

European Competition Law Update

The New Verticals Regime

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Agenda

- Current Status and Timing
- Quick Reminder of the Current Regime
- Key Issues and Changes
- Conclusions
- Case Study

Status

- Current regime is due to expire in June 2010
- Consultation on revised block exemption and Guidelines form July - September 2009
- Latest draft is close to being adopted – but lobbying activities still ongoing
- Expected adoption: March – May 2010
- A one-year transition period until 31 May 2011 allows companies to make the necessary adjustments to their agreements/distribution systems

Overview of Current Regime

- Block exemption and guidelines offer a “safe harbour”
- Supplier market share test – 30%
- “Hard core” restrictions
 - resale price maintenance
 - customer and territory restrictions
 - restrictions on sales to end users/trading with an SDS
 - restrictions on spare parts suppliers
- Conditions
 - non-compete: 5 year fixed duration
 - post term non-competes: 1 year from same premises
 - restrictions on specified brands within an SDS

Relevance of Market Shares

- Current rules: exemption applies provided supplier's market share does not exceed 30%. The buyer's market share is only relevant where there is “exclusive supply”
- Consultation Draft: additional 30% market share threshold applicable to buyer's market share (including all markets in which the product is resold/incorporated)
 - Legal uncertainty
 - Sledge hammer to crack a nut?
- Latest proposals: additional 30% market share threshold applicable on the market on which the buyer **purchases** the contract goods (the relevant geographic market will likely be wider than the relevant market for resale)

Exclusive Distribution

- Current Position:
 - EXEMPTED: Active sales ban into territories/customer groups exclusively allocated to another distributor/reserved to supplier
 - “HARD-CORE”:
 - Passive sales restrictions
 - Active sales bans if territory/customer group not exclusively allocated/reserved
 - Greater territorial protection may be justified in limited circumstances – e.g. for a period of up to two years to develop a new market
- Consultation Position:
 - Rumoured change to allow restriction on all active selling but no change
- Latest Proposals:
 - clarification that supplier’s right to sell into an exclusively allocated territory or customer group does not affect the possibility of shielding exclusive distributors from active selling by other distributors
 - distributors appointed to sell a new product/first rounds of a staggered introduction can be restricted in active selling outside the market for the test/introduction period

Selective Distribution

- Current Position
 - EXEMPTED:
 - sell only to those who satisfy specified criteria
 - prevent sales by authorised dealers to unauthorised dealers
 - can't combine exclusive (at wholesale) with selective (at retail) because authorised dealers must be able to cross-sell to each other (at whatever level of trade) and to end-user customers anywhere in the EU
- Consultation Position
 - ebay's "Call for Action"
 - return to pre current VBE position
 - no block exemption for SDS
 - No change, VBE still available for SDS

Selective Distribution

- Latest Proposals
 - Guidelines state that exemption applies “regardless of the nature of the product concerned and regardless of the nature of the selection criteria”
 - If wholesalers have to invest in promotional activities in their territories and not practical to agree by contract effective promotion requirements, restrictions on active sale by wholesalers to appointed retailers in other wholesalers’ territories may fulfil the conditions of Article 101(3)
 - Virgin territory: restriction on selling to unauthorised dealers permissible in territory of SDS and territory reserved for future roll out provided the seller does not yet sell the products there

Online Sales – Key Issues

- Current Position
 - Internet selling generally considered passive
 - All dealers must be free to sell over the internet
- A policy decision made ten years ago – single market
- Need for re-evaluation
 - Modern online sales stray into active sales, e.g. techniques to obtain high ranked listings; language options
 - Need for “special treatment” of the internet?
 - Case law developing at a national level
- ebay “Call for Action” ⇒ politicisation
- Consultation Position
 - Online sales even less likely to be “active” under new wording in Guidelines
- Latest proposals
 - Territory based barriers/paying a search engine/search engine optimiser to have website found more easily in a particular territory/by a customer group = active

Online Sales – Key Issues

- Limits on the amount sold over the internet
 - Hard-core: requiring a distributor to limit the proportion of overall sales made over the internet
 - Permitted:
 - a minimum volume/value offline sales requirement to ensure efficient operation of brick and mortar stores
- Dual-pricing
 - Hard-core: higher prices for goods being re-sold online/variable fees which increase with offline turnover
 - Permitted:
 - fixed fees to support a distributor's offline sales efforts
 - potentially where online sales lead to substantially higher costs for the supplier than offline sales but likely to be rare – *Dutch Kitchens*

Online Sales – Key Issues

- Requirement to have a bricks and mortar outlet in an SDS
 - On-line retailers lobbied for this to be prohibited
 - Guidelines expressly acknowledge legitimacy – can require dealer to have “**one or more**” bricks and mortar outlet before selling online BUT
 - Changes to bricks and mortar requirement possible “except if these changes have as their object to directly or indirectly limit the online sales by the distributors”
- Third Party Platforms
 - Permitted:
 - require a buyer not to distribute through a third party platform
 - except where TPP allows dealer to set up a site which satisfies the criteria i.e. outsourcing
- Ongoing Area of Debate

Online Sales – Key Issues

- The “equivalence” test
 - Hard-core: internet criteria which are not “overall equivalent” to those applied to bricks and mortar stores
 - “Equivalent”:
 - = must pursue the same objectives and achieve comparable results...the difference between the criteria must be justified by the different nature of those two distribution modes
 - recognises that specific requirements may have to be formulated for online sales e.g. secure payment, sales helpdesks

Resale Price Maintenance (RPM)

- Current rules: prohibit RPM but allow suppliers to recommend a resale price and to fix a maximum resale price (for as long as that does not operate as a fixed or minimum resale price)
- Latest proposals: maintain existing rules but recognise that RPM may qualify for exemption/may be justified
 - Extra margin allows retailers to provide additional pre-sales services (especially in relation to experience or complex products) where the parties can convincingly demonstrate that it provides the means and the incentive to overcome possible free-riding on retailers that provide additional pre-sales services
 - During the introductory period of expanding demand to induce distributors to promote the product
 - Necessary to organise a short term low price campaign (2-6 weeks)

Agency – A More Complicated Approach...

- Current rules: two categories of risk exclude “genuine” agency:
 1. contract-related risks (e.g. financing of products)
 2. risks relating to market-specific investments (sunk costs)
- Consultation draft - a new third category:
 3. risks related to other activities required by the principal – but not as agent (e.g. after-sales/repair services) IF indispensable to the main agency relationship
- Latest proposals – amended so only relates to other activities in the same market

Conclusions


- No major changes to the block exemption itself
- Complex and detailed guidance on online sales
- Missed opportunities for greater simplification of some of the other rules e.g.
 - customer and territory resale restrictions
 - non-compete provisions
- Latest proposals are unlikely to require major overhaul of existing distribution systems but:
 - Possible amendments to take advantage of clarifications which may allow greater flexibility
 - do your agreements fall outside the VBE because of the buyer's market share and should you make any changes?
 - Check – do your online sales practices fall foul of the Guidelines definition of “hard-core” restrictions?

Case Study





Vanity Visage manufactures and supplies beauty products. Vanity Visage has subsidiaries in most EEA countries where it sells directly to retailers via a selective distribution system. For historical reasons it sells through distributors in Poland and the Czech Republic. In these territories it has exclusive distribution arrangements but also specifies to the distributors which retailers the distributors should sell to. Vanity Visage also sells directly to major department stores in these countries. These department stores represent a significant share of the sales of beauty products in these countries. Vanity Visage has not previously sold any products in Estonia but is contemplating a launch shortly.

- Can Vanity Visage prevent its distributor in Poland selling to retailers in the UK? Can Vanity Visage prevent distributors in Poland selling to retailers in the Czech Republic? Does the fact that Vanity Visage sells directly to customers in the Czech Republic make any difference?
- Can Vanity Visage prevent distributors or retailers in other EEA countries selling to retailers in Estonia? Would your answer differ if Vanity Visage products were already being sold in Estonia by a retailer based in Germany via a website?
- What changes would you recommend to the distribution arrangements to ensure that they fall within the block exemption/do not contain any "hardcore" provisions?





Vanity Visage requires its stores to satisfy extremely high standards of customer care. Trained dermatologists must be available at all times, to demonstrate the full product range and the store must be of a highly luxurious nature. Vanity Visage considers that this environment is the only suitable environment for the sale of its products. It has previously had complaints when sales were made on-line without appropriate guidance as to the suitability of the product for an individual's skin type.

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- In these circumstances would Vanity Visage be justified in preventing on-line sales?
 - What type of criteria could it introduce?
 - Could it charge retailers a fee for on-line sales to compensate for the costs of dealing with complaints?



Vanity Visage is launching a new miracle anti-ageing cream "ToxSkin" which has been developed using an artificially manufactured snake's venom. This is a revolutionary product and Vanity Visage wants it to be launched in a staggered way across Europe to ensure that they have the resources for a full blown media campaign (featuring guest appearances by Patsy Fabulous, the supermodel) and, can iron out any wrinkles in the product marketing/gauge acceptance of and demand for the product. They also want to ensure that the product is only sold in the very high end stores at a minimum resale price of £99. Selected retailers will be expected to have in store promotions and dedicated staff who have attended a full day "ToxSkin" Vanity Visage training.

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- Can Vanity Visage set a minimum resale price of £99?
 - Can Vanity Visage restrict the network of retailers entitled to ToxSkin?
 - Can Vanity Visage restrict retailers from selling outside the launch country?
 - Can Vanity Visage stipulate that ToxSkin products must not be sold online?

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- Can Vanity Visage give the retailers an additional bonus each time the product is sold in store vs. sold on-line? What about an additional bonus for each customer questionnaire completed in store?
 - Can Vanity Visage provide retailers with a promotional budget which must be spent exclusively on in-store promotional activities?