Autorité de la concurrence

Opinion of 28 September 2009

on the review of EC regulation N. 2790/99 and of the guidelines

on vertical restraints

Note: The gist of the *Autorité*'s observations in response to the public consultation launched by the European Commission is summarized in the opening section of the opinion, in English and in French.

Les principales observations présentées par l'Autorité en réponse à la consultation publique organisée par la Commission européenne sont synthétisées en début d'avis en anglais et en français.

EXECUTIVE SUMMARY

1. The *Autorité* welcomes the renewal of a block exemption regulation and of guidelines dedicated to vertical relations, as well as the modernization process, which is aimed at keeping up with economic analysis and with the changes that have occurred on the marketplace during the last decade. This modernization and fine-tuning should however go hand in hand with a high level of guidance and predictability, for the benefit of market players as well as of enforcement agencies and review courts.

2. Given the current lack of actual evidence of pro-competitive effects of price-related vertical restraints, which are characterized as hardcore restraints in the current texts, it is legitimate to retain such a characterization, in line with the international consensus in that regard.

3. Nevertheless, it is crucial to stress that such practices can be justified by Article 81, paragraph 3, of the EC Treaty; to incentivize firms to come up with efficiency gains liable to ground such a justification; and to make it clear that competition authorities will take such claims seriously.

4. For its part, the approach to non-price related vertical restraints must strive to promote consumer welfare. It must at the same time take care not to inhibit the variety of distribution strategies that contribute to this welfare, insofar as they are grounded on competition principles.

5. In particular, it is important to guarantee in the long run the coexistence between online trade and physical distribution networks, which is meant to satisfy varying consumer preferences in terms of price, choice, quality and proximity, by providing for the "fine tuning" instrument necessary to ensure a fair balance between these two activities.

6. Finally, the foreseen evolution of the method applied for calculating the market share threshold conditioning the availability of the block exemption regulation should allow competition authorities to assess more precisely the market power of firms all along the distribution channel, if it helps targeting cases of foreclosure liable to appreciably impede competition.

SYNTHESE

1. L'Autorité salue le maintien d'un règlement d'exemption et de lignes directrices dédiés aux relations verticales, sous une forme destinée à tenir compte de l'enrichissement de l'analyse économique et à intégrer les évolutions intervenues dans le monde de la distribution depuis dix ans. La modernisation et l'enrichissement de ces textes doivent cependant se faire à niveau de pédagogie et de prévisibilité constants, dans l'intérêt des entreprises ainsi que des autorités et des juridictions de contrôle.

2. Compte tenu du peu de preuves concrètes, à ce jour, des effets pro-concurrentiels des restrictions portant sur les prix de revente, qui sont qualifiées de restrictions caractérisées par les textes actuels, il est légitime de conserver cette qualification, en ligne avec le consensus international.

3. Pour autant, il est fondamental de rappeler que de telles pratiques peuvent être justifiées au titre de l'article 81, paragraphe 3, du traité CE, d'encourager les entreprises à faire valoir les raisons d'efficacité économique susceptibles de les fonder, et de souligner que les autorités de concurrence prendront ce type d'arguments au sérieux.

4. Pour sa part, le traitement des restrictions concernant d'autres modalités de vente que les prix doit chercher à promouvoir le bien-être des consommateurs. Il doit, dans le même temps, veiller à préserver la diversité des stratégies de distribution qui concourent à ce bien-être, dès lors qu'elles sont fondées sur une logique de concurrence.

5. En particulier, il est important d'assurer dans la durée la coexistence du commerce en ligne et des réseaux de distribution en dur, qui est de nature à répondre à des préférences différentes des consommateurs en termes de prix, de choix, de qualité et de proximité, en prévoyant les outils de « réglage fin » nécessaires pour assurer un équilibre équitable entre ces deux activités.

6. Enfin, l'évolution préconisée du mode de calcul du seuil de part de marché conditionnant l'applicabilité du règlement d'exemption par catégorie devrait conduire les autorités de concurrence à appréhender plus finement le pouvoir de marché de l'ensemble des agents de la chaîne de distribution, en se préoccupant des cas de verrouillage de nature à porter une atteinte sensible à la concurrence.

INTRODUCTION

On 28 July 2009, the European Commission (hereinafter, the "Commission") invited interested parties to comment on two draft texts – a regulation and guidelines – intended to modernize European competition policy as regards agreements between operators involved at different stages of the supply chain.

So far, vertical agreements are covered by the Commission's Regulation (EC) N. 2790/99 of 22 December 1999 regarding the application of Article 81, paragraph 3, of the EC Treaty to categories of vertical agreements and concerted practices[1] (hereinafter the "exemption regulation"), supplemented by the Commission's communication N. 2000/C 291/01 of 13 October 2000 relative to guidelines on vertical restraints[2] (hereinafter the "guidelines").

Since their adoption, these texts have stimulated the development of a more economic analysis of the possible pro-competitive[3] and anticompetitive[4] effects of vertical restraints. They have also fostered transparency and legal certainty, notably by contributing to ensure the consistent interpretation and implementation of European competition rules in this field. This role has become even more significant since the entry into force of Council Regulation (EC) N. 1/2003 of 16 December 2002 on the implementation of the competition rules contained in Articles 81 and 82 of the EC Treaty[5], which has resulted in handing over a significant part of the cases relative to vertical restraints to national competition authorities (hereinafter, the "NCAs") and to national judges.

In France, the *Autorité* has, in recent years, applied the exemption regulation and/or the guidelines in four opinions and in forty-two decisions, eighteen of which related to price maintenance, seventeen to selective distribution, two to exclusive distribution and eight to exclusivity or non-competition clauses. The *Autorité* has therefore developed a significant experience in the implementation of these texts.

Given this decentralized implementation of European competition law, combined with the abolition of the mechanisms of prior notification and individual clearance decisions that typified the former European competition enforcement system, the need for predictability is of utmost importance for market players. The modernization of the exemption regulation and of the guidelines must therefore leave unaffected the current level of legal certainty afforded to market players, both in the case where they can benefit from a "safe harbour" because their market share is lower than 30% and in the case where they must conduct a self-assessment, on a case-by-case basis, of their trade practices and contracts.

The *Autorité* consequently welcomes the Commission's decision to retain dedicated texts on vertical restraints.

That said, the content of these texts clearly needed to be updated in two respects. First, the marketplace has considerably evolved in the last ten years. New forms of commerce have emerged or developed, such as online trade. At the same time, market power may have shifted in some cases, as illustrated by the gradual increase in bargaining power of a number of retailers of goods and services. Second, the more effects-based approach initiated ten years

[1] OJ N. L 336 of 29 December 1999, p. 21
[2] OJ N. C 291 of 13 October 2000, p. 1
[3] Notably the struggle against free riding, the opening of new markets or of new investments, the reduction of double marginalization, as well as the promotion of the quality of products and services offered to consumers
[4] Such as the limitation of inter-brand competition or the foreclosure effects
[5] OJ N. L 1 of 4 January 2003, p. 1

ago has significantly matured, in particular with regards to efficiency gains, thus justifying an update of the texts on vertical restraints.

In its response to the public consultation, the *Autorité* will focus its observations on the three main changes suggested by the Commission, which relate to hardcore restraints regarding prices (1), to the coexistence of on-line and off-line trade (2) and to the new provisions for calculating the market share threshold (3). It will also briefly mention other points (4).

1. THE MODERNIZED TREATMENT OF HARDCORE RESTRAINTS SHOULD ENCOURAGE DEFENCES BASED ON EFFICIENCY GAINS

The new balance that the Commission suggests to strike in relation to vertical restraints (1.1) is welcome: while arguably keeping a cautious approach to restraints related to price maintenance (1.2), the architecture of the draft guidelines should give firms a true opportunity to plead a defence based on economic efficiency gains (1.3).

1.1. The draft guidelines undertake to restore the balance between the prohibition of restraints that affect intra-brand competition and the possibility to justify them on efficiency grounds

The Commission stresses that, while hardcore restraints[6] (notably resale price maintenance) should still be analyzed as practices forbidden by Article 81, paragraph 1, of the EC Treaty, they are nonetheless fully eligible to an individual exemption pursuant to Article 81, paragraph 3, of the EC Treaty, provided that they are justified by economic efficiency gains, of which a fair share is passed on to consumers.

This approach is in line with the provisions of the EC Treaty, that do not deprive *a priori* any type of vertical restraint from the benefit of Article 81, paragraph 3. This change should be welcomed, rather than played down. Indeed, it conveys a very positive signal to the marketplace, where many may have come to the conclusion that the case-law developed on hardcore restraints during the last fifty years, in particular at European level, has made any individual exemption of resale price maintenance not only very unlikely, but perhaps also virtually impossible, as if this were a *per se* infringement.

The new texts should remove the ambiguity that may exist in this regard. Consequently, they should result in a clear distinction between the policy followed with regards to vertical restraints and the more severe approach followed in relation to cartels: in the future, only the latter type of infringements should, in practice, continue to be considered as "unjustifiable", in consideration of their particularly harmful effects on consumer welfare.

1.2. Retaining the notion of hardcore restraints is in line with the international consensus and with the experience gained by a number of competition authorities so far

The draft guidelines follow up on the current approach to hardcore restrictions, insofar as they point out that these restraints are presumed to be anticompetitive by object and are thus deprived from the benefit of the exemption regulation.

On the basis of the current experience gained by the *Autorité*, this approach remains justified to date, in particular with regards to resale price maintenance. The *Autorité* approaches such restraints, in line with the current guidelines, as being anticompetitive by object. Therefore, it does not undertake an in-depth analysis of their actual or potential effects on competition when considering them in light of Article 81, paragraph 1, of the EC Treaty. Nonetheless, the French Code of commerce provides that fines imposed on competition law infringers are proportionate to the "*importance of the damage caused to the economy*", and not only to the duration and seriousness of the infringement. The *Autorité* thus has to set out an economic scenario, to elaborate a "theory of harm" and to make a qualitative assessment of the impact of the practices at stake on consumer welfare and on the wider economy, including in the case of resale price maintenance, when calculating the fine. As a consequence, where the *Autorité*

[6] Hardcore restrictions are listed in Article 4 of the regulation. The presence of a clause imposing such a restriction within a contract results in a presumption of illegality for the entire contract

imposes a fine on firms that have engaged into resale price maintenance, as has happened on several occasions, it does so in consideration of all these elements, and not for the mere reason that a hardcore restraint is at stake.

This concrete experience of the anticompetitive effects that resale price maintenance often happens to have stands in stark contrast with the lack of tangible evidence available to the *Autorité*, at this stage, with regard to its possible pro-competitive effects, despite the important economic literature devoted to this issue. It is understandable that this experience, together with that of other competition authorities, serves as a starting point for the Commission's envisaged modernization, i.e. that it leads to retaining the notion that such practices are hardcore restraints which pursue an anti-competitive object.

Actually, abolishing this presumption would have been at odds with the international consensus on the pro- and anti-competitive effects of resale price maintenance, as illustrated by the exchanges that took place during the roundtable held by the OECD's Competition Committee in October 2008. The very lively discussion that has developed in the wake of the overruling of the United States Supreme Court's case-law in the *Leegin* case[7] shows that this consensus may well come to be reassessed at some point in the future, but it also shows that this time has not come yet.

1.3. The assessment of the effects of some hardcore restrictions should nevertheless gradually take up

While keeping to the notion of hardcore restraints, the draft texts[8] modify the way in which Article 81 of the EC Treaty is to be implemented on a case-by-case basis. The draft guidelines very clearly point out that the notion of anticompetitive object – which is akin to a presumption of anticompetitive effects – is rebuttable, a move which goes in the right direction. The presence of such a restraint in an agreement deprives the whole agreement of the benefit of the exemption regulation, but it in no way bars Article 81, paragraph 3, of the CE Treaty from being implemented, as illustrated by the latest decision issued by the *Autorité* on this issue[9].

This welcome clarification has naturally prompted the Commission to set out, in its draft guidelines, how the burden of proof related to Article 81, paragraph 3, of the EC Treaty operates in practice. Pursuant to Regulation N. 1/2003, it falls in the first place on the firms involved to adduce evidence that the conditions set out by this provision are met. However, where they do plead efficiency gains (i.e. actual or potential pro-competitive effects), it is then obviously up to the competition authority involved to assess, first, whether this evidence does prove the existence of likely efficiency gains and, second, to balance the pro- and anti-competitive effects of the practice at stake. This last step manifestly involves identifying the likely anticompetitive effects (which may also be actual or potential) that had been presumed

[7] In its Leegin ruling dated 28 June 2007 (*Leegin creative leather products, inc. v. PSKS*, 551 U.S. 877), the Supreme Court of the United States invited the Circuit courts to no longer consider imposed prices as anticompetitive practices per se, but only to rule against them when the complainant could demonstrate their anticompetitive effect. Nevertheless, the Supreme Court did not exclude the effect of presumptions, when justified (points 898 and 899 of the ruling). Four judges expressed a dissenting opinion. This case law is not followed by all of the Circuit courts

[8] Article 4, sub a), of the draft regulation and paragraphs 47 to 49 and 219 to 225 of the draft guidelines

[9] Decision N. 08-D-25 of the *Conseil de la concurrence* of 29 October 2008 relative to practices implemented in the distribution sector for cosmetic and personal hygiene products sold on the basis of pharmaceutical advice

in the course of the analysis carried out in relation to Article 81, paragraph 1, of the EC Treaty[10].

Without radically shifting the centre of gravity of the European competition policy followed in relation to vertical restraints, nor unduly complicating its implementation, the architecture designed by the Commission therefore opens the door to a better resort to efficiency gains, on a case-by-case basis. It should therefore encourage companies to put together a concrete and convincing economic reasoning in that regard and to share it with competition authorities and with judges, much in the same way as has been witnessed over the last ten years with regard to mergers[11] and, more recently, to abuses of a dominant position[12].

The draft guidelines actually pave the way, as they describe the various effects, whether positive[13] or negative[14], of the most commonly encountered vertical restraints. These developments are very welcome, as they provide detailed guidance in the perspective of the case-by-case assessment to be carried out by the NCAs and by national judges. That said, this proposed analytical framework should not prevent NCAs from considering arguments other than the ones described in the draft guidelines, insofar as they are relevant to the case at hand, such as the form of the contracts signed between distributors and suppliers[15], the way negotiations between retailers and suppliers are conducted or the degree of risk-aversion of the different operators involved.

Eventually, the *Autorité* fully supports the progressive and manageable evolution envisaged by the Commission. Such a move does not rule out further progress at a later stage, once the incentives injected in the guidelines have led market players to develop efficiency arguments on a routine basis and once NCAs have gained sufficient experience in handling them.

[10] Paragraph 47 ; also see the ruling of the European Court of First Instance of 27 September 2006, *GlaxoSmithKline Services v. Commission* (case T-168/01, under appeal on points of law)

[11] See notably Commission Notice N. C(2008) 265 establishing guidelines on the assessment of non-horizontal mergers in view of the Council regulation relative to the assessment of mergers between companies (OJ N. C 265 of 18 October 2008, p. 6)

[12] See Commission guidance paper N. C(2009) 864 relative to orientations on the priorities adopted for the application of article 82 of the EC Treaty to exclusionary abusive practices by dominant companies (OJ N. C 45 of 24 February 2009, p. 7)

[13] With regard to imposed resale prices, paragraphs 221, 222 and 225 contain developments relative to the elimination of double margins, and also on promotional campaigns

[14] With regard to imposed resale prices, see paragraphs 221, 223 and 224

[15] Notably the provisions for setting the compensation (linear or non-linear rates, two-part rates with a fixed part, reference listing premiums and commercial cooperation contracts), procurement exclusivity clauses and commercial counterparts

2. THE INCORPORATION OF ONLINE TRADE IN THE GUIDELINES TENDS TO ENSURE A FAIR BALANCE BETWEEN THE VARIOUS DISTRIBUTION MODELS THAT FOSTER CONSUMER WELFARE

The unprecedented uptake of online trade that has occurred during the last decade is a revolution for consumers. It increases consumer choice and intensifies price competition. Its impact on the other parameters of consumer welfare – proximity and service – is however more ambiguous, or even paradoxical. Unless he runs brick-and-mortar shops, an online retailer is, in a way, accessible everywhere and nowhere at the same time; likewise, contrary to a product shown in a display window, a product offered on the Internet is subject to infinite, instantaneous and effortless comparisons, but at the same time remains out of physical reach for the consumer. This twofold characteristic – ubiquity and dematerialisation – explains the potential and the limits of online trade, which is both a source of new opportunities for consumers and an imperfect substitute for brick-and-mortar trade. It also explains why trade-offs between internet trade and physical trade may vary from one consumer to another, with some acting more in view of considerations related to price, whereas others will determine themselves more on the basis of service or brand image.

The same may be said for companies. Most of them will see the internet as a new opportunity to reach consumers and to innovate, and will thus progressively invest in this new distribution channel. However, online trade may also have a broader impact on their distribution strategy, which may be based on different trade-offs, from one company to another, between competition parameters such as price, choice, quality, services or brand image. In itself, the fact that different companies have different strategies should not be a source of concern for competition authorities: in the market-based economy chosen by Europe, companies have the obligation to compete with one another, but they are free to choose how to do so.

In practice, the swift expansion of online trade is therefore prompting profound changes in the distribution world. Its impact on inter-brand competition is rather positive: it increases total sales, saves transaction costs and, in certain cases, makes it possible to diversify the services made available to consumers. These effects can also occur in relation to intra-brand competition, but in this respect, the impact of the Internet is more subdued, since it is also liable to bring about negative external effects within retailer networks[16] – distortions that can be particularly acute when the manufacturer's distribution strategy is based on brand image, on stock rotation and variety, on the sales environment and on professional services that can only be offered through a brick-and-mortar network. It is also difficult to define territorial exclusivity when it comes to online sales.

In this context, the current guidelines called for much-needed clarification. They currently do apply the traditional prohibition of restraints on passive sales (in exclusive distribution systems) or of restraints on passive and active sales (in selective distribution systems) to Internet-based activity. Nonetheless, in view of the technological changes that have occurred over the last ten years, they had to be updated in order to give companies the legal and practical certainty needed in order for them to be sure that they set up competition-based distribution strategies and to articulate their online and off-line sales activities.

The draft guidelines, which are consistent with the balance reached by the French decisional practice and case-law, tends to provide the legal security needed by market players and by competition authorities, by updating the distinction between passive sales and active sales (2.1), by defining more precisely the scope of the prohibition of restraints on online sales (2.2) and by providing suppliers with the tools they needed to convey their distribution strategy in

[16] See the *Conseil de la concurrence* decision N. 06-D-24 of 24 July 2006 relative to the distribution of watches by Festina France (paragraph 70)

their contracts with their retailers (2.3). There would be some benefit, however, to elaborate further on certain points, as explained in the following sections.

2.1. The distinction between passive and active sales, which is indispensable for the operation of exclusive distribution and franchising agreements, is retained and updated

Since restraints on active sales only are authorized within exclusive distribution networks, it is essential to retain the distinction between active and passive sales and to clarify how it applies to online sales. Otherwise, the guidelines would have the unintended effect of drastically disrupting the activity of operators who have chosen exclusive distribution as their *modus operandi*, by considering arbitrarily (from a technical point of view), either that internet sales are always active sales, or that they are always passive sales.

One should nevertheless bear in mind that drawing the line between passive and active online sales is a challenging exercise. Excessively detailed or rigid criteria based on technological considerations could be a strenuous, and possibly pointless, exercise. Excessively subtle distinctions would also lessen legal certainty and possibly give rise to unnecessary and costly litigation.

All in all, the *Autorité* is of the view that it is justified to consider that the notion of active sales is centered on promotional efforts that target a given clientele, irrespective of its technical features, while the notion of passive sales extends to sales made as a result of the customers' spontaneous requests or of general promotional initiatives without which a retailer would not be able to address his reserved clientele or the clientele not reserved to other retailers[17].

2.2. The draft texts appropriately intend to detail the scope of the prohibition of restraints of active and passive online sales

As has been recalled previously, a ban on online trade is considered as being a limitation of passive sales and, in certain cases, of active sales. It must therefore be analyzed pursuant to the criteria set out in Article 4, sub b) and c), of the draft exemption regulation. The draft guidelines provide useful clarifications in that regard.

In particular, the guidelines provide that the opening of a website cannot be likened to the opening of a new point of sale[18], an approach which is consistent with the French approach. The *Autorité*, followed by the French courts[19], also considers that a website is not a new point of sales, but a means to carry out sales. It thus deemed that "*an Internet site is not an outlet, but an alternative sales means that is used, just like direct sales in a store or mail-order selling, by the distributors of a network who run brick-and-mortar shops*"[20]. The French *Cour de Cassation* [Supreme Court] held the same view, by considering that a franchisor's opening of a website did not violate the contractual guarantee of territorial exclusivity that it has granted to his franchisee[21].

[17] Paragraphs 50 to 53 of the guidelines
[18] Paragraph 58 of the guidelines
[19] See *Cour de cassation* [Supreme Court] (commercial law chamber) ruling of 14 March 2006, *Flora Partners*, overturning the 26 February 2003 ruling of the Bordeaux Court of Appeal, which had determined that the Internet site opens by a franchisee constituted a new point of sale covering the entire national territory
[20] See the aforesaid decision N. 08-D-25 (paragraph 63)
[21] See the aforesaid ruling of the *Cour de cassation* (commercial law chamber) of 14 March 2006

Likewise, the draft guidelines dwell in greater detail on the case, already foreseen by the current guidelines[22], in which an absolute ban on online sales may appear to be objectively necessary and thus fall out, without further analysis, of the scope of the prohibition provided by Article 81, paragraph 1, of the EC Treaty[23]. It is now made clear – as is also the case in the French decisional practice[24] – that this exception, to be interpreted narrowly under the principles set out in the European case-law, is in substance equivalent to a public interest reservation, applicable for example in order to comply with a general ban on selling dangerous substances over the Internet for public safety or public health reasons. It is quite obvious that this approach in no way prevents companies from convincing a NCA or a judge that an absolute ban on online sales that cannot be justified "upstream" on such grounds of general interest and that is consequently prohibited by Article 81, paragraph 1, of the EC Treaty may nevertheless benefit, in a given case, from an individual exemption pursuant to Article 81, paragraph 3, of the EC Treaty insofar as it is justified by economic efficiencies. From this point of view, the assessment of non-price vertical restraints is identical to that of price-related restraints, discussed in the first part of the present opinion.

2.3. The draft guidelines are intended to ensure the long-term coexistence of all the distribution strategies that are liable to benefit consumers

Insofar as companies are free to choose their distribution strategy, provided that they comply with competition rules, the architecture adopted by the Commission in its draft guidelines is most welcome. It builds on the issues encountered by NCAs to date in their decisional practice, in order to allow for a consistent deployment of the various distribution strategies that are liable to be implemented within the Single Market, starting with selective distribution, whose legitimacy, key features and interest for the consumers have been anchored in European case law for decades. The building blocks of this architecture are the following.

Firstly, the Commission recalls[25] that it is forbidden to prohibit the retailers that have been authorized to join a given distribution network from trading online – subject to the public interest clause mentioned in the previous section and to the possibility afforded to manufacturers to justify the existence of such a ban, in a given case, by showing that it secures likely efficiency gains and that a fair share of these gains is passed-on to consumers. The *Autorité* fully supports this approach, which should seemingly only concern a small number of cases, since the exchanges with stakeholders show that most companies whose competitive strategy is based on selective or exclusive distribution support online sales, provided that they are carried out in a fashion that is consistent with their "business model". It is quite arguable and indeed logical to consider that, once a retailer has been admitted to join a distribution network on the ground that he meets the criteria required for membership[26], he is entitled to trade online and not only offline. There may well exist reasons of economic efficiency for shutting off this sales channel, but such reasons have to be analyzed in-depth pursuant to Article 81, paragraph 3, of the EC Treaty.

Secondly, and symmetrically, the draft guidelines indicate that suppliers are free to impose the operation of a physical point of sale ("traditional store") on retailers who wish to join their distribution network[27]. The *Autorité* also supports this approach, which is based on the prior

[22] Paragraphs 14, 15, 16, 18 sub-paragraph 2, 49 at the end and 51
[23] Paragraphs 50 and 54
[24] See the aforesaid decision N. 08-D-25
[25] Paragraphs 52 and 54
[26] Criteria that, according to European case law, must be objective and non-discriminatory
[27] Paragraph 54

practice of the Commission[28] and which is also followed in France[29]. The reason for this is simple. The deployment and continued existence of a distribution network is based first and foremost on the solidarity and collective investment of its members; it would thus hardly be acceptable, particularly when the manufacturer's competitive strategy focuses not only on the brand image and quality of the products, but also on the existence of qualified services of proximity such as professional advice, that some retailers do not play along with the rule of the game, thus benefiting from the effort of their peers without contributing to it in due proportion. Belonging to such a network implies duties, and not only rights.

In the end, the Commission thus recommends a balance that revolves around a "mix" between brick-and-mortar presence and online activity, which could be referred to as "*brick and click*".

Thirdly and finally, the draft guidelines devote detailed attention to the mechanisms needed in order to maintain this balance over time. This effort is welcome: it would be somewhat paradoxical to make sure that consumers are indeed able to reap benefits from the competitive potential offered by the Internet, while not making sure that they can also, if they so wish, turn themselves, according to their individual preferences, to other forms of trade that are equally legitimate from the point of view of competition law.

In the current state of the draft regulation and guidelines, there are indeed tools provided to that effect, including: the ability to adapt the criteria governing "brick-and-mortar" sales to online activities (criteria that need not be identical, given the differences of nature between these channels of distribution, as illustrated by the experience of the *Autorité*[30], but that should pursue the same objective and reach comparable results[31]); the possibility of making sure that agreed dealers contribute to the collective investment that makes up the core of the network's added value, by achieving a given quantity of sales through their physical store[32]; the right to ensure that distributors who request to join a selective distribution network do not limit themselves to "window dressing" by opening a physical point of sale only for form while focusing the bulk of their efforts on online sales, but truly play along with the network[33]; or the possibility of preventing sales by non-agreed distributors[34]. However, the current terms of Article 4, sub b), third indent of the draft exemption regulation give rise to unintended and unnecessary ambiguity in this regard, as compared to the current text. If the new formulation were to be retained, it could easily be clarified, by stating that territorial restraints are forbidden unless the aim is to restrict "*sales by the members of a selective distribution system to unauthorised distributors in markets where such a system is set up or operated*.". This clarification would reflect the fact that such systems do not arise as a result of "waving a magic wand", but are rather deployed progressively within the Single Market.

That said, it is important to stress that the implementation of these tools, on a case-by-case basis, will occur under the control of NCAs and national judges. It would be very helpful for them if the guidelines introduced the somewhat technical sections devoted to the relationship between online and offline trade by a short and straightforward presentation, in plain wording, of the "philosophical" convictions that underpin them – much in the same way that the guidelines, far from simply listing minute examples of practices that are likely to constitute restraints to passive sales, first present the overall "policy" that guides this listing. It would

[28] For example, see the Commission's decision in the case of Yves Saint Laurent Parfums (OJ N. L 12 of 18 January 1992), confirmed by a ruling of the European Court of First Instance of 12 December 1996, *Edouard Leclerc v. Commission* (case T-19/92, Rec. p. II-1851)
[29] For example, see the aforesaid decision N. 06-D-24
[30] See decision N. 06-D-28 of the *Conseil de la concurrence* of 5 October 2006 relative to practices implemented in the selective distribution sector for hi-fi and home cinema equipment
[31] Paragraphs 51 and 57
[32] Footnote page 29
[33] Same references
[34] Footnote page 31

help everyone, from the specialized NCA to the generalist judge occasionally called upon to adjudicate a case of vertical restraint, if the guidelines made it clear that the Commission's approach is to ensure a fair balance between the various distribution strategies that are legitimate under Article 81 of the EC Treaty, in order to guarantee a lasting coexistence of the various channels of distribution that contribute to satisfying consumer preferences, and thus to promoting consumer welfare.

The first objective of the guidelines – namely to contribute to ensuring the consistent interpretation and implementation of European competition rules within a system of decentralized operation – would thus be fully met.

3. THE CONSIDERATION OF THE DISTRIBUTORS' MARKET SHARES SHOULD RESULT IN A MORE FINE-TUNED ASSESSEMENT OF FORECLOSURE RISKS

In certain sectors, the buyer power of distributors has grown considerably over the course of years, as a result of factors such as regulatory entry barriers (authorizations related to commercial urban planning; negotiation provisions between retailers and suppliers), non-regulatory barriers (high entry costs), the rationalization of purchases and referencing, or the development of distributor brands. Recent economic analysis shows that such a context favours foreclosure effects and may hinder the entry of new products or the development of competing companies in downstream markets. For example, when the installation of a distribution network is expensive, the ability of suppliers to turn to distributors already present on the downstream market is crucial.

If the access to these distributors is limited, as a result of procurement exclusivity agreements of excessive scope or duration, the intensity of competition is reduced insofar as the arrival of new products is hindered[35]. Symmetrically, such agreements can serve to strengthen a distributor's position and to hamper the development of competing companies in the downstream market. These observations make it difficult to retain a mechanical presumption that agreements involving a market player with a high market share are legal.

As an illustration, in its recent decision regarding the exclusivity agreements between Apple and Orange for the distribution of the *iPhone*, the *Conseil de la concurrence*, followed by the Paris Court of Appeal, evidenced that the risks of detrimentally affecting competition, due to the exceptionally long duration and to the extent of the exclusivity agreements signed in this case, were so much the more significant that the position of the exclusivity beneficiary on the mobile telephone services market was strong and that prior competition was not very intense in this market[36].

The modification of the method followed in order to assess whether the 30% threshold that determines the applicability of the exemption regulation is met or not therefore appears to be justified, in principle, from an economic viewpoint[37]. It is also in line with the preoccupations expressed by the French parliament and government, in the course of the enactment of the law on the modernization of the economy of 4 August 2008[38], relative to the relations between producers and distributors.

That said, the exemption regulation in no way presumes the illegality of agreements signed between companies one of which has a market share of more than 30%. Above this threshold, in the absence of any presumption of legality or illegality, one has to carry out a customized economic analysis, on the basis of parameters such as the need for the amortization of investments, risk sharing, provisions for the rollover or termination of contracts, or the dispersal of the demand.

Arguably, having to carry out such a case-by-case analysis, despite its economic justification, results in less legal certainty than a presumption of legality, all the more so as the guidelines can obviously not predefine the product market and the geographical market to be taken into consideration for determining if a given agreement is covered by the exemption regulation;

[35] Notably see *Patrick Rey and Thibaud Vergé, The economics of vertical restraints, in Handbook of Antitrust Economics, MIT Press, April 2008*

[36] Decision N. 08-MC-01 of 17 December 2008 relative to the implemented practices for the distribution of iPhones (paragraph 174)

[37] Article 3 of the regulation and paragraphs 83 to 88 of the guidelines

[38] Law N. 2008-776 of 4 August 2008 on the modernization of the economy (OJ N. 0181 of 5 August 2008, p. 12471)

such a definition is the responsibility of the competent competition authority and entails a facts-based analysis of the case at stake.

Thus, it could be stressed that the amendment contemplated by the draft texts are first and foremost intended to allow competition authorities to tackle cases of foreclosure liable to appreciably hamper consumer welfare, and clearly not to engage in generalized "micro-management" of distribution agreements in the absence of any particular risk for competition. In the aforementioned case of the *iPhone*, the downstream market was of a national scale. One can imagine cases in which the downstream market will be of a more limited geographical dimension, but it is expected that the NCAs, that can generally prioritize their cases, will target the ones in which one of the parties to the agreement has significant market power, leading to an appreciable risk of foreclosure that warrants an *in concreto* assessment.

4. THE LINKAGE OF THE NEW TEXTS WITH OTHER INSTRUMENTS OF EUROPEAN COMPETITION POLICY

The review of the instruments on vertical restraints has to be tackled within the broader context of the modernization of European competition law. The *Autorité* hereinafter provides a few observations intended to ensure the consistency with other texts that are either in the process of being reviewed or are expected to be reviewed in the short term: Regulation N. 1/2003 (4.1), the regulation on technology transfer agreements (4.2) and the regulation regarding automobile distribution (4.3).

4.1. Linkage with Regulation (EC) N. 1/2003 relative to the implementation of the competition rules provided by Articles 81 and 82 of the EC Treaty

It could be useful to bring Article 6, paragraph 2 of the exemption regulation into line with Article 29, paragraph 2 of Regulation N. 1/2003, as suggested by paragraph 74 of the draft guidelines, in order to unify the withdrawal power conferred upon the NCAs. In the current state of the project, the draft exemption regulation limits this faculty to individual agreements. Where the relevant market has all of the characteristics of a distinct geographical market and where similar agreements are implemented in its jurisdiction alone, a NCA could benefit from the possibility of withdrawing the exemption, for the future, on the entire market involved.

4.2. Linkage with Regulation (EC) N. 772/2004 relative to technology transfer agreements

The inclusion of know-how amongst the intellectual property rights defined in Article 1st, sub b), of the regulation is a policy choice, that can be based on reasons relating both to competition law and to intellectual property law.

That said, this clarification may impact the assessment of franchising agreements, which imply a know-how transfer. To avoid any ambiguity as to the handling of these agreements, it could be clarified that Commission Regulation (EC) N. 772/2004 of 27 April 2004 regarding the application of Article 81, paragraph 3, of the EC Treaty to categories of technology transfer agreements[39] does not apply to franchising agreements which do not have as their essential purpose the transfer of intellectual property rights since they are directly linked to the use, sale or resale of goods or services by the buyer or its customers.

4.3. Linkage with Regulation (EC) N. 1400/2002 on car distribution

The ongoing review of the approach followed in relation to the agreements currently falling under Commission Regulation (EC) N. 1400/2002 of 31 July 2002 regarding the application of Article 81, paragraph 3, of the EC Treaty to vertical agreements and concerted practices in the automobile sector[40] should, independently of its scope and calendar, be carried out in consistency with the evolution of ordinary law regarding vertical restraints.

The evolution of the method followed in order to evaluate the market share of the parties to the agreement, if it is also envisaged in that context, should lead NCAs to better tackle agreements that include appreciable risks of foreclosure for competition, without dispersing their limited resources on cases that are less of a priority from the standpoint of consumer welfare.

[39] OJ N. L 123 of 7 April 2004, p. 11
[40] OJ N. L 203 of 1st August 2002, p. 30

CONCLUSION

The implementation of the regulation and guidelines on vertical restraints has given rise to an abundant practice in France. This practice has not brought any particular difficulty to light. Yet, it has allowed the *Autorité* to handle many new legal and economic issues and to provide responses that, alongside those of many other NCAs, have contributed to feeding the work carried on within the European Competition Network (ECN) in the course of the review of these texts.

The *Autorité* welcomes the policy options taken by the Commission, as well as the technical proposals intended to transcribe them in the draft texts. These drafts renew the effort undertaken since the start of the millennium in favour of a more effects-based approach of business conduct, while preserving the overall balance between the case-by-case handling that this evolution necessarily implies, on the one hand, and the need for rules that are as simple, predictable and consistent as possible for companies, on the other hand. As regards substance, the future texts should allow the NCAs and national judges to foster more finely consumer welfare, without interfering in strategic or commercial choices made by market players economic actors, provided that these choices do not hinder competition.

However, this situation of decentralized enforcement of European competition rules could, with regard to a few technical points dealt with by the draft guidelines, justify further clarifications intended to optimize legal certainty and, in the end, to facilitate the consistent implementation of the law by competition authorities and judges. It is with this in mind that the *Autorité* will go on contributing to the common work of the ECN.

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