Position Paper

UEAPME[1] position on the review of competition rules applicable to vertical agreements

Preliminary comments

On 28 July the European Commission has launched a public consultation on the review of the competition rules applicable to vertical agreements, which ran until 28 September. UEAPME regrets that the European Commission, once again, did not respect the spirit of the "General principles and minimum standards for consultation of interested parties" it set, as the consultation was launched during the main holiday period and a pan-European consultation was necessary for UEAPME to produce this response.[2]

Introduction

UEAPME warmly welcomes the consultation and the intention of the Commission to take into account stakeholders' comments and the recent market developments. The proposed draft regulation is mainly a continuation of the existing one and UEAPME is in favour of this practice. The aim of the existing and of the new draft regulation, i.e. to increase the efficiency and to reduce the transaction and distribution costs, is still valid.

Specific comments

The practice has shown that some **concepts and definitions should be clarified**, such as "relevant market", "franchise", "know-how" and "equal treatment".

According to UEAPME, there is no reason at all to include know-how in the definition of "intellectual property rights" (article 1(d)) as this can lead to legal uncertainty. In addition, the definition of "know-how" given in article 1(e) is far too general and too vague and can cover nearly everything, which will not avoid existing abuses. Even the clarifications of "secret", "substantial" and "identified" remain vague and are adding nothing to a better description of "know-how". UEAPME is therefore in favour of a more limited definition.

Article 6 "withdrawal of individual cases" must also be clarified, especially regarding the position of the individual Member States. Indeed, the possibility for Member States to withdraw a specific individual case from the benefit of the Regulation, may not lead to arbitrariness in the internal market.

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[1] UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

[2] "Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards for consultation of interested parties by the Commission." COM(2002)704final : "On the other hand, a consultation period longer than eight weeks might be required in order to take account of: - the need for European or national organisations to consult their members in order to produce a consolidated viewpoint; - the specificity of a given proposal (e.g. because of the diversity of the interested parties or the complexity of the issue at stake); - main holiday periods…"

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Article 5(b) of the current and also the new draft regulation states that the exemption shall not apply if the agreement contains a post term non-compete obligation unless the non-compete obligation is indispensable to protect know-how transferred by the supplier to the buyer, is limited to the premises and land from which the buyer has operated during the contract period and is limited to a maximum period of one year. This clause is not convincing. In our opinion, the buyer should be completely free to start again any kind of commercial activity. A non-compete obligation should be limited to the contract period. The protection of know-how does not justify the exclusion of a buyer from the market. In addition, the supplier has been compensated for the transfers of know-how through the fees the buyer has paid during the contract. Moreover, the sector itself is more and more convinced that a balanced agreement should not contain a post term non-compete obligation.[3]

Finally, non-compete obligations are ineffective. Competition e.g. by a third party in the neighbourhood of the same selling point can never be avoided. So only the buyer is punished by such a clause while it has nearly no positive effect at all on the protection of the competitiveness of the supplier.

It would be recommendable that the new regulation contains a provision stating that the block exemption will not apply to vertical agreements containing a clause in which the valuation of the business is fixed at the moment of the signature of the agreement. Such clauses restrict the free market and deprive the buyer of the possibility to sell his/her business at the end of the agreement at a competitive price.

UEAPME believes that pre-emptive rights are only acceptable if the free competitive market can continue to play. If a buyer wants to sell his/her business, in which he or she has invested him/herself and for which he/she has taken risks, then he/she should be allowed to do so. Predetermined prices, as they are mostly lower then the real value, should be considered as unwritten.

The block exemption should also not apply if the agreement contains performance obligations which oblige the buyer to generate a certain turnover in a fixed period or to purchase an X number of goods. Moreover, any sales obligation should never be linked with a dissolution clause: clauses that contain the possibility to dissolve unilaterally and immediately the contract without taking into account external factors should be declared null and void. After all, good commercial co-operation agreements depend on the efforts of every party. Unilateral imposed performance obligations harm commercial co-operation.

UEAPME would also like to stress that retailers and franchisees can suffer from competition from their providers and franchisers as for example through direct internet selling by these providers and franchisers. While the retailer and franchisee have to cooperate in the services of the franchiser, the franchiser is operating in the "exclusive" market of the franchisee. UEAPME regrets that this is not taken into account in this regulation.

Finally, it will be necessary to draft understandable and easily accessible information on the new regulation for SMEs.

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[3] See for example the criteria to obtain the label in Belgium. The main brand agreed not to include such a clause.

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