INFORMATIVE NOTE

EU AND COMPETITION

NEW COMPETITION RULES APPLICABLE TO THE DISTRIBUTION SECTOR

On April 20, the European Commission has adopted a new Block Exemption Regulation and respective Guidelines on Vertical Restraints (supply and distribution agreements). This new Regulation, which draft had already been approved and submitted to public consultation on July 2009, renews the rules that have been in force since January 2000[1] and are due to expire 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 101(3) of the Treaty on the Functioning of the European Union, and are thus exempt from the ban set forth in Article 101(1). The Commission has evaluated the functioning of the Regulation in a positive manner and considered that its basic principles should be kept in force. However, the new Regulation introduces two significant amendments with regard to the current rules:

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.

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 novelty in the Regulation with most impact. 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 101), 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.

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[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.

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"Corporate Law Firm of the Year - Southern Europe"
ACQ Finance Magazine, 2009

"Best Portuguese Law Firm for Client Service"
Clients Choice Award - International Law Office, 2008,2010

"Best Portuguese Tax Firm of the Year"
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A.M.PEREIRA, SÁRAGGA LEAL, OLIVEIRA MARTINS, JÚDICE E ASSOCIADOS
SOCIEDADE DE ADVOGADOS, RL

The new Regulation will enter into force on 1 June 2010.

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. Thus, for instance, an 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.

The new Regulation further eliminates the condition currently in force that the buyer's turnover must be below € 100 million so that a vertical agreement between competing undertakings may benefit from the exemption.

The new Regulation will enter into force on 1 June 2010. A transitional period is foreseen for agreements already in force on 31 May 2010: the current regime will remain applicable to these agreements until the 31st May 2011.