Association Professionnelle du Libre-Service Indépendant en Alimentation asbl

Brussels, 14th September 2021

Conc : Aplsia Position on the draft revised Regulation on vertical agreements and vertical guidelines.

I. Who are we?

Since 1993, **APLSIA** (***Association Professionnelle du Libre-Service Indépendant en Alimentation***) is the only Belgian French-speaking professional association exclusively engaged in defending the interests of SME leaders, active in local supermarkets, franchisees or not.
All the members are all self-employed, active in supermarkets of all sizes. Moreover, almost 90% of them are franchisees of well-known retail groups such as ***Carrefour, Delhaize, Colruyt, Match, Intermarché, independent organic food-stores*** … spread over Wallonia and Brussels. They benefit from a lot of advantages thanks to APLSIA operating partnership with **UCM** (largest Belgian French-speaking SME organization): representatives in their Joint Committees, in various Boards of the Federal Agency for the Safety of the Food Chain (**FASFC**), etc.

II. Introduction

One of APLSIA 's biggest concern since more than 25 years, has been **to aim at well-balanced relationships between franchisors and franchisees, reflected in the clauses of the franchising contract.**
Aplsia is concerned, in the framework of the public consultation on the revised Regulation on vertical agreements and vertical guidelines (VBER), about the use by certain large franchisors of ***post-contractual non-compete clauses*** and its negative impact on family businesses, on the fundamental right to entrepreneurship, and on the free market and the free movement of goods and services.

III. The "Vertical Block Exemption" and post-contractual non-compete clauses: negative impact on family businesses and breach of the right to entrepreneurship

A lot of family business franchisees, in and outside our membership, are faced to post-contractual non-compete clauses up to one year after the end of the contractual relationship, which are evidently a consequence of an imbalance in negotiation power. As a consequence, at the end of the contract, family companies/franchisees, who have been the owners of their commercial premises since two or more generations, are being obliged to close down their activities - consequently losing all their customers-, or to unconditionally continue the (forced) collaboration with the same franchisor.

Although such practices seem evidently in breach with the fundamental right to entrepreneurship, it is the "excluded restrictions" in the VBER that inspire many franchisors to argue, that these practices are completely within the legal framework ***of commercial agreement contracts, and more precisely franchising,*** thereby referring to the "excluded restriction" that non-compete clauses cannot surpass a term of 1 year after the end of the contractual relationship.

IV. *The "Vertical Block Exemption" and post-contractual non-compete clauses: Impediment to the free movement of goods and services within the EU*

APLSIA would like to insist on the fact that, due to mergers, acquisitions, and concentration of dominant retail players over the last 20 years, dominant food retail groups constantly abuse their domination towards small and medium, local and familial franchisees.
Apart from misuse of their dominant position, these non-compete clauses have other undesired effects as well, since they also closedown the national market for other foreign franchisors trying to enter the national market.

V. The "Vertical Block Exemption" and post-contractual non-compete clauses: protection of the so-called franchisors' "know-how" and network?

Retail franchisors defend these non-compete clauses and practices by claiming their industrial and intellectual property, their so called "know-how". It can be defined in unique concepts and secret ingredients necessary to produce a specific product (ex. Coca-Cola or McDonald's), but how can a retailer claim its concept or formula is unique, apart from better purchasing conditions?
As regards to this, the franchisee according to the terms of his/her franchising contract, is paying for this know-how or service. It can be considered as "sold" to the franchisee", but certainly not "lent" for the duration of the contract.
Franchisors claim for the protection of their network, but as soon as a franchisee leaves a retail network, it's damaging for both.
Even if the franchisee is prevented to work for one year, the franchisor can open the empty supermarket or open a new one in the area.
Post-contractual non-compete clauses should be legally declared void: many franchisees acquired a lot of their experience and know-how before the collaboration. Furthermore, it is disproportionate since such clauses, even if limited in time, result in the franchisee having to close his/her doors after the end of the contract and therefore will be out of business.

VI. The "Vertical Block Exemption" and post-contractual non-compete clauses: derogating (stricter) legislation by EU Member States?

There exists uncertainty whether Member States can derogate from the VBER conditions in their national legislation, such as formulating stricter requirements for post contractual non-

compete clauses than those listed in the VBER, in order to restore proper competition on the national market.
Some interest groups contest that Member States can derogate from the conditions of the VBER. However, other opinions have a convincing legal reasoning that it is possible since the VBER only works as a "safe harbor", and not as regulation creating a strict legislative framework with no room for flexibility for national legislators.
In our opinion, it seems that in this aspect it is still the prerogative of a national Member State to take measures, and that those measures could be considered of national public order given the economic importance. We would be grateful if the EU Commission would clarify its stance on this point.

VII. Conclusion & APLSIA requests

APLSIA insists towards the European Commission:

1. to limit post-contractual non-compete clauses in the "hard core restrictions" of the "Vertical Block Exemption" **to the duration of the franchising contract period**;

2. to clearly state in the "Vertical Block Exemption Regulation", more specifically with the "hardcore restrictions", that **one year after contract is the maximum period,** whereby Member States **have the opportunity to reduce this period, or exclude the use of contractual non-compete clauses all together, if the Member State deems this necessary to maintain or restore competition on their national market**, depending on certain circumstances and to the extent that they can promote free competition;

3. **to redefine the definition of "knowhow" in the more strict sense of the Regulation of 1999:** "know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, **which is secret, substantial and identified**: in this context, 'secret' means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

4. **to clarify its position on possible national derogations from the VBER conditions** to allow stricter requirements for post contractual non-compete clauses in order to restore proper competition on the national market.

Should you have any question regarding the subject, don't hesitate to contact us.
Best Regards,

Luc Bormans
President of the Board