



Response to the European Commission's consultation on the draft communication on dual distribution in the draft Guidelines on the future Block Exemption Regulation for vertical agreements

The FICIME - French Federation of International Companies in Mechanics and Electronics - groups 450 companies established in France generating 417,000 jobs and achieving an estimated total turnover of 44.8 billion euros. With a very strong representation in the durable and capital goods sectors, the FICIME offers assistance and support to companies through a wide range of services in the legal, social, customs, environmental, training, technical, statistical and documentation fields.

This document is intended to complement the answers provided by the FICIME during the previous consultations of the European Commission on Regulation n°330/2010 of 20 April 2010 (the "Regulation"), as well as the guidelines on vertical restraints (the "Guidelines").

RELAXATION OF THE RULES APPLICABLE TO DUAL DISTRIBUTION

Modification of the thresholds

On reading the draft Notice, and subject to the final text of the Exemption Regulation (in particular Article 2), it is our understanding that only the 30% market share threshold would henceforth be applicable to dual distribution, below which vertical agreements would be generally exempted, including exchanges of information provided that they are necessary to improve the production and distribution of products and services. We welcome this.

Indeed, it is worth remembering that exchanges of information are inherent to distribution networks and allow them to function properly, and that the current system already allows for the treatment of possible horizontal exchanges of information between suppliers and distributors.

However, we would have liked to see a clear statement of the presumption of lawfulness inherent in an exemption if the exchange of information is "necessary", particularly in the light of the examples provided, which are not, however, an exhaustive list. The burden of proof of the unlawfulness of the exchange of information would thus expressly rest with the Commission and/or the Competition Authorities.

Indeed, legal certainty and practical feasibility plead in favour of dispensing with the need for operators to carry out systematic assessments of their distribution systems in the light of the various categories of information.

Clarification of the categories of information

The FICIME also welcomes the work done by the Commission to define the exchanges of information considered necessary, or not, to improve the production and distribution of the contractual products or services by the parties.

The draft first sets out the categories of information whose exchange would in principle be authorised. It distinguishes in this respect according to the type of distribution network, so that in the case of exclusive distribution it may be necessary to exchange information relating to territories or customer groups allocated exclusively to the distributor or reserved for the supplier. The same applies to selective distribution for information on compliance with the selection criteria for distributors.

On the other hand, a list is presented of categories of information which can be presumed not to be necessary for the improvement of the production and distribution of products and services, and whose exchange would therefore be prohibited.

In the light of what we have said above, it seems to us to be essential to be able to identify the information whose exchange would cause the benefit of the exemption to be lost. It is nevertheless difficult, given the timeframe of this consultation, to determine whether the list provided is exhaustive and covers all forms of distribution and situations, and to effectively consult our members in this regard.

FICIME considers that these categories will have a value of example and that the assessment that can be made on a case-by-case basis will make it possible to refine their outline and/or to complete them.

RECOMMENDATIONS CONCERNING AGREEMENTS NOT COVERED BY THE EXEMPTION

The draft also provides responses to companies whose agreements do not benefit from the exemption, particularly with regard to the precautions they can take to limit the risks incurred.

These include the systematic aggregation of information and a sufficient waiting period between its production and communication, which it is up to the company concerned to determine according to the circumstances, as well as the establishment of a "Chinese wall" (technical or administrative measures) enabling it to ensure that the information transmitted by the purchaser is only accessible to the supplier's personnel concerned (in charge of upstream and not downstream activities).

It remains to be seen whether the companies concerned will have the necessary resources and means to implement these measures, and what the cost will be for them.

It should also be recalled that the draft Regulation excludes any exemption, irrespective of market share, for vertical agreements which "directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of competition between competing suppliers and the buyer". Legal uncertainty therefore lies in the extensive interpretation that the competition authorities give to this notion of restriction by object.

Finally, we agree with a number of commentators who have pointed out that the exclusion of the exemption for any supplier of online intermediation services is likely to concern not only the large platforms, initially targeted, but also all suppliers providing their distributors with a website enabling them to sell online.

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In conclusion, and while awaiting the final exemption Regulation, FICIME underlines the progress made by the draft Communication with regard to the 30% market share threshold applicable to dual distribution on the one hand, and to the categories of information that may be exchanged within distribution networks on the other.

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