BUSINESSEUROPE

POSITION PAPER

BUSINESSEUROPE
Representative Register
ID number: 3978240953-79

12 October 2009

REVIEW OF THE COMPETITION RULES APPLICABLE TO VERTICAL AGREEMENTS

INTRODUCTION

These comments are intended to outline the position of BUSINESSEUROPE regarding the Commission's initiative to review its policy towards vertical restraints.

Generally speaking, BUSINESSEUROPE believes that the current rules have been working well and welcomes the Commission's more economic approach in its assessment of vertical restraints. We appreciate the opportunity to exchange views with the Commission in this revision process and hope that close consultation and cooperation with the Commission on this important subject will continue to take place in the upcoming period.

Despite its general support for the Commission's initiative, we still have some reservations regarding several important elements of the proposed revised framework. Our suggestions for further development of specific points of the suggested Commission policy are set out below.

OUR COMMENTS

BUSINESSEUROPE believes that the current Block Exemption Regulation and the Guidelines have been functioning successfully. They provide benefits for consumers, manufacturers, suppliers and retailers and do not prevent market access to newcomers, ensuring competition in the market.

Since the entry into force of the current rules, there have been important developments in the markets, with the increase of online sales and the appearance of new economic factors that need to be integrated in the new rules. While we believe that the Commission has duly taken into account these factors in its revision process, we still have some comments in the following pages.

- Market share thresholds

On various occasions in the past BUSINESSEUROPE communicated its concerns regarding introduction of thresholds in a block exemption on vertical restraints. Its concerns relate primarily to the fact that markets are difficult to define with any precision, and to the certainty which the parties to vertical agreements require as to the enforceability of their contractual arrangements.

The Commission is now proposing the introduction of a symmetric threshold on the buyer's side, excluding from the application of the block exemption those agreements where a buyer has more than a 30% market share. We understand that with this proposal the Commission wants to reflect market developments that have taken place during the application of the current rules, with some buyers who can increasingly exercise a strong market power on suppliers, thereby risking to directly or indirectly distort competition. However, we believe the introduction of measures aimed at tackling similar problems could only be justified by the existence of difficulties in applying the existing rules. We therefore invite the Commission to better justify the concrete need for proposals in this regard.

BUSINESSEUROPE does not support the introduction of a new threshold. Whereas market dimensions - both as to relevant products as well as to territories - change continuously as a consequence of technological developments and economic integration, and market shares fluctuate accordingly, the introduction of a market share percentage above which the benefit of the block exemption would not be available is undesirable because it creates many additional complications and legal uncertainties.

The suggested new threshold would not provide a safe harbour for a sufficiently large number of contracts. In addition to creating legal uncertainty, the dual market share cap would substantially increase the complexity of the necessary analysis. For their proper functioning, and in line with the principles of better regulation, block exemptions should be as simple and straightforward as possible to apply

In this context, it has to be considered that obtaining the necessary information to evaluate the market quota of each distributor or retailer would be in practice very difficult for suppliers, particularly when the buyer is a retailer operating on numerous local markets or when the exchange of relevant information could be a potential anti-competitive conduct. Another aspect is that local or regional markets could not probably be the geographic markets to be taken into consideration, as in such a case almost no enterprise could benefit from the block exemption (since a large number of distributors in local markets may easily have market shares above 30%).

We do not consider market share caps as an appropriate instrument to reflect the risk of distortions of competition linked to the increasingly strong market power of some buyers. The current rules already provide for better targeted instruments to face anticompetitive effects of certain agreements, like the possibility for the antitrust authority to withdraw the application of the block exemption in a specific case or cease to apply it in a particular sector.

BUSINESSEUROPE stresses its general scepticism towards the principle of market share caps. However, only as a subordinate option and if considered absolutely necessary, we would rather maintain one single cap as opposed to introducing a second one on the buyer's side. We also suggest that any cap should be set at 40%, a figure that would provide a safe harbour for a larger number of contracts, thus relatively reducing the legal uncertainty created by the market share cap.

Subordinately, if the new market shares' thresholds are retained, we suggest the introduction in the guidelines of further clarification regarding the definition and evaluation of the buyer's relevant market.

- Resale price maintenance (RPM) and recommended prices

The draft regulation still prohibits the supplier to restrict the buyer's ability to determine its sale price. However, this is without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure or incentives.

In this respect, it would be desirable to clarify the concept of "tacit acquiescence" and the proposed test relating to "the number of distributors who are actually implementing in practice the unilateral policy of the supplier" (Paragraph 25 of the draft Guidelines). It would also be helpful to clarify that "tacit acquiescence" must be to (or with) a supplier's binding unilateral policy. Mere tacit acquiescence with a supplier's recommended price (without any evidence of pressure or incentives) would not amount to hard-core RPM.

It is common practice for producers/suppliers to distribute a list of recommended prices to their buyers, with the purpose of placing new products strategically in the market. The buyers themselves often require such indications to better position similar products from different brands. It is generally recognised that this practice can lead to economic efficiencies, in the interest of suppliers, retailers and consumers. Recommended prices can in particular help the entry into market of new competitors and facilitate promotional campaigns.

However, the guidelines recognise that even fixed or minimum retail prices may in certain instances lead to similar efficiencies. BUSINESSEUROPE suggests that these specific situations where restrictions have pro-competitive effects are listed directly as exceptions in article 4(a), thereby allowing the application of the block exemption to the relevant agreements.

- Exclusive supply agreements

The draft regulation leaves unchanged the exemption for a non-compete clause if its duration is less than 5 years or it covers 80% or less of the buyer's purchases. To improve predictability, we suggest that purchase obligations are calculated on the basis of volume instead of value, and that they are calculated on the basis of current purchases rather than previous year's purchases.

Defining purchase obligations on the basis of value makes it impossible to predict what the purchase obligations will be in volume if prices fluctuate during the year. A change

from a calculation in value to a calculation in volume would be all the more appropriate since the Regulation itself acknowledges in Article 8(a) that “market sales volumes” are “reliable market information” for the purpose of the calculation of the 30% threshold.

Furthermore, such a change would avoid the difficulty of adjusting the gross sales value to exclude excise and other taxes and levies, which vary among Member States.

- Selective distribution

Selective distribution is not only important to establish and maintain brand image, but also to give consumers the benefit of high quality services.

Certain industry sectors include products with strong brand image (e.g. high quality products) and products for which consumers expect sophisticated service and advice (e.g. professional and high-tech products). EC competition law recognises the specificities of certain sectors and products which justify limiting the distribution of such products to selected retailers that satisfy qualitative criteria, in order to preserve integrity and guarantee quality of the products and of the sale-related services.

It is crucial that this approach is maintained and that no formalistic approach be imposed on suppliers as regards the appropriate distribution models to be used.

With specific regard to the restriction of sales to unauthorised distributors, we suggest the previous text of the third indent of Article 4(b) should be retained. An extensive interpretation of the new wording could inhibit suppliers from preventing that authorised retailers sell to unauthorised retailers in a territory where the selective distribution system is not (yet) in place.

This would be particularly problematic for smaller suppliers who may not have the means of operating an EU-wide selective network, as in this case they would be prevented from securing the network against unauthorised distributors, affecting the essence itself of selective distribution systems.

With specific regard to franchising, we note that the there is an ongoing debate on the difference between franchising and selective distribution. The current regulation does not specify the characteristics of franchising, which are only mentioned in the guidelines. For the sake of legal certainty and clarity, we suggest the Commission could consider to include a definition of franchising within the text, as it has done for selective distribution.

- Active and passive sales

BUSINESSEUROPE supports the choice to maintain the distinction between active and passive sales in the guidelines and notes that such distinction is also relevant for online sales.

We welcome the fact that the Commission is taking into consideration the online dimension in its new definition of active sales. For the sake of legal clarity, still, we point out at the importance of a definition of active and passive sales that is sufficiently

adaptable to future developments in the online selling world. We also suggest that the guidelines could provide further clarification regarding the criteria for distinguishing between active and passive sales.

However, we note that the provision that active sales restraints be limited only to territories that have been exclusively allocated to another distributor or exclusively reserved to the supplier has been a source of confusion and divergent interpretation ever since its introduction. As most distribution systems are mixed (exclusive and non-exclusive), the ban on active sales restrictions as currently formulated will be difficult to apply. In addition, the fact that restrictions on active sales are only allowed where an exclusive distribution agreement is in place might encourage the use of exclusive distribution more than it would otherwise be the case.

For the above reasons, we suggest the deletion of the prohibition of active sales restraints and only maintain the prohibition to restrain passive sales.

- Internet selling

BUSINESSEUROPE underlines the importance that the new rules accompany the developments of e-commerce, in consideration of its continuous growth and the volume reached by online sales. Consumer protection, quality, fairness in transactions and free competition are fundamental principles that must be applied equally online as they apply in "traditional" commerce.

Virtual and physical distribution channels are complementary. Websites can provide customers with detailed information on brands and products, while "brick and mortar" shops allow customers to physically appreciate the product. It has to be noted however that, in the context of online sales, the issue of so called free-riding is particularly relevant. The Internet may create further opportunities for unauthorised distributors to benefit from the significant investments made by certain brands and their authorised networks without the associated costs. The rules should allow suppliers to prevent free-riding on the significant investments made by brick-and-mortar retailers.

In order to avoid that similar situations lead to unfair competitive advantages for unauthorised retailers, BUSINESSEUROPE considers that selective distribution rules applied to offline marketing and distribution should be similarly applied online, taking into account that – as the guidelines note – the different nature of the two distribution models can sometimes justify different criteria. Therefore the criteria for online sales must not necessarily be identical to those for offline sales, but they should pursue the same objectives and achieve comparable results. In particular, the Guidelines should clarify that it is permissible to differentiate off-line and on-line distribution where it can be shown that one channel provides efficiencies that the other does not. Also, appropriate quality criteria for retail Internet sites should be promoted in order to avoid a negative impact on brand and product image and enhance consumers' interests.

- Distributors' own labels

Another example of the strong development of the competition is that many retailers have launched own labels or private labels. A clarification of Article 2 of the current Vertical Block Exemption Regulation could better reflect market developments and the fact that an agreement between a manufacturer and a distributor who also sells own-label goods should not be seen as an agreement between competitors. For the purpose of the block exemption there seems to be no difference between own labels and brands of other suppliers. The Block Exemption Regulation should therefore apply.

- Transition period

The draft Regulation does not include any provision for a transitional period. This is a source of concern given the likelihood that several contracts currently meet the requirements for exemption under Article 2 would no longer do so under the new Regulation.

In addition, the proposed date of 1st June 2010 leaves a very short period before the entry into force of the revised regulation. We suggest that a transitional period of at least 18 months would be more appropriate, in order to allow undertakings to assess all their agreements in light of the new rules.

- Uniform application throughout the internal market

BUSINESSEUROPE strongly opposes the removal from recital 14 of the reference to need for Member States to ensure that the exercise of the power of withdrawal does not prejudice the uniform application throughout the internal market of EC competition rules or the full effect of the measures adopted in implementation of those rules. We believe that it is important for the Commission to stress the Member States' obligations in respect of both withdrawal decisions and enforcement decisions where the benefit of the block exemption is not available. We therefore recommend reinserting such reference into the draft Regulation.