



Competition newsletter

Latest updates from the Competition team - May 2010

OFT imposes record fine of £225m on tobacco manufacturers and retailers

The OFT has fined tobacco manufacturers and retailers a record total of £225m for unlawful retail pricing practices.

Summary

The Office of Fair Trading (OFT) has found that two tobacco manufacturers (Imperial Tobacco and Gallaher) and ten retailers (Asda, The Co-operative Group, First Quench, Morrisons, One Stop Stores, Safeway, Sainsbury's, Shell, Somerfield and TM Retail) breached UK competition law by engaging in unlawful retail pricing practices.

The OFT concluded "that each manufacturer had a series of individual arrangements with each retailer whereby the retail price of a tobacco brand was linked to that of a competing manufacturer's brand". The OFT considered that "these arrangements restricted the ability of these retailers to determine their selling prices independently and breached the Competition Act 1998".

Imperial Tobacco has confirmed that it will appeal the OFT decision to the Competition Appeal Tribunal. It will request the Tribunal to quash the OFT fine in its entirety, and rejects "any suggestion that it acted in breach of the Competition Act or in any way contrary to the interests of consumers". The Co-operative Group is also considering an appeal, and Morrison's has also indicated that it will appeal.

Background

The OFT noted that the arrangements covered different periods between 1 March 2001 (when the Competition Act 1998 first applied to them) and 15 August 2003 (when the OFT sent its first request for information under the Act). According to the OFT, they related to the markets for UK duty paid cigarettes, hand rolling tobacco, pipe tobacco, cigars and cigarillos.

Sainsbury's alerted the OFT to the alleged arrangements, and applied to the OFT for leniency. As a result it received complete immunity to OFT fines. Asda, One Stop and Somerfield also co-operated with the OFT and as a result received discounts in the fines imposed on them.

The OFT investigation began on 15 August 2003, when it sent a request for documents and information under the Competition Act 1998. In April 2008 it issued a "Statement of Objections" to the parties concerned, setting out its allegations of infringement.

Then in July 2008 Gallaher, Asda, First Quench, One Stop Stores, Somerfield and TM Retail reached an 'early resolution agreement' with the OFT, admitting to involvement in alleged infringing arrangements, and receiving in return a reduction in the fines imposed on them.

The OFT's investigation into Imperial Tobacco, The Co-operative Group, Morrisons, Safeway, Shell and Tesco continued. It has now imposed a fine on each of them apart from Tesco, having decided that it did not have enough evidence for an infringement finding in relation to Tesco's relationships with Imperial Tobacco and Gallaher.



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Facts

The OFT imposed a total fine of approximately £225 million, which it notes is the largest total fine that it has imposed in a Competition Act 1998 case.

The parties involved were fined the following amounts:

- Imperial Tobacco - £112,332,495
- Gallaher - £50,379,754
- The Co-operative Group – £14,187,353
- Asda - £14,095,933
- Safeway - £10,909,366
- Morrisons - £8,624,201
- Somerfield - £3,987,950
- Shell - £3,354,615
- TM Retail - £2,668,991
- First Quench - £2,456,528
- One Stop Stores - £1,314,095
- Sainsbury's - £0

Comment

Simon Williams of the OFT said: "Practices such as these, which restrict the ability of retailers to set their resale prices for competing brands independently, are unlawful. They can lead to reduced competition and ultimately disadvantage consumers. This enforcement action will send out a strong message that such practices, which could in principle be applied to the sale of many different products, can result in substantial penalties for those who engage in them."

Conversely, Imperial Tobacco in confirming its appeal against the OFT's decision to the Competition Appeal Tribunal, commented:

"The OFT's Decision relates to certain promotional arrangements that Imperial Tobacco had entered into with multiple retailers prior to August 2003. Imperial Tobacco categorically denies that these promotional arrangements had the purpose or effect of restricting competition. The purpose of these arrangements was to encourage our brands to be priced competitively and that the promotional discounts given to retailers were passed on to consumers in the form of lower retail prices. Far from being anti-competitive, these arrangements were pro-competitive and to the benefit of consumers. Retailers remained free to set their own prices."

The Co-operative Group (which since March 2009 has owned Somerfield) is also considering an appeal, saying:

"We are in the course of studying the OFT's decision in detail, but throughout the investigation to date our judgement has been that our behaviour during the years in question did not infringe competition law nor did it result in consumers paying more for tobacco products than they otherwise would have done. As a result, we are actively considering pursuing an appeal to the Competition Appeal Tribunal."

Morrisons (which has owned Safeway since March 2004) has indicated that it too will appeal, saying:

"Morrisons considers the OFT's stance to be illogical and without foundation. The practices to which the OFT refers were intended to reduce the retail prices charged to consumers, and the OFT has itself acknowledged that its case is based on a novel interpretation of the law. Morrisons fully expects that when this case is considered with proper judicial scrutiny by the Competition Appeal Tribunal, the OFT's findings will be overturned. At all times Morrisons set its retail prices for tobacco products independently, and endeavoured to get the very best deal for its customers. It is therefore disappointing that the OFT has claimed that legitimate arrangements between Morrisons and its suppliers, aimed at reducing the price paid by Morrisons customers, are unlawful."

So this significant OFT decision looks set to be tested before the courts, with appeals seemingly set to be made by Imperial Tobacco, the Co-operative Group and Morrisons.

As well as testing the OFT's decision, the appeals may also provide valuable information for businesses on the best strategy to pursue when faced with a possible competition law breach, or an actual investigation. Applying for leniency, reaching an early resolution agreement, appealing an infringement decision: each is an option for a business faced with a competition law investigation, and each was chosen by different parties in this investigation. The outcome of any appeals in this case may provide good clues as to which route – in general terms – is best to follow.



RBS fined for competition law infringement

RBS to pay a fine of £28.59 million for breaking competition law, the OFT announces.

Summary

Royal Bank of Scotland (RBS) has agreed to pay a £28.59 million fine, after admitting to breaching competition law between October 2007 and February or March 2008. An Office of Fair Trading (OFT) investigation found that individuals in RBS disclosed confidential future pricing information to counterparts at Barclays Bank. The OFT found evidence that the information was taken into account by Barclays in determining its future pricing.

Background

Barclays brought the matter to the OFT's attention under the OFT's leniency policy, under which a company which is the first to inform the OFT of its involvement in an infringement may obtain immunity to financial penalties. If it continues to co-operate with the OFT, then Barclays is not expected by the OFT to pay a fine.

Specifically, the OFT's guidance states: "an undertaking [will](#) benefit from total immunity from financial penalties if the undertaking is the first to provide the OFT with evidence of cartel activity in a market before the OFT has commenced an investigation of the cartel activity".

Facts

The OFT's subsequent investigation found that individuals in RBS's Professional Practices Coverage Team unilaterally disclosed generic and specific confidential future pricing information to counterparts at Barclays. The OFT found that the disclosures occurred in contacts on the fringes of social, client or industry events or through telephone conversations. The information related to the pricing of loan products to large professional services firms, such as solicitors, accounting and real estate firms.

The OFT found evidence that Barclays took the information disclosed by RBS into account when determining its own pricing.

RBS's fine was reduced from £33.6 million to £28.59 million to reflect RBS's admission of the infringement, and its agreement to co-operate with the OFT.

Comment

Ali Nikpay, OFT Senior Director of Cartels and Criminal Enforcement, said:

"Any company that discloses confidential future pricing information to its competitors risks a substantial penalty. It is important that companies operating in the UK understand the seriousness of such conduct and ensure effective competition compliance throughout their organisation. This case underlines the OFT's commitment to protecting competition in the financial services sector. It also highlights the strong benefits of acting promptly to report anti-competitive conduct to the OFT and of co-operating with such investigations".

The Office of Fair Trading sets out its plan for the coming year

High-impact enforcement of competition law and streamlined procedures for Competition Act 1998 cases are on the OFT's agenda for the year ahead.

Summary

The OFT's annual plan continues the OFT's prioritisation of high-impact enforcement of competition law, for example against hard-core cartels, and announces its intention to streamline its processes for Competition Act 1998 cases and to minimise the burden on businesses of its interventions, for example in merger case investigations. The plan is written against the background of the pressures of the recession on competitive markets, and in the context of an OFT budget that will have reduced by 15% over the last three years.

Background

Under the Enterprise Act 2002, the OFT is required each year to publish a plan setting out its main objectives and priorities for the year ahead, and to consult with stakeholders on those proposals. The plan covers both consumer and competition policy.



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Facts

2010-11 will be the consecutive third year in which the OFT's budget has reduced by 5%, and the current plan continues the theme of prioritisation by which the OFT seeks to focus its activities on markets or behaviours that pose the greatest risk of consumer harm. The plan stresses that the OFT will not allow competition law enforcement to be sidelined as a result of the recession. In terms of its competition law role, the OFT will:

- use high-impact enforcement, with effective use of corporate and individual sanctions; interventions will be selected on the basis of maximising impact on direct harm to consumers and the educational or deterrent effect of such actions. In particular, hard-core cartel activity will continue to be a target
- look to influence behaviour of businesses, consumers and government to make markets work well, and advocate the importance of competition law at a time when government interventions in markets may be more common as a result of the economic situation
- seek to improve its efficiency against its reduced budget, including reviewing its internal procedures for Competition Act 1998 cases and streamlining processes where possible without limiting a party's rights of defence
- minimise the burden on businesses of its interventions, including (in the context of merger control) the use of undertakings from merging parties to address competition concerns, the use of the 'de minimis' exception where markets are of insufficient importance, and providing informal assistance to resolve merger situations that involve real competition issues.

Comment

Philip Collins, the Chairman of the OFT, commented "The OFT's combined competition and consumer role has been vital in responding effectively to the challenges posed by the recession. Over the year ahead, we will continue to demonstrate the benefits of competitive markets, the value of effective consumer protection and the pitfalls of short-term policy fixes which risk longer-term damage to consumers, markets and the UK economy". The OFT hopes to do this while achieving "more for less" in the way it manages its interventions.

UK competition law regime to apply to land agreements from 2011

In 2011 legislation that has excluded land agreements from the UK competition law regime is set to be repealed. As a result, competition restrictions in existing and future land agreements will be exposed to domestic competition law for the first time.

What is changing?

In 2011 legislation that has excluded land agreements from the UK competition law regime is set to be repealed. As a result, competition restrictions in existing and future land agreements will be exposed to domestic competition law for the first time.

What type of restrictions will now be caught?

Typical restrictions in land agreements that will become subject to UK competition law are:

- restrictive covenants in leases that limit the commercial activities that the tenant can carry out
- restrictions on a landlord letting adjacent property to competitors of a tenant

Does that mean that these restrictions will automatically be unlawful from the date of the repeal?

Not necessarily. Some may infringe competition law, and those will be unlawful from the date of the repeal (6 April 2011). Others may be covered by an exemption, meaning that they will remain valid and enforceable. Others may have an insignificant effect on the market and so fall outside the scope of the relevant prohibition altogether. Compliance will depend on the specific circumstances of each case.

What do we need to do?

Assess the competitive restrictions in your land agreements for compliance with UK competition law, and agree amendments where appropriate. Each business is responsible for ensuring its own compliance with the competition rules and must self-assess its agreements. It is no longer possible to notify



agreements for clearance by the competition authorities.

What is the timeframe?

Businesses have a one-year grace period until the repeal takes effect on 6 April 2011 to bring existing land agreements that will remain in force after 6 April 2011 into compliance with competition law. Restrictions in all future agreements that will be in force after 6 April 2011 will need to be assessed to ensure that they comply. Restrictions in agreements that expire before 6 April 2011 can be left as they are (provided that they are covered by the exclusion).

What happens if our agreements are non-compliant after the repeal?

The most likely practical consequence of non-compliance after the repeal takes effect is that the offending restrictions will be void and unenforceable.

In more serious cases, investigation by the Office of Fair Trading may lead to directions to modify restrictions to ensure compliance. In the most serious cases the OFT may impose regulatory fines of up to 10% of worldwide turnover. Separately, third parties that suffer loss as a result of an infringing restriction can litigate to seek an injunction and/or damages. Company directors can also be disqualified for involvement in competition law infringement, and individuals who dishonestly participate in anti-competitive cartels can be subject to fines and imprisonment.

What is the status of the repeal?

The Department for Business, Innovation and Skills decided in January 2010 to repeal the statutory instrument that excludes land agreements from the prohibition on anti-competitive agreements set out in the Competition Act 1998. The exclusion has been in place since the Act came into force in March 2000.

The legislation effecting the repeal was passed by the House of Commons, but was not passed by the House of Lords before the dissolution of Parliament ahead of the General Election. The draft legislation states that the repeal will take effect on 6 April 2011. There is no indication that the date of the repeal will change on account of the delay in passing the legislation, and it is best to assume that the repeal will go ahead on 6 April 2011.

New Block Exemption Regulation adopted for Insurance

Insurers may need to review their risk-pooling arrangements following the European Commission's new block exemption for agreements in the insurance sector.

Summary

Co-operation between competitors can risk of infringing competition law, but in the insurance sector certain forms of co-operation were permitted under a block exemption which expired on 31 March 2010. The new block exemption, which runs for seven years from 1 April 2010, modifies the existing exemptions for information exchange in the form of joint compilations, tables and studies, and for co- and re-insurance pools; however, the exemption for co-operation on standard policy conditions and security devices has been withdrawn, and such agreements must now be assessed on general competition law principles.

Background

European competition legislation prohibits agreements that restrict competition, but exempts from this prohibition agreements that lead to efficiency gains and give consumers a fair share of the benefits. Demonstrating that such gains exist can be a difficult process. The position is simplified where there is a block exemption, since any agreement that falls within that exemption will not be prohibited under competition law. The insurance block exemption recognises that the insurance sector has particular features that make specific co-operation between insurers necessary.

Facts

Information exchange between insurers is important because the more data that can be gathered, the more accurately the cost of covering specific risks can be assessed. The existing exemption for information sharing is therefore retained. There is a new requirement that this data must now also be made available on reasonable terms to consumer organisations or customer organisations (subject to public security considerations); there is also a clarification that information on policy pricing must not be exchanged.



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Risk pooling is another form of insurance-specific co-operation, since there are some risks (e.g. environmental, nuclear or terrorist) that insurers are reluctant to cover individually, which will therefore only be insurable through insurance pools. The exemption for pooling is retained with modifications: pools that do not cover 'new risks', cannot, as before, exceed 20% (co-insurance) or 25% (co-reinsurance) in combined market share held by the pool members. However, market share is now calculated not only by gross premiums earned within the pool but also by premiums earned outside it, so it is possible that some existing pools will move outside the exemption.

For such pools, an individual assessment will need to be carried out as to whether the agreement can be exempted on general principles. For pools covering 'new risks', the market shares do not apply. The new regulation extends the definition of 'new risks' to include risks that have changed so significantly that it is not possible to know in advance how large a pool will be needed to cover them.

The new block exemption withdraws the 'safe harbour' from two forms of co-operation: agreements for the joint establishment and distribution of non-binding standard policy conditions (SPCs) for direct insurance, and agreements setting standards for security devices.

Comment

These changes represent a streamlining of the insurance block exemption, rather than a radical overhaul. Forms of co-operation that are not now covered by the exemption will have to be assessed against the general test of efficiency gains and consumer benefit – the EC has indicated that SPCs, for example, can benefit competition by allowing customers easily to compare different insurers' policies, or switch between insurers. The EC will address both SPCs and technical standards in its revised [Horizontal Guidelines](#) later this year, which will be a useful guide for insurers in assessing their own forms of co-operation.

Freight forwarding: cartel investigation continues

European Commission nears end of cartel investigation in air freight forwarding industry.

Summary

On 10 February 2010 the European Commission (Commission) confirmed that it had sent a "Statement of Objections" to a number of companies, concerning "their alleged participation in price fixing cartels in the air freight forwarding business".

Background

The Commission is investigating allegations that providers of international freight forwarding services broke EU competition law, by fixing prices – and specifically "by colluding on the imposition, level, timing and application of various surcharges, in breach of Article 101 of the TFEU".

The allegations relate to four separate infringements that concern freight forwarding:

1. from the UK to outside the European Economic Area (EEA);
2. from the EEA to the US;
3. from China to the EEA; and
4. from Southern China / Hong Kong to the EEA.

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements that restrict competition. The same Article was previously known as Article 81 of the EC Treaty.

Facts

The Commission carried out unannounced inspections (or 'dawn raids') at the premises of various international freight forwarders on 10 October 2007, seeking evidence of a suspected competition law infringement.



In February 2010 it confirmed that its investigation had advanced, with the sending of a Statement of Objections to a number of alleged participants in air freight forwarding price-fixing cartels.

The issue of a Statement of Objections "is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing to the Statement of Objections, setting out all facts known to it which are relevant to its defence against the objections raised by the Commission. The party may also request an oral hearing to present its comments on the case."

After the sending of the Statement of Objections, and the opportunity for the addressee to reply, "the Commission may then take a decision on whether the conduct addressed in the Statement of Objections is compatible with the EU antitrust rules".

Comment

The Commission advises that "sending a Statement of Objections does not prejudice the final outcome of the procedure".

This is procedurally correct. However, in practice many Statements of Objections do lead to infringement decisions and the imposition of significant financial penalties. For that reason, it is possible that air freight forwarding will hit the headlines again later in 2010, when the Commission announces its final decision in the case.

New competition law regime for supply and distribution agreements

New exemption regulation and accompanying guidelines enter force on 1 June 2010, with a transitional period until 31 May 2011 to bring existing agreements into line.

Background

In 1999 the European Commission (the Commission) introduced Regulation 2790/1999 – the 'block exemption' regulation for supply and distribution agreements (the 1999 Block Exemption).

Such agreements are known as 'vertical agreements' because they are between businesses at different levels of the supply chain (by contrast, businesses at the same level of the supply chain enter into 'horizontal' arrangements). A good example of a vertical agreement is one made by a manufacturer to sell goods to retailers who will resell those goods to the public.

Businesses across all industries enter into many 'vertical agreements'. For the last 10 years the 1999 Block Exemption and its accompanying Guidelines on Vertical Restraints (the 1999 Guidelines) have contained the competition law rules that applied to them. They have provided a single set of competition law rules for vertical agreements across the EU. As such they have been of great importance to businesses that trade in the EU, and were generally thought to have been a success.

The 1999 Block Exemption expires on 31 May 2010. On 20 April 2010 the Commission published the new revised block exemption (the 2010 Block Exemption) and guidelines (the 2010 Guidelines) that on 1 June 2010 will replace the 1999 Block Exemption and the 1999 Guidelines.

The 2010 Block Exemption and Guidelines do not make widespread changes to the 1999 Block Exemption and Guidelines. Instead they make a small number of important substantive amendments.



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Block exemptions generally

Under EU and UK competition law, agreements that have as their object or effect the prevention, restriction or distortion of competition are prohibited. However, it is possible for certain agreements to benefit from an exemption to that prohibition, for example where they improve production or distribution.

To help businesses to decide whether specific types of agreement can benefit from exemption, the European Commission has introduced a number of 'block exemption' regulations. If an agreement complies with the terms of a block exemption, then it will be exempt from the prohibition on anti-competitive agreements. That means that it will be within a 'safe harbour' for competition law purposes – any competitive restrictions that it contains will not infringe competition law.

The 1999 Block Exemption

The 1999 Block Exemption granted exemption for competition law purposes to agreements for the sale or purchase of goods or services, where (a) the supplier's market share did not exceed 30% and (b) the agreement did not contain 'hardcore restrictions' of competition (such as price fixing or market sharing).

It was a short piece of legislation which set out the laws concisely. It was accompanied by a detailed set of explanatory guidelines (the 1999 Guidelines), which provided essential clarity on how the 1999 Block Exemption applied to specific types of vertical agreement, and to specific types of competition restrictions.

The 2010 Block Exemption – what changes?

Market shares

The 2010 Block Exemption makes the availability of the exemption conditional on the supplier and the buyer both having market shares less than 30%.

The basic rule under the 1999 Block Exemption was that the exemption applied provided that (a) the supplier's market share did not exceed 30%, and (b) the agreement did not contain hardcore restrictions.

Under the 2010 Block Exemption, the availability of the exemption depends on:

- the supplier's share of the sales market not exceeding 30%; and
- the purchaser's share of the buying market not exceeding 30%; and
- the agreement not containing hardcore restrictions.

Where a party is both a buyer and a seller under a multi-party agreement, its market shares on both the buying and selling markets must not exceed 30% for the 2010 Block Exemption to apply.

The new purchaser market share threshold prevents the exemption covering competition restrictions in purchase agreements concluded by businesses with high shares of buying markets. Such businesses will in future need to assess restrictions in their purchasing agreements on a case-by-case basis to ensure compliance with competition law.

Selective distribution

Selective distribution systems remain covered under the 2010 Block Exemption where the conditions described above are met. However, an important change has been made to the scope of the exemption for selective distribution.

Under the 1999 Block Exemption, suppliers were permitted to restrict appointed resellers from selling to unauthorised distributors. In other words, that restriction was 'block exempted' and did not offend competition law. Under the 2010 Block Exemption, that restriction is still permitted – but only where it prevents sales to unauthorised distributors in the territory where the selective distribution system applies.

The Block Exemption will not apply where the supplier restricts appointed resellers from selling to unauthorised distributors that are located outside the selective distribution territory elsewhere in the EU.

This means that suppliers that use selective distribution in part of the EU only (say the UK) can prevent appointed resellers from selling products to unauthorised distributors in that part (the UK). However, if they wish their agreement to be covered by the 2010 Block Exemption, they cannot prevent those appointed resellers from making sales to unauthorised distributors located elsewhere in the EU.



Suppliers that operate selective distribution systems should review their agreements, and consider whether revisions are needed to ensure that the 2010 Block Exemption applies. They may also wish to consider whether a pan-EU selective distribution system would be advantageous, given this change.

Restriction on where the buyer trades from

The 2010 Block Exemption makes clear that suppliers are permitted to restrict a buyers' place of establishment to a particular address, place or territory: such a restriction will not mean that the benefit of the exemption is lost.

This restriction should not be confused with restrictions on the territory where or the customers to whom the buyer may resell, which remain permitted in only limited circumstances under the 2010 Block Exemption.

Clarification of market share calculation methodology

The 2010 Block Exemption makes clear that for the purposes of assessing market shares, the supplier's market share is calculated on the basis of market sales value data, and the buyer's on the basis of market purchase value data, each in the preceding calendar year.

Transitional period

The 2010 Block Exemption contains a one-year transitional period from 1 June 2010 (the date it enters force) until 31 May 2011. During that period, existing agreements that comply with the 1999 Block Exemption but not the 2010 Block Exemption will continue to be exempted. If they will remain in force after 31 May 2011 they should be brought into line with the 2010 Block Exemption before that date.

This applies obviously to selective distribution agreements, as described above. Additionally, buyers may wish to check their buying market shares to know whether the 2010 Block Exemption will cover their agreements after the end of the transitional period. If not, they may need to reconsider any restrictions that those agreements contain.

Expiry

The 2010 Block Exemption will remain in force until 31 May 2022 – a period of 12 years.

How do the 2010 Guidelines differ?

The 2010 Guidelines make a number of revisions to the 1999 Guidelines, a small number of which introduce important substantive changes in how the Commission considers vertical agreements should be analysed.

Agency

The 2010 Guidelines clarify how to define what is a genuine agency agreement. Genuine agency agreements are not caught by the prohibition on anti-competitive agreements, and do not require any exemption to be lawful. They are characterised by the agent not taking material financial or commercial risk in the activities he is appointed to perform.

The 2010 Guidelines explain that there are three types of risk which the agent must not take on, if the agreement is to be genuine agency and thus outside the scope of the prohibition altogether:

- contract-specific risks relating to the deals negotiated by the agent – such as financing stock
- market-specific sunk investments made by the agent to enable it to perform its functions
- risks or costs incurred by the agent in carrying out activities 'in the same product market' which are required by the principal, where those activities are carried out at the risk and cost of the agent – an example would be advertising and promotional costs which are incurred by the agent and not reimbursed by the principal

Subcontracting agreements

The 2010 Guidelines contain new guidance on subcontracting agreements – explaining that such agreements will generally not be caught by competition law, provided certain conditions are satisfied.

Unilateral conduct

The 2010 Guidelines include guidance on how unilateral policies are to be analysed. Unilateral policies are not agreements as such and in general are not caught by the competition law prohibition on anti-competitive agreements; the Commission has provided important guidance based on recent court judgments on the dividing line between a genuine unilateral policy and an agreement.



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Hardcore restrictions

The 2010 Guidelines explain that the inclusion of a 'hardcore restriction' may be justifiable on a case-by-case basis if it produces economic efficiencies.

Hardcore restrictions are listed in the 2010 Block Exemption. Examples are price-fixing and market sharing. Where included in a vertical agreement, such measures will preclude the availability of the 2010 Block Exemption and may infringe competition law. Although the competition authorities have often investigated and imposed fines on businesses that agree hardcore restrictions, there is no absolute rule that they always automatically infringe competition law – there is always the possibility of an individual exemption applying on a case-by-case basis.

Resale price maintenance specifically

Resale price maintenance (RPM) involves the supplier setting or agreeing with the reseller a fixed or minimum resale price to be charged by the reseller. It is a hardcore restriction. As such it will generally infringe competition law, and will preclude the application of the Block Exemption.

However, the 2010 Guidelines explain that – like other hardcore restrictions – RPM may be justifiable (and benefit from an individual exemption) if it produces economic efficiencies: for example, where it helps a suppliers and resellers to launch a new brand or enter a new market.

The 2010 Guidelines specifically point out that: "in some situations, the extra margin provided by RPM may allow retailers to provide (additional) presales services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) [for individual exemption] are fulfilled".

Suppliers should note that significant and compelling evidence is likely to be needed to prove that RPM is justifiable and qualifies for an individual exemption.

Internet sales

New and updated guidance is provided on Internet sales, in the light of the substantial growth in that channel in the 10 years since the 1999 Guidelines.

The 2010 Guidelines continue to make a distinction between 'active sales' and 'passive sales'.

'Active sales' involve directly approaching individuals customers – for example by visits, direct mail, unsolicited emails or specifically targeted promotional activity. Under the Block Exemption, resellers can be restricted from making 'active sales' into territories or to customer groups that are exclusively granted to other resellers, or reserved to the supplier.

'Passive sales' by contrast involve responding to unsolicited requests, and include general (as opposed to targeted) advertising, as well as maintaining a website. Restricting passive sales will usually be a hardcore restriction – precluding the availability of the 2010 Block Exemption. The 2010 Guidelines emphasise this, stating that "in principle, every distributor must be allowed to use the Internet to sell products", and that "having a website is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor".

However, the 2010 Guidelines also acknowledge that some Internet trading methods can amount to 'active sales', and can be restricted accordingly. For example, online advertising targeted at specific customers is 'active sales', which suppliers can restrict in territories that are exclusively allocated to other distributors or reserved to the supplier.



The 2010 Guidelines explain that the following types of Internet restriction will be hardcore restrictions of competition:

- requiring a reseller to prevent customers located in other territories from viewing its website
- requiring a reseller to re-route customers to the supplier's or another distributor's website
- requiring a reseller to terminate a consumer's Internet purchase where credit card data show an address located outside the reseller's territory
- requiring a reseller to limit the proportion of its sales that are made on the Internet
- requiring a reseller to pay a higher price for products intended to be resold online than those which will be resold offline

There are some important exceptions to these hardcore restrictions.

First, a supplier can require a reseller to have a bricks-and-mortar store as a condition to being admitted to the distribution system. It can then require the resellers to sell at least a specific minimum value or volume of products offline, to ensure the efficient operation of the store – provided that online sales are not limited. The specific minimum value or volume could be the same for all resellers, or determined on an individual basis for each reseller.

Second, a supplier can agree to make fixed payments to support a reseller's sales efforts, but not variable payments where the payment increases with the reseller's offline turnover. The Commission considers that variable support payments indirectly amount to 'dual pricing'; as such they will (presumably) amount to a hardcore restriction by indirectly requiring a higher price for products destined to be sold online.

Upfront access payments

The 2010 Guidelines set out new guidance on the assessment of 'upfront access payments' (paid by suppliers to resellers to gain access to the reseller's network) and similar arrangements such as 'pay-to-stay fees', all of which are block exempted provided that the market share threshold of 30% is not exceeded by either the supplier or the reseller. However, in the UK such measures are subject to additional regulation under the Groceries Supply Code of Practice which should be considered in that sector.

Category management agreements

The 2010 Guidelines include guidance on the assessment of 'category management agreements' (where the reseller tasks the supplier with the marketing of all the products in a given product category – including both those of the supplier and its competitors). Such arrangements are block exempted provided that the market share threshold of 30% is not exceeded by the supplier or the reseller.

What this means

The importance of the 2010 Block Exemption and the 2010 Guidelines to businesses trading in the EU is significant. The new rules will directly affect more businesses than almost any other set of competition law rules.

Businesses now have 1 year until 31 May 2011 to bring existing agreements into line with the 2010 Block Exemption. Agreements that enter force on or after 1 June 2010 should be drafted – where necessary – to comply with the 2010 Block Exemption.