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COMPETION LAW NEWSFLASH

| 14/06/10 |

Competion law newsflash

June 2010

Since June 1st 2010, vertical agreements are ruled by a new block exemption regulation (the EU regulation N°330/2010) and new guidelines, both texts applying to all business sectors except motor vehicles distribution1.

The revision concerns "agreements entered into between two or more undertakings each of which operates for the purpose of the agreement at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"2. Until May 31st 2010, vertical agreements were ruled by the EU regulation
N°2790/1999 and accompanying guidelines of October 13th 2000.

Regarding the overall success of the pre-existing rules, the new regulation restates its basic principles, but updates them in order to take into account recent market developments, in particular the increased purchasing power of large retailers and the evolution of Internet online sales.

For the Commission, "the basic principle remains that companies are free to decide how their products are distributed, provided their agreements do not contain price-fixing or other hardcore restrictions, and both manufacturer and distributor do not have more than a 30% market share"3.

According to the Commission, it is essential to reduce the regulatory burden for companies without market power, in particular for small and medium sized enterprises.

This reform was very welcome by French authorities, since it is consistent with the new French law on the modernization of the economy (LME) of August 4th 2008 (particularly, the new rules regarding payment deadlines, the single contract rule and the special merger control thresholds in the retail distribution sector), as well as with the French Competition Authority recent case law on electronic distribution.

More efficient control of mass retail distribution

Previously, an agreement could benefit from a block exemption, providing that it did not contain any hardcore restrictions (minimum resale price, absolute territorial protection …) and that the supplier's market share did not exceed 30%.

The new regulation innovates by providing that an agreement can be block-exempted only if each party to the agreement – i.e. both the supplier and the distributor – holds a market share that does not exceed 30%. The agreement would not benefit from the block exemption if one of the parties overruns the 30% threshold.

This double threshold is aimed at taking into account the increased buyer power of big retailers. This particularly benefits small and medium sized enterprises, because they are the most likely to be harmed by buyer-led vertical restraints4. In addition, the guidelines provide new examples of vertical restraints, which constitute indications of the buyer power of large retailers, such as listing fees.

Freedom to sell online

The new guidelines also confirm that the Commission is willing to promote the development of this mode of distribution, considered as able to enhance competition and decompartmentalize national markets.

For the Commission, "every distributor must be allowed to use the Internet to sell products"5 and the online sales prohibition is regarded as a hardcore restriction.

Therefore, the launching of a website "cannot be assimilated to the opening of a new outlet in a different location"6: it is only a specific form of distribution. The supplier of a selective distribution network thus cannot regard a website as an unauthorised point of sale and ban the use of electronic distribution on these grounds.

In the Pierre Fabre case however, the European Court of Justice has been asked to determine this question of law and should give an answer soon7.

But using a website to sell products is in general considered by competition authorities as a form of passive selling. For this reason, an exclusive distributor shall not terminate a transaction once the customer credit card data reveal an address that is not within its exclusive territory. Moreover, the supplier shall neither require a higher price for online sales, nor limit the share of overall sales made over the Internet.

Online sales monitoring

The freedom to sell online is not absolute though, as it must be balanced with the specificities of each distribution network.

A supplier “may require quality standards for the use of the Internet site to resell his goods, just as a supplier may require quality standards for a shop or for selling by catalogue or advertising and promotion in general”8.

Therefore, a supplier may require its distributors to have one or more brick and mortar shops and thus may exclude from its network, distributors selling exclusively online (« pure players »).

Such monitoring however, may not have the effect of dissuading appointed dealers from using the Internet to reach a wider range of customers “by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shops”: these criteria should “pursue the same objectives and achieve comparable results […], the difference between the criteria must be justified by the different nature of these two distribution modes”9. Therefore, the supplier may not require the translation of a website into, or the advice in all foreign consumers' languages, but it may require the translation into the languages of the countries where the distributor delivers the contractual goods. Furthermore, the supplier may require a hotline, providing that its operating procedures (time slots, maximum answering delay, …) are not too restrictive.

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