banks, equity markets) may provide capital sub-optimally when they have imperfect information about the quality of the borrower or there is an inadequate basis to secure the loan (in their opinion)*".

UGAL is of the opinion that the Commission rightly considers, in point (103) § 8, that "*Where the supply provides the loan to the buyer, this may lead to non-compete or quantity forcing on the buyer.*"

11.3. Indeed, due to the fact that the banks have opted out of lending, when groups – as suppliers – have stepped in to support the start-up or expansion of their members, they are taking what is for them an unaccustomed risk. Therefore, they need security in the form of applicability of a non-compete clause. Particularly against the backdrop of the credit crunch for small and medium-sized businesses, it should be borne in mind that this financing function can be developed only in exchange for strengthening retailer loyalty, in the event that the supplier has made a credit arrangement in favour of the client.

In this case an undertaking must likewise be made for the duration of the arrangement in order to cover the group risk or financial commitment.

In this case, the terms granted for a loan must also be at least identical to those demanded by the traditional lenders.

11.4. → In UGAL's opinion, it is wrong to demand that a loan made by a group acting as supplier may be granted only if least restrictive as possible. Terms comparable to those usually applicable on the market must be possible, whatever the nature of the financial institution or business operator making the loan ! It would in any case be necessary to state in point (103) § 8 that always where supplier (central office of a group) accords its member a credit arrangement, it should possible to impose the latter purchasing obligation for the credit duration in order to protect the group from any risk related to this financial engagement.

12) (52) GUIDELINES - E-COMMERCE

12.1. In order to increase competition, UGAL agrees that every distributor must be free to use the Internet to advertise or to sell products and, consequently, that a

limited and justified number of restrictions to this capacity could be imposed. That said, UGAL recognises some uncharted territory, uncertainty and vagueness in explanations given in the Guidelines, that are likely to lead to divergent analyses and interpretations by national authorities and undertakings :

12.2. → UGAL believes that the distinction between active and passive sales may also prove to be useful in the Internet context, although here technology blurs the boundaries between the two types of sales. The Guidelines could perhaps elaborate on the criteria used to distinguish between active and passive sales. In particular the borderline between "general advertisement" and advertisement that is "specifically addressed" should be clarified.

12.3. UGAL calls for reviewing of the draft Guidelines as regards some restriction aspects of passive and active Internet sales.

It seems that the Commission did not take into consideration all the possible vertical relations when ruling the issue of Internet sales. It clearly ensues from the deliberations included in the Guidelines that the reflections of the Commission strictly refer to the configuration industry/supplier - distributor. In practice, the vertical relationships likely to be linked to online sales are much larger and complex. The problem of online sale also appears within the franchise and similar distribution systems like groups of undertakings. Nevertheless it is important to stress that it is necessary to warrant that the business methods developed by the group are fully respected and that the image and reputation of the network are upheld. Very often the concept itself has been developed for shops and not for Internet website. There is no way in this case for these distribution systems to apply a concept that does not even exist.

12.4. In view of the foregoing, as far as groups of independent retailers are concerned, UGAL considers that the draft Regulation is, to say the least, rather nebulous when it comes to applying its provisions and relative Guidelines on active and/or passive selling on Internet to franchising similar contracts.

12.5. → UGAL therefore urges the Commission explicitly to allow the head of distribution systems (central office of a group of undertakings or franchisor), if and when necessary, to protect their know-how, image and uniformity of the network, even through the possibility of imposing restraints on their members for use on the Internet the concept or own brand products of these networks, including active prevention of active sales.

12.6. Furthermore, the new provisions as regards Internet sales are impossible to apply in practice for groups of independent retailers from a technical point of view.

Inter alia, point (52), introduces a new analysis which qualifies its restrictions characterised by passive sales on the Internet, e.g. :

- requiring that a buyer redirect customers directly to the site of the manufacturer or other buyers ;
- requiring that a buyer put an end to a sales transaction via the Internet when the data on the customer's credit card reveals that he/she is not established on its exclusive territory ;

- requiring that a distributor limit the proportion of overall sales made via the Internet.

12.7. UGAL does not share the Commission's analysis and cannot accept these new developments in the Guidelines. To illustrate its remarks, UGAL points out that in groups, retailers are free to decide whether to participate or not in certain sales activities. However, if the central organisation offers via the Internet a product that is only available from certain retailers, it must include the statement "*offer only valid for participating sales outlets*".

At present, if a customer living in a particular region wants to take advantage of an offer, he is automatically redirected to the nearest sales outlet in his region. If this sales outlet is not participating in the offer, it is logical that the customer cannot have access to it. Groups cannot force all independent retailers to participate in promotional campaigns !

Nevertheless, one avenue for reflection would be to specify that if the practice relies on a unilateral decision by the group and not on an agreement, the analysis is different, and the restriction is not characterised.

12.8. → UGAL wants the Guidelines to provide additional clarification in point (52) about the term "requiring" in order to differentiate clearly between practices relying on an agreement between parties and those relying on a unilateral decision by an undertaking.

13) ANALYSIS OF SPECIFIC VERTICAL RESTRAINTS (199) TO (204) GUIDELINES - UPFRONT ACCESS PAYMENTS (205) TO (209) GUIDELINES - CATEGORY MANAGEMENT AGREEMENT

13.1. UGAL totally opposes the idea that upfront access payments are generally likely to make market access more difficult and therefore calls for the deletion of points (199) to (204). Assessing the terms that a retailer negotiates with a supplier and determining which of those could be classed as "upfront access payments" should not be regarded as an issue of vertical restraints in the framework of Article 81 of the EC Treaty.

13.2. → For UGAL upfront access payments should not be considered a vertical agreement restraining competition. On the contrary, Article 82 of the EC Treaty provides an appropriate legal framework to regulate the abuse of buyer power and to impose the necessary sanctions.

13.3. → By the same token UGAL calls for the deletion of points (205) to (209) from the Guidelines for the reason that it is possible to consider that category management agreements do not relate to the supply of goods or services in the meaning of the BER

13.4. Since both points do not relate to any issue specific to groups alone, UGAL supports the positions expressed by EuroCommerce on these subjects.

III – MISCELLANEOUS

14) VERTICAL AGREEMENTS - BETWEEN "*INDEPENDENT*" UNDERTAKINGS

14.1. As pointed out in the proposals for the Guidelines, the only agreements subject to Article 81(1) are those between independent undertakings.

14.2. To assess independence, no useful purpose is served by limiting the considerations in asking the classic question "is the member free to determine all the elements of his own commercial strategy independently of the central organisation of his group ?" More to the point, it should be taken into account that the member may choose freely to join a brand that transfers know-how in exchange for commitment to abide by a commercial concept.

14.3. However, if we read the new draft Guidelines as worded by the French competition authorities, we notice that franchises or groups are considered as having to be examined from the viewpoint of control of concentrations on the grounds that vertical agreements – compatible with Article 81(1) – which ties members to groups are of such a nature as to limit their independence in a formal sense.

EXTRACT

c) Assessment criteria of a determinant influence

49. Distribution contracts may take various forms. Those most commonly subjected to scrutiny by the Authority, in the context of controls on concentrations, are franchise contracts or those for membership of a cooperative of independent retailers or car dealership contracts.

The Authority examines all the clauses enabling the "head of the network" to limit the autonomy of the "member", both in the running of his commercial policy (for example, via contractual mechanisms which transfer all or part of the member's commercial risk to the head of the network) as in the possibilities of changing network (for example, the fact that the "head of the network" holds a blocking minority stake, which enables it to prevent the member from changing groups) and determines whether they are sufficient to treat the "head of the network" as having a determinant influence over its "member's" undertaking.

14.4. → In the considered opinion of UGAL, it would be more than desirable that the Commission provide the necessary clarifications to avoid any such discrepancy in the interpretation of competition law.

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Established in 1963, **UGAL – the Union of groups of independent retailers of Europe** – is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.

These groups are set up like wholesale businesses by independent retailers and craftsmen. Their aim is not only to provide their members with the best purchasing conditions. What they are also seeking is to jointly contribute technical and material resources, together with all the services and the human capacity required to guarantee the operation and development of modern commercial and distribution enterprises for retailers to effectively respond to consumer expectations.

To achieve this, these groups seek economic performance through networks of points of sale – consisting of SMEs usually working under a common brand name.

UGAL represents more than 316.500 independent retailers, who manage more than 475.000 sales outlets. This represents a total employment of nearly 4.000.000 persons.

More information about UGAL under www.ugal.eu