

Draft Revised Regulation on Vertical Block Exemption and Vertical Guidelines

17.09.21

Seldia Contribution to Public Consultation

We welcome the draft texts presented by the European Commission on 9 July regarding the revision of the Vertical Block Exemption Regulation and the Vertical Guidelines as well as the opportunity offered to us to submit comments.

Seldia represents 28 national associations and 16 companies active in direct selling, which is a method of marketing and retail of products and services directly to the consumer, in their homes or at any other location, away from permanent retail premises. Seldia Members highly value these two legal instruments, which provide for a high level of legal certainty when it comes to the way they should be operating as well as the relations between companies and their salesforce.

We would like to comment on the following topics that are of key importance for us:

Restrictions on the use of online marketplaces

The Commission recognises in the draft guidelines that, by putting restrictions on the use of online marketplaces, suppliers may wish, among others, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services or to ensure that the retailer maintains direct a relationship with customers. It also acknowledges that in many of those cases mentioned above (quality services, fight against counterfeit), such restrictions may lead to efficiencies.

The very essence of the direct selling is that by offering products and services directly to the consumers, **both online and offline**, direct sellers succeed in building personal relations with their customers. Thanks to the important product knowledge gained through specialised trainings organised by direct selling companies, direct sellers can provide customers with expert advice tailored to their personal needs. By doing so, direct sellers can offer a high quality service and a unique experience to the consumer, who otherwise would not able to benefit should products be sold in online marketplaces. Another reason why direct sellers are typically prohibited from using online marketplaces is to safeguard consumer safety and ensure consumers do not buy counterfeit products that could pose a serious risk to their health and safety.

We warmly welcome the fact that the draft Vertical guidelines incorporate the EU case law as well as the findings of the EU Commission's Competition Policy Brief dated April 2018 on the application of the EU competition rules to marketplace bans ("Policy Brief"). The draft guidelines also echo the request made by us and many stakeholders during the evaluation

process to further clarify the findings of the Coty judgment in order to ensure legal certainty and harmonised application of EU rules across Member States.

The draft guidelines highlight that restrictions on online sales constitute a hardcore restriction, because they have as their object to prevent the buyers or their customers from effectively using the internet to sell their goods or services online and therefore, they restrict sales to customers located outside the physical trading area of the buyers or their customers. This reflects, after all, the landmark ruling of the CJEU in the case of Pierre Fabre.

On the other hand, in its Coty judgment **the CJEU holds that restrictions on online marketplaces do not constitute hardcore restrictions**, because while such restrictions concern a specific online channel, other online channels remain available to the buyer (for example, selling through websites). We are pleased to see that the Commission follows the ruling in this regard and that this important finding is clearly presented and explained in the draft guidelines, providing additional clarity and legal certainty for companies and national regulators.

Indeed, when it comes to the direct selling sector, direct sellers are free to market and sell their products and services to consumers via various online channels, either by setting up their own web shop, or even through social media.

We also concur with the Commission's approach that restrictions on the use of online platforms, irrespective of the distribution system used by the supplier, **are not restrictions by object** and can therefore benefit from the safe harbor, as "these restrictions do not affect a group of customers which can be circumscribed within all potential customers" and therefore "do not amount to a restriction of the territories into which or the customers to whom the distributors or their customers can sell the contract goods or services".

To conclude on this point, **we fully agree with the approach** taken by the European Commission when it comes to restrictions on the use of online marketplaces. We would therefore like to urge the European Commission **to maintain the current approach and wording as found in the draft Vertical guidelines on restrictions on online marketplaces**.

Selective distribution system and Coty

As already indicated above, it has been of absolute essence for the direct selling sector and other stakeholders to have a better understanding and harmonised interpretation of the important Coty judgement issued by the European Court of Justice.

We welcome the additional clarification provided by the European Commission regarding the application of the Metro criteria. Especially when it comes to the nature of products that justify the use of a selective distribution system, we agree with the interpretation provided by the Commission that a selective distribution system can be operated not only for luxury products but also for **high-quality** and high-technology products. This is in line with the EU case law, as cited in the draft guidelines. **We would urge the Commission to maintain this interpretation, which is compliant with the relevant EU case law, in its finalised guidelines.**

In addition, we appreciate the clarification provided by the Commission that even if they do not meet the Metro criteria, selective distribution systems can still benefit from the safe harbour, provided the market shares of both the supplier and the buyer each do not exceed 30% and the agreement does not contain any hardcore restriction.

Commercial agents

The current exemption from Article 101 (1) of the Treaty applied to agency agreements is of high importance for the direct selling industry. Many of our company members have in place agency agreements with their salesforce and benefit greatly from the existing legal framework and the Vertical guidelines, which provide with the necessary flexibility and valuable guidance in the way those direct selling companies operate.

While we consider that the current framework as set out by the current guidelines is sufficiently clear for our sector, we welcome the Commission's additional clarifications, which we understand are important to address some new agency models. We do consider, nonetheless, that those clarifications do not alter the main spirit of the existing guidelines nor the core criteria around the role of commercial agents.

That being said, we would invite the Commission to maintain the current wording in its draft vertical guidelines on commercial agents, without introducing any further changes that could, even unintentionally, hinder the good functioning of the agency framework.