16th BILETA Annual Conference

April 9th - 10th, 2001.
University of Edinburgh, Scotland.

The central idea of the new Block Exemption Regulation is that for most vertical restraints, competition concerns can only arise if there is insufficient inter-brand competition

SESSION 4

(c) Convergence & Competition

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"Closed Distribution Networks and E-Commerce: Antitrust Issues in theEuropean Context"

In a previous paper published in the JILT[1],we observed how Closed Distribution Networks (such as Franchise, SelectiveDistribution and Exclusive Distribution) could integrate Internetopportunities, taking into account legal parameters. This analysis integratedneedful arrangements or modifications in producers contractual politic as wellas threats coming from free riders. We determined which strategic choices wereavailable to producers, and we pointed out the effects of this choice on thedistribution contract. We concluded this paper in opening a consideration onlegal risks related to European competition law.

Since the publication of this paper, the Block Exemption Regulation 2790/99[2] has been usefully completed by Guidelines onVertical Restraints[3]. A careful reading ofthese Guidelines enables some certitudes to know if the producer's choiceconcerning on line distribution of its products, is square with Europeancompetition law. However, some questions remain.

Our purpose is to analyse implications of the online distribution strategy thatcould be made by a producer, in regard of the European competition law. In Part1, we determine opportunities and constraints presented by the Guidelines froma producer's point a view. The aim of this Part 1 is to see if Europeancompetition law does offer an interesting room of manoeuvre for producersdeveloping closed distribution networks.

In Part 2, we analyse which elements could withdraw the benefit of the BlockExemption Regulation 2790/99 ; we will be showing that this withdrawingcan arise from the market share evaluation, or from the disproportion betweencompetition restraints stemming from the distribution contract clauses and thenecessity of economic progress within the EC.

Part 1 : Opportunities and constraints standing out of the Block ExemptionRegulation 2790/99 related to E-Commerce

First of all, it seems important to recall how the Block Exemption Regulation2790/99 and the Guidelines define "closed distribution".

Selective distribution is defined as a system in which the producer sells itsproducts only to a retailer he has selected on the basis of defined criteria[4]. This retailer promises to not resale theseproducts to a retailer who does not belong to the producer's network. Exclusivedistribution could be defined as a system in which the producer promises tosale its products only to one retailer on a determined territory (for instanceFrance or the city of London)[5]. Franchise ischaracterised by a know-how transfer (from the producer to the retailer) and alicence of intellectual property rights[6].

In a Section 1, we show that the Guidelines state a principle of freedom forretailers to sale products online, whether they are authorised dealer,exclusive dealer or franchisee. In a Section 2, we explain how producers cantry to elaborate some boundaries to this freedom, taking benefit of theGuidelines opportunities.

Section 1 : The Freedom of online distribution for retailers

To analyse the scope of this freedom, we have at first to explain how theGuidelines distinguish active sales and passive sales. This distinction is veryimportant. According to the legal qualification of the distribution network(selective distribution, exclusive distribution or franchise), the freedom todevelop active sales on the Internet could be different.

1. Distribution on the Internet as a passive or active sale

The Guidelines define active sales as the fact to prospect clients within adetermined territory (for instance by mailing, doorstep selling, advertisingwhich target these clients, creation of a point of sales on this determinedterritory...)[7].

Passive sales are defined by the Guidelines as the fact to satisfy demandscoming from individual consumers who have not been solicited by the retailer,or to advertise (or to launch general promotion campaigns) in newspapers, ontelevision, on the Internet... without any objective to target consumers in aspecific territory (for instance advertising in a national newspaper which canbe bought by people living in London, Bristol, Newcastle, Manchester...).

To summarise, in the first hypothesis that is the retailer who comes to thecustomer (active sale), whereas in the second case that is the customer whocomes to the retailer, without having been specifically solicited before(passive sale). The question is to know how Internet may be analysed, regardingthe distinction between active and passive sales.

The European Commission considers that every retailer must be free to haverecourse to Internet to sale the contractual products or to advertise[8]. Therefore, Internet is not considered as anactive sale. When a consumer connects on the retailer's website and buys someproducts, it is only a passive sale. It does not matter if this consumer livesin a specific territory. Internet is by nature world-wide ; the websitecan be consulted from anywhere.

Meanwhile, marketing experts know that some tools do exist which allow to drawtowards a website some kind of consumers (profiling approach, viralmarketing...). The retailer may use this kind of tools which could beconsidered as active sales : for instance, commercial banners or hypertextlinks that could appear on some web sites related to the geographic situationof consumers. It may also be commercial banners appearing on a search enginewhen the consumer from a specific territory enters some key words. In the samespirit, one can think about metatags on the retailer's web site, targetingconsumers of a specific territory (country, city...). Another active sale wouldbe the fact for the retailer to send unsolicited e.mail to consumers, targetingthem according to their geographic situation. The use of cookies or equivalenttools evidently facilitates this application[9]

http://www.droit.fundp.ac.be/crid/eclip/Luxembourg.htm[1]

. But a tricky retailer could avoid the qualification of active sale inpractising the following method. When a consumer enters for the first time onthe web site, he is asked if he wants to subscribe to a newsletter. In case ofa positive answer, the consumer will frequently receive by e.mail some newsabout his favourite products (new products, special promotions, specialoffers...). It will be difficult for the producer to qualify this practice asan active sale, because the consumer has solicited these news.

The fact to open a web site, on which products can be purchased, is not anactive sale from the European Commission's point of view. The language used onthe web site does not matter[1]0.We think that Internet reality and the way a web site can be created, are muchmore complex than the European Commission's vision of online distribution. Aweb site address can be adapted to the targeted territory. For instance,Parfumsnet's web site existed in ".fr" and in ".com". Parfumsnet.fr closedafter an "*ordonnance de référé*" taken by the*Tribunal de commerce de Nanterre*[1]

http://Legal.edhec.co[m]

1. Parfumsnet.com, housed in Spain, was still available inseveral languages. When a consumer entered http://www.Parfumsnet.fr, hearrived on a page which indicated that the web site was closed (because of thecourt decision). This page contained an hypertext link to Parfumsnet.com. Ifthe consumer clicked on this link, he entered on the French version ofParfumsnet.com home page. This French version was exactly the same thanParfumsnet.fr !

Furthermore, it is possible to avoid the access to a web site for specific IPaddress (for instance, those corresponding to a specific territory). In thatway, one can imagine that the French version on the ".com" web site could onlybe available from an IP address in France. In such a case, is it really apassive sale ? The question must be asked...

When a retailer develops some practices on Internet, it is not a theoreticalpoint to know if these practices can be considered as active or passive sales.In fact, according as the network qualification (selective distribution orexclusive distribution), producers will have or not the possibility to forbidactive sales for their retailers.

2. The possible banning of active sales according to the distributionqualification

The Guidelines are perfectly clear about the possibility for a producer torestraint active or passive sales within a selective distribution network. Inreferring to Article 4-c) of the Block Exemption Regulation, the Guidelinesstate that no limitation can be prescribed to retailers who belong to aselective distribution network[1]2.In other words, these retailers must be free to sale supplier's products ontheir own web site. They are also free to canvass consumers on the Internet,with adapted tools, everywhere in the EU. However, as we will be showing inSection 2, producers could forbid their authorised retailers to sale productson the Internet, if producers can objectively justify it.

In the case of an exclusive distribution network, the Block ExemptionRegulation makes an exception to the above-mentioned prohibition[1]3. In other words, the producer can limit thefreedom that has its exclusive dealer to develop online sales. The Guidelinesare absolutely clear on this point[1]4. If there is an exclusive territory (forinstance France) which has been allocated to a specific retailer (named Z), theproducer can prohibit any active sales on this territory to its otherretailers. It seems to be absolutely logical. What would it mean for Z to be an"exclusive dealer - or retailer -", if other retailers (members of the samedistribution network) can canvass consumers on Z exclusive territory ?Therefore, within an exclusive distribution network, the producer can avoid anyactive sales on Internet (from retailer Y on Z territory)[2]. Passive sales remain possible for retailers. But if thisnetwork is also based on retailers selection from defined criteria, theproducer does not have the possibility to forbid active sales[1]5.

In the case of a franchise distribution network, it is advisable to take backprevious developments. If the franchise network is based on retailers selectionfrom defined criteria, the specific elements of franchise (know-how transferand intellectual property rights licence) do not matter. In this hypothesis,the franchise network is also a selective distribution network. Therefore,retailers must be free to develop both active and passive sales on Internet[1][6]. If there is no retailersselection based on defined criteria, and if the franchise contract contains aclause of territorial exclusivity (for instance franchisee Z has theexclusivity for France), the producer can forbid active sales on the Internet (franchisee Y, who has the exclusivity for Belgium, could not develop activesales on the Internet to canvass customers in France).

This principle of freedom for retailers who want to distribute products onlineis clearly a major problem from many producers' point of view. Many closeddistribution networks (even exclusive distribution or franchise) are based onretailers selection from defined criteria. In these networks, producers can notforbid their retailers (exclusive dealer or franchisee) to develop active orpassive sales on the Internet. This freedom conflicts with the traditionallogic of these networks : a distribution often organised by territories.Producers are in a quandary. Either they select their retailers on the basis ofdefined criteria, without the possibility to forbid active and passive sales onthe Internet later, even in the case of an exclusive distribution. Or theyconfer exclusive territories to their retailers, and they guarantee retailersthat any active sales won't affect consumers on allocated exclusive territory;but in this case producers have to forsake any kind of selection based ondefined criteria.

Facing this freedom of online distribution for their retailers, producers canfind some boundaries within the Guidelines. We explain in Section 2 howproducers could try to forbid or to restrain online distribution of theirproducts.

Section 2 : Boundaries of the freedom of online distribution forretailers

We are going to see that the Guidelines offer to producers the possibility toforbid their retailers to resale their products online. If producers are notable to benefit from this opportunity, they could try to insert in thedistribution contract some clauses which could allow them to control stronglyonline sales of their products by retailers.

1. The notion of objective justification

In point 51, the Guidelines state that a flat prohibition of online sales isonly permissible if there is some objective justification. But thisjustification does not allow the producer to reserve to itself sales oradvertising on Internet.

The question is to know what could be an "objective justification". The deepnature of the product could be seen as an objective justification. Forinstance, products with a high level of technology or dangerous products, whichrequire an advice well suited to each consumer (taking into account hisknowledge level, his health and so forth). In the same spirit, the producer whodevelops a franchise distribution network, could try to demonstrate that onlinedistribution is not compatible with its know-how. Likewise, the brand image ofthe product (the fact that consumers perceive it as a luxury product) could bean argument developed by the producer. In the Pierre Fabre case, the VersaillesCourt of Appeal considered that Pierre Fabre products sales on the retailer'sweb site depreciated the brand image[1][7].

We think that in a very closed future (if it is not already the case) thetechnology will enable to put in order all these problems. An online advice canbe developed, with a chat functionality and video-conference tools. Theargument of an insufficient advice will disappear. Regarding the aesthetic ofthe web site (presentation of products...), some technology does exist whichenables to obtain a high quality standard (for instance Flash Technology). Itwill remain an only problem for retailers : the cost to develop a web site ofsuch a level.

To conclude on this possibility for producers to argue that objective elementsjustify a prohibition of online distribution, we are very sceptical. It willbe very difficult for a producer to reject completely Internet opportunities(and constraints). Therefore, the most probable hypothesis (under pain to takean unbearable risk regarding European competition law) will be for producers toorganise online distribution of their products in partnership with theirretailers (or just some of them). It is clear that producers will have to lookafter a perfect adjustment of the web site with their network logic and brandimage. So they will have to take care of some specific clauses within thedistribution contract.

2. Limits fixed by the contract clauses

What kind of clauses can producers include in the distribution contract, toallow online sales by their retailers ? These clauses will constitute as manylimits given to the freedom of online distribution.

For selective distribution contract, one can think that classical qualitativeselection criteria can be adapted to the case of online sales :

* clauses related to the brand image protection :

- name of the web site.

- layout and aesthetic of the web site (colours, quality of pictures,frames...).

- advertising banners and hypertext links.

- have a specific space on the web site reserved to producer's products.

- no brands sale on the web site which could affect producer's brand image.

- a web site regularly updated (prices, new products, special offers...).

- clauses related to the consumers advice.

- qualification of online sales advisor.

- have an e.mail functionality, with the shortest reply delay ; or, better, achat functionality which enables live questions/answers; and, better, avideo-conference functionality.

The producer can also use some traditional (for physical points of sale)quantitative selection criteria, such as :

- the "minimum online sales turn-over" that the retailer has to realise onproducer's brands. It could be a minimum turn-over for each specificterritory.

- the minimum amount of orders ("quantity forcing") that the retailer has to doon producer's brand.

- a coefficient of stock rotation that the retailer has to respect.

Producers could also prohibit their selected (and then authorised) retailers tosale online competitors brands. Such a non-compete arrangement is notprohibited by the Block Exemption regulation, if it is limited to 80% of theglobal amount of orders made by the retailer and if its duration does not gobeyond 5 years[1][8].

Finally, the producer could also allocate an exclusive territory for onlinesales to the retailer. But, as we have shown in Section 1, it could not in thatcase guarantee the retailer that other retailers won't be authorised topractice active sales in this territory. If the producer wants to controlactive sales on each exclusive territory, then it has to forsake any kind ofselection based on defined criteria. The producer could try to mask thisselection, but it would be easily detected !

We think that in mixing strong qualitative requirements and well suitedquantitative selection criteria, producers could minimise the impact ofpotential active sales. But they have to verify that there is noincompatibility risk (or a low one) between their distribution contract and thecompetition law. We show in Part 2 that there is no certainty on this issue. Itwill depend on the producer's market share and on the real benefit got foreconomic progress by the contract clauses.

Part 2. The Risks of Incompatibility between the Distribution Network andCompetition Law

The new Block Exemption Regulation on vertical restraints lays down thebasic rules - clarified by the Guidelines - on how distribution agreements canbe exempted from the provisions of Article 81 (1) of the Treaty of Rome.The central idea of the Commission's Regulation is that for most verticalrestraints, competition concerns can only arise if there is insufficientinter-brand competition on the market. That is the reason why the BlockExemption Regulation focuses on the degree of market power held by one or theother party of a distribution agreement, i.e. by the supplier (mostly) or thebuyer (in some specific cases) or at both level. Taking into account the degreeof market power, the Commission adopts a more economic - and less formalistic -approach which is based on the effects generated by a distribution agreement onthe market in which it deals, effects that has to be precisely assessed fordetermining whether or not this agreement can be exempted (Section 1).

But whatever the market share of the parties, there is another risk ofincompatibility between the distribution network and the competition law if thedistribution contract does not give rise to objective advantages such as tocompensate for damages which it causes to competition (Section 2).

Section 1. The Incompatibility related to the Market Share

In the Commission's new approach of vertical restraints, the calculation ofmarket share and the definition of the relevant market in itself are at thecore of the reasoning : it is one of the key factors for determining whether adistribution agreement can be exempted and, for companies involved in suchagreements, one of the basic step of the self-assessment process. On thatsubject, some authors have pointed out the fact " *that legal certainty[could] be sacrificed and that business [could] be even more reliant on advicefrom lawyers and economists to determine whether [the distribution] agreementsfell under the requisite market share threshold* "[3]. It is true that the importance given by theEuropean rules to the market share is equal to the difficulty in defining it[4]... That is what we see in a pointn° 1.

As regards the impact of e-commerce in relation with competition law, thequestion arises to know if the use of Internet as a distribution channel forsuch or such product or service, in the context of a closed distributionnetwork, could modify the definition of the relevant market on which thisproduct or service is sold ? That is what we examine in a pointn° 2.

1. The importance of the market share definition within the BockExemption Regulation

a) Thresholds and ceilings : a graduated evaluation

The new Block Exemption Regulation imposes thresholds - or ceilings - ofmarket share at different levels : 10 per cent, 30 per cent and 50 percent.

*** 10 per cent : the *de minimis* threshold**

The first thresholds refers to the *de minimis* notice[5]. As regards this Commission notice, vertical agreementsentered into by companies whose market share does not exceed 10 per cent areconsidered to fall outside the scope of application of Article 81 (1). There isa presumption that these agreements are not capable of appreciably affectingtrade between member States or of appreciably restricting competition withinthe meaning of Article 81 (1)[6]. One canthink that, by application of the *de minimis* threshold, a large numberof distribution agreements are out of the scope of European competition law.But it should be noted that if an agreement is considered to be of minorimportance at the European level, it may be considered to be anticompetitive byapplication of the national law by a national court or a national competitionauthority. Moreover, an agreement of minor importance will not benefit from theBlock Exemption Regulation if it contains a blacklisted restriction orgenerates a cumulative effect[7].

A particular situation has to be examined, when a new product is launched or anew market is entered by a company. In that case, the market share is not areliable indicator, because the market in itself is just emerging and is stillnot shared... This leads us to wonder whether the use of Internet as a (new) distribution channel creates a new market or not. We shall examined thisquestion in greater detail later[8].

*** 30 per cent : the *safe harbour* ceiling**

The most important change in the Commission's approach of verticalrestraints is that the Block Exemption Regulation creates a presumption oflegality for vertical agreements depending on the market share of the supplier: this market share may not exceed the threshold of 30 per cent in order forthe exemption to apply. Below 30 per cent, companies benefit from a so-called*safe harbour* under the Community competition rules. Above the 30 percent market share threshold, vertical agreements are not covered by the BlockExemption Regulation. Nevertheless, vertical agreements falling outside theBlock Exemption Regulation are not presumed to be illegal, but they need anindividual examination. In that case, the Commission bears the burden of proofthat the agreement infringes Article 81 (1). The individual examination isdeveloped under Article 81 (3) which spells out the conditions under whichagreements between companies may be exempted from EC competition rules.

*** Above 50 per cent : the cumulative effect**

A company may hold less than 30 per cent of market share without beingcompletely secured as regards the Block Exemption Regulation : the combinedmarket shares of the others companies involved on that market have to be takeninto account. Article 8 of the Block Exemption Regulation enables theCommission to withdraw the benefit of automatic exemption if parallel networksof similar distribution agreements cover more than 50 per cent of a relevantmarket. It appears then that if companies have to assess their own marketpower, they can not ignore the position of their direct competitors, if thelast mentioned use the same type of distribution agreement : in case ofparallel networks of agreements, the legal security of a company depends upontheir competitors' distribution strategy.

b) The definition of the relevant market : a difficultassessment

The definition of the relevant market is a very important stage incompetition analysis in general, and in vertical restraints assessment processin particular, since it provides the context in which the degree of marketpower will be measured. But if market share is the usual criterion to evaluatemarket power, one have to admit that it brings us to a double question : how tomeasure shares, and how to determine the relevant market ?

About the first question, the Block Exemption Regulation indicates that thecalculation of market share has to be based on value figures. Where valuefigures are not available, substantiated estimates can be made, based on otherreliable information such as volume figures. It is in general the market shareof the supplier on the market where it sells the contract goods or servicesthat is decisive for the block exemption.

In order to calculate the market share, it is necessary to define the relevantmarket in its two fundamental dimensions : the product/service market on onehand, and the geographic market on the other hand. The relevant product/servicemarket is made up of those goods or services which the buyer considers to beinterchangeable, by reason of their characteristics, price and intended use[9]. The product/service market depends in thefirst place on substitutability from the client's perspective. The relevantgeographic market comprises the area in which companies are involved in thesupply and demand of concerned goods or services and which can be distinguishedfrom neighbouring areas (in particular, because conditions of competition aredifferent in those areas). The combination of all these factors results in theidentification of the relevant market[10].

2. Is Internet a relevant market ?

According to the importance of market share evaluation and to the consequencesof this process (i. e. the potential withdrawal of the benefit of the blockexemption), it remains to be seen whether the use of Internet as a distributionchannel could lead to the definition of a specific relevant market. Take thecase of a firm producing a product A which is sold through a selectivedistribution network ; this company has allowed its approved dealers to saleproduct A online, and its distribution agreement contains clauses whichorganise online sales[11]. The firm hascurrently a market share of 15 per cent on the market for the distribution ofthis kind of product. *A priori*, its distribution agreement can beexempted as taking benefit of the *safe harbour* (market share less than30 per cent). But being the first firm in its market using Internet as adistribution channel, it makes 100 per cent of the volume supplied by thisway ! If Internet, as a specific format of distribution, is considered asa distinct relevant market, the position of the firm within the Block ExemptionRegulation could be somewhat tricky : the producer would have to demonstratethat its online network fulfils the requirements for an individual exemption.Yet, it is uncertain that the online distribution channel is directly competingoffline distribution...

The right question would rather be : what are the consumer's needs that aresatisfied by an Internet sale, which are not filled by the traditional(offline) distribution system ? Considering this side of the problem, ouranswer would be somewhat quite different. People buying on the Internet arelooking for the accommodation it provides : a shop opened anywhere, at anytime, the largest display of products... On condition that the consumer has acomputer with an Internet connection, it can be felt as the most convenientway to buy a product !

The guidelines on vertical restraints stand no restriction on that point,providing that "*markets are in general not defined by the form ofdistribution that is applied [because] different distribution formats usuallycompete*"[12]. Even if the Europeanjurisprudence provides no decision on that topic, we can assume that the Frenchcompetition authority (the *Conseil de la concurrence*) has alreadyconsidered that the fact for a consumer to be a member of a books mail-orderingclub stands him on a specific relevant market, differing from the traditionalbooks distribution channel[13].

Nevertheless, if Internet is nowadays a somehow specific relevant market, itcan be assumed that its forthcoming astonishing development will transform itinto a channel of distribution perfectly substituable to the traditional one.It will be reinforced by the ever easier access for producers and sellers tothe technology and know-how nowadays required by e-commerce.

Section 2. The Incompatibility related to the Contract Clauses

Vertical agreements may contain certain restrictions to competition which, inthe absence of significant market power by the companies involved, neverthelessimprove production and distribution of the goods and services concerned. Thesafe harbour below 30 per cent market share offers companies the freedom tocreate supply and distribution arrangements best suited to their individualcommercial interest and to adapt to the changing economic conditions. Forexample, we have seen in the Part 1 how producers could legally integrateInternet opportunities in their distribution strategy, by using contractclauses designed to organise online sales by their retailers. However, suchagreements - and such clauses - can also have negative effects on the market(1°), leading to the withdrawal of the presumption of legality conferredby the Block Exemption Regulation if negative effects are more important thanpositive effects (2°).

1. Harmless / dangerous clauses

Irrespective of market power (and market share), the block exemption can notapply to agreements which do not give rise to objective advantages such as tocompensate for the damages which they cause to competition on the relevantmarket[14]. In other words, even with marketshare below 30 per cent, the risk for a company to lose the benefit of thegroup exemption depends on the degree of competition restraint stemming fromthe clauses contained in its distribution contract : some of these provisionsmay be harmless, some others may appear as being much more dangerous as regardscompetition analysis.

What about clauses - described in Part 1 - which a supplier can insert in thedistribution contract to allow online sales by its retailers ? To answer tothis question, we must distinguish clauses which have a qualitative nature (a),from clauses which have a more quantitative nature (b).

a) Qualitative clauses

We have seen in Part 1 that classical qualitative selection criteria could beused to design contract clauses suited to online sales : especially in the caseof (online) selective distribution, the use of clauses related to the brandimage protection and/or clauses related to the advice service which has to begiven to the consumers is absolutely justified. We remain in the field of apure qualitative selective distribution, widely block exempted.

But it is likely that an online selective distribution which would be based onvery disproportionate criteria (in comparison with qualitative criteria usedfor off-line distribution) would not be exempted : products (or service) soldare the same, whatever the distribution channel, and there is no reason for aproducer to be much more demanding for the online distribution of its productsthan for the off-line distribution. For example, the distribution agreement mayimpose to the dealer's web site to have an e. mail or a chat functionality,with the shortest reply delay, to provide for advice to consumers ; but is itacceptable to impose a night and day accessibility to this online service,whereas the "physical" point of sale has precise opening hours ? The reasoningcan also be reversed : the block exemption benefit could be lost if therequirements applied to the dealer's web site (aesthetics, maintenance, advice,etc.) would be more flexible - and less demanding - than the ones imposed foran off-line point of sale. In both cases, qualitative criteria are applied in adiscriminatory manner, which is hardly acceptable as regards competition law...

b) Quantitative clauses

A producer can also organise the online sale of its products by introducing inthe distribution agreement some quantitative constraints, such as minimumonline sales turn-over, stock rotation, quantity forcing, single branding (forinstance, by means of a non-compete arrangement), etc[15]. These constraints can be combined with other verticalrestraints, such as tying, exclusive purchasing, exclusive supply, or theallocation of an exclusive territory...

It is emphasised by the Commission that "*a combination of verticalrestraints aggravates their negative effects*"[16]. Moreover, it has to be noted that quantitativerestrictions are seen by the Commission as generating much more negativeeffects than qualitative ones. So the producer has to be careful in designingspecific arrangements to organise online sales of its products : we can assumethat the more a distribution agreement is constraining for the dealer, the morelikely it is to be seen as a combination of vertical restraints, putting it ina difficult position as regards the Block exemption Regulation ! Companies inthat situation are encouraged to do their self-assessment of the possibleconsequences of their distribution agreements under the EC competition law...

2. Consequences of the incompatibility

An agreement which is not covered by the new Block Exemption Regulation mayrequire an individual examination under the conditions spelled out by Article81 of the Treaty of Rome. Where the withdrawal procedure is applied, theCommission bears the burden of proof that the agreement falls within the scopeof Article 81 (1) and that it does not fulfil all conditions of Article 81 (3): to put in a nutshell, the Commission has to establish that there is noeconomic progress which consumers may enjoy. This conclusion leads to the deathof the distribution network...

All in all, the question of the consumer's interest must be at the centre ofthe self-assessment process that a company has to develop as regardscompetition rules applying to vertical restraints : do constraints, standards,obligations and criteria set up by the firm to control its e-business activitymeet the consumer's expectations and interest ? In other words, do thecontractual means used by the firm regarding electronic sale of its products gotowards improving the quality of services offered to customers, and towards abetter answer to their expectations ?

One can think that these are not only legal questions, but also strategic ones...

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[1] Collard C. and Roquilly C.,« Electronic Commerce and Closed Distribution Networks :Proposals for Solving Legal Problems », 2000 (2), The Journal ofInformation, Law and Technology,http://elj.warwick.ac.uk/jilt/00-2/collard.html

[2] Block Exemption Regulation (EC)n°2790/1999 of the Commission, december 22 1999, JOCE n° L 336,29/12/1999. On the Commission's approach to vertical restraints, see Riley A.,"Vertical Restraints : A Revolution ?", E.C.L.R. [1998] issue 8, 483-492., andKorah V., "The Future of Vertical Agreements under E.C. Competition Law",E.C.L.R. [1998] issue 8, 506-513.

[3] Communication of the Commission, Guidelineson vertical restraints, 2000/C291/01, JOCE n° C 291/1, 13/10/2000

[4] See art. 1-d) of the Block ExemptionRegulation, op. cit.

[5] See point 161 of the Guidelines.

[6] See especially points 42 and 199 of theGuidelines.

[7] Point 50 of the Guidelines

[8] Point 51 of the Guidelines

[9] About e-marketing and profiling, see J.-M.Dinant, « Les traitements invisibles sur l'Internet », [; Bayers C., « The promise ofone-to-one, a love story », Wired, May 1998 ; Leonard Th.,« E-Marketing et protection des données àcaractère personnel », Droit & Nouvelles Technologies, 23mai 2000, http://www.droit-technologie.org

10] See point 51 of the Guidelines

[11] Tribunal de commerce de Nanterre,ordonnance de référé, 4 octobre 2000, SA Yves SaintLaurent Parfums, SA Parfums Van Cleef & Arpels c/ SA Parfumsnet, [

12] See points 51 and 53 of the Guidelines

[13] See art. 4-b) of the Block ExemptionRegulation

[14] See point 51 of the Guidelines

[2] See *supra*, n°1, about "activesales practices".

[15] See point 53 of the Guidelines

[16] On this issue, see R. Fabre,« Les contrats de distribution et internet à la lumièredu nouveau règlement communautaire », Le Dalloz, 2001,n°5, chr. p. 437. Hubert Bensoussan, « Franchise :l'exclusivité territoriale vidée de sa substance », LeDalloz, 2000, n°41, chr. p. 629

[17] No aesthetic research on the web site, no« virtual » shop case, no real advice for consumers...CAVersailles, 13ème ch., 2 décembre 1999, SA PierreFabre Dermo Cosmétique c/ Breckler, JCP éd E, 2000, n°30, p.1230

[18] See point 58 of the Guidelines. But thenon competition clause can't target some specific competitors brands, see point61 of the Guidelines

[3] Nazerali J. and Cowan D., "Unlocking E.U.Distribution Rules - Has the European Commission Found the Right Keys ?",E.C.L.R. [2000], issue 1, 50-56.

[4] To quote Nazerali and Cowan :"*working out the relevant market is not an exact science*" (idem, p.54).

[5] See Notice on agreements of minorimportance of 9 December 1997, OJ C 372, 9.12.1997, p. 13.

[6] Guidelines on Vertical restraints (2000/C291/01), p. 4.

[7] See above.

[8] See above, 2°.

[9] See point 90 of the Guidelines.

[10] See Commission notice on the definitionof relevant market for the purposes of Community competition law, OJ C 372,9.12.1997.

[11] See above, Part. 1, Section 2, 2°.

[12] See point 91 of the Guidelines.

[13] Paris Court of Appeal, 11/03/1993,France-Loisirs *vs* Le Grand livre du Mois, BOCCRF 26/03/1993,p. 104.

[14] See point 71 of the Guidelines. TheCommission adds : "*This may particularly be the case withrespect to the distribution of goods to final consumers [because]in the case ofsales to final consumers, the disadvantages caused by a vertical agreement mayhave a stronger impact than in a*

case concerning the sale and purchase ofintermediate goods".

[15] See below, Part 1, Section 2, 2°.

[16] See point 119-8) of the Guidelines.