# INFORMATIVE NOTE


## EU AND COMPETITION

# COMMISSION REVIEWS COMPETITION RULES APPLICABLE TO THE DISTRIBUTION SECTOR

The European Commission has launched on July 28 a public consultation on the proposal for a revised Block Exemption Regulation and Guidelines on Vertical Restraints (supply and distribution agreements). The Commission thus chooses to renew the rules in force since January 2000[1], putting to rest the doubts regarding the future of this Regulation, which expires on the May 31, 2010.

In general terms, the Block Exemption ensures that vertical agreements in which the supplier's market share does not exceed 30% and which do not include any of the so-called "hard core restrictions" are considered as meeting the conditions of Article 81(3) of the EC Treaty, and are thus exempt from the ban set forth in Article 81(1). The Commission considered that the Regulation has been working well and thus most rules are to be maintained. The two major amendments it proposes to introduce are the following:

a) For an agreement to benefit from the block exemption, not only the supplier's but also the buyer's market share should be at or below the 30% threshold in each of the affected markets;

b) The distinction between active and passive sales, in the context of which restrictions may be included in the agreement without it loosing the benefit of the block exemption, is clarified.

[1] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

The first amendment aims at taking into account the growing countervailing buyer power of retailers in European markets. The condition of a buyer's market share which does not exceed 30% was already demanded in case the agreement included an exclusive supply obligation and is now extended to all vertical agreements. This new condition seems to be the development with most impact in the Regulation now proposed by the Commission. Despite some commentators having predicted that the Commission could opt for increasing the market share threshold which ensures the protection of agreements under the Block Exemption (virtually taking vertical agreements out of the scope of Article 81), it has in fact taken the opposite route and made the conditions for a vertical agreement to be considered as justified under the Block Exemption even harder to meet.

The second amendment is justified by the increasing importance of online sales. In principle, the existence of a territorial restriction or of a restriction on the group of clients to which the buyer can sell the goods object to the agreement, determines that the agreement cannot benefit from the Block Exemption. Notwithstanding, such a restriction is tolerated if it constitutes a restriction on active sales with regard to the exclusive territory which has been attributed to another buyer. Within this scope, the Commission found it relevant to clarify the nature of online sales: generally, the use of the internet is not considered as a form of active sale and thus should not be restricted (for

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PLMJ
A.M.PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS
SOCIEDADE DE ADVOGADOS, RL

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example, the obligation imposed upon the distributor to prevent clients located in another distributor's exclusive territory from accessing its website would be considered as a hard-core restriction and would take the agreement out of the scope of the Block Exemption). On the other hand, the use of the internet may be considered as a form of active sale when it is specifically addressed to a particular group of clients: online advertisement specifically addressed to certain customers constitutes a form of active selling to these customers.

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The Commission calls upon the business community and its representatives as well as other organizations, including industry associations and consumer interest associations, who have direct experience with the current regime, to submit their comments to the proposal until the September 28, 2009.