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European Commission Adopts New Competition Rules For Distribution Of Goods And Services

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On 20 April 2010 the European Commission adopted the new block exemption regulation and guidelines for vertical agreements. The new rules will enter into force on 1 June 2010. A one year transition period applies to existing agreements.

The new rules are intended to take into account market developments during the past decade, such as the increased concentration of the retail sector and the growth of online sales. The guidelines also contain new sections on specific market practices in the retail sector, such as up-front access payments and category management.

The new BER for the first time introduces a **30% market share threshold for the buyer.** The current BER exempts vertical agreements provided the market share of the supplier does not exceed 30% (except in case of exclusive supply for which the market share of the buyer needs to be taken into account). As from 1 June 2010 both the market share of the supplier and of the buyer will have to be considered. The new BER applies "*on condition that the market share held by the supplier does not exceed 30 per cent of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services*". Agreements between companies with market shares exceeding 30% are not automatically considered illegal but their effect on competition needs to be assessed individually.

Similar to the current rules, the new the BER contains a list of **hardcore restrictions**, such as restraints on the buyer's ability to determine its sales price or certain types of re-sale restrictions. Inclusion of hardcore restrictions in the agreement deprives the parties from the benefit of the BER even if the 30% market share thresholds are not exceeded.

The Commission's approach to certain of these hardcore restrictions is, however, becoming slightly more lenient. This is particularly true for the issue of resale price maintenance (RPM). Until now, the Commission treated RPM as a *per se* violation of Art. 101 (1) TFEU with no real scope for exemption under Art. 101 (3) TFEU. As from 1 June 2010 this position will change. The Commission recognizes that RPM may generate efficiencies, for example in the case of new product launches or short term low price campaigns (§ 225 of the guidelines). This moves the EU approach to RPM more in line with the US change in RPM as a result of the *Leegin* decision. We note, however, that the US approach to RPM has (a) been contradicted by several states in the US, and (b) is the target of potential repeal via legislation in the US Congress. So this apparent point of convergence may, in fact, be a new area of divergence between the US and the EU.

With regard to **online sales** the new rules specify that once a distributor is allowed into the distribution system, it must be free to use the internet to sell the goods and services that are covered by the distribution agreement. Restrictions on online sales are, as a general rule, prohibited. A requirement to terminate transactions with consumers from other territories or to re-route consumers after they have entered credit card details showing a foreign address, for example, are not acceptable. The same applies to an agreement that the distributor shall pay a higher price for products intended to be resold online.

The ban on restrictions of online sales is, however, subject to limited exceptions:

- The supplier can impose an outright ban on online sales where this is objectively necessary (e.g. the products are inherently dangerous, or the prohibition is justified for other safety and health reasons);
- the supplier can require that the buyer/distributors sells at least a certain absolute amount (in value or volume) of the products off-line to ensure an efficient operation of its brick and mortar shop (§ 52 of the guidelines) and that the online activity of the distributor remains consistent with the supplier's distribution model (§§ 52, 54 and 56 of the guidelines);
- the supplier can impose "quality standards" for online sales.

The BER also allows, in certain circumstances, to ban active sales in the territory exclusively allocated to another buyer or reserved to the supplier. The Commission's new guidelines provide the following examples of online active sales that can be banned in such context:

- use of territory based banners on third party websites;
- paying a search engine or online advertisement provider to have advertisement displayed specifically to users in a particular territory.

The BER confirms that the benefits of the BER for any individual vertical agreement may be lost if similar vertical restraints cover more than 50% of a relevant market; however a separate regulation removing the BER will have to be enacted, and there is a minimum 6 month transition period to allow all affected undertakings to adapt their practices. While the US cases (such as *Standard Station* and *Leegin)* talk about similar tests of market coverage, in practice the US cases have not taken account of market-wide impacts of similar, parallel agreements.

Finally, the Commission also provides new guidance on practices such as upfront access payments and category management.

- Upfront access payments are fixed fees paid by suppliers to distributors for services such as the provision of shelf space or access to the distributor's promotion campaigns. These agreements are exempted under the BER if the market share thresholds are not exceeded (§ 203 of the guidelines). In situations where the market share thresholds are exceeded, upfront access payments may lead to foreclosure of other buyers or suppliers (§§ 204-205 of the guidelines) or to collusion between distributors (§ 206 of the guidelines). They may also, however, lead to efficient allocation of shelf space for new products or prevent free-riding of competitors (§§ 207, 208 of the guidelines), and therefore a case-by-case assessment will have to be made if the market share thresholds are exceeded.
- Category management agreements are agreements under which a distributor puts a supplier in charge of its marketing for a particular product category including those of the supplier's competitors (§ 209 of the guidelines). Again, these agreements are exempted under the BER if the market share thresholds are not exceeded (§ 209 of the guidelines). While recognizing the potential efficiencies created by category management agreements, e.g. through access to the supplier's marketing expertise for a certain group of products (§ 213 of the guidelines), the Commission also points to potential issues such as the risk of foreclosure of competing suppliers or the risk of collusion between suppliers (§§ 210-212 of the guidelines).

Other issues that likely will be of interest to both manufacturers and distributors are the standards by which the Commission will assess whether a *bona fide* agency agreement exists (in which case the principal is dealing with the customer, and is not in a sale-resale situation), and when there has been tacit acquiescence by a distributor to the manufacturer's unilateral policy (the EU equivalent of the *Colgate* doctrine in the US).

The new rules apply, in principle, only to vertical agreements that affect trade between EU Member States but they will in practice constitute a role model for many Member States in the formulation of their own competition rules.

Leading experts from the European Commission, in-house and private practice will discuss the implications of the new EU regime and RPM in particular at the fourth ICC and Crowell & Moring annual conference "Trends and Developments in Global Competition Law" on 7 May 2010 in Brussels. The conference programme and registration form are available at http://www.crowell.com/NewsEvents/Event.aspx?id=1104.

The new block exemption regulation (BER) and guidelines for vertical agreements are available at http://ec.europa.eu/competition/antitrust/legislation/vertical.html.

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