

# SMEUnited<sup>1</sup> Position paper on the draft revised Regulation on vertical agreements and vertical guidelines

## Introduction

The issue that SMEUnited is concerned about in the framework of the public consultation on the revised Regulation on vertical agreements and vertical guidelines ('VBER') is the use by certain large franchisors of post-contractual non-compete clauses and its negative impact on (1) family businesses (and the fundamental right to entrepreneurship) and (2) the free market and the free movement of goods and services.

## Negative impact on family businesses and breach of the right to entrepreneurship

Several family business franchisees in and outside our membership are confronted with post-contractual non-compete clauses up to 1 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 for two or more generations, are being obliged to close down their activities and thereby losing all of their customers, or to unconditionally continue the (forced) cooperation 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, thereby referring at the 'excluded restriction' that non-compete clauses cannot surpass a term of 1 year after the end of the contractual relationship.

This was evidently not the intention of the EU Regulation no. 330/2010 which only foresees an exemption of the prohibition on vertical price fixing (the so-called 'safe harbour'), where certain 'excluded restrictions' need to be complied with.

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<sup>1</sup> With the exception of CPME

## Impediment to the free movement of goods and services within the EU

Apart from misuse of the dominance position of certain large franchisors vis-à-vis small and medium enterprises and franchisees, these non-compete clauses have other undesired effects as well, since they also close down the national market for other foreign franchisors when trying to enter that national market.

## Derogating (stricter) legislation by EU Member States ?

There exists uncertainty whether Member States can derogate from the VBER in their national legislation on some points, 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 there are other opinions that have a convincing legal reasoning that it is possible since the VBER only works as a “safe harbor” and not as regulation which is 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.

## SMEUnited requests

Therefore SMEUnited asks the European Commission to:

1. **Primarily** limit non-compete clauses in the ‘Excluded restrictions’ of the ‘Vertical Block Exemption’ to the duration of the franchise cooperation / contract period.
2. **As a secondary (subordinate) consideration:** clearly state in the explanatory memorandum to the ‘Vertical Block Exemption’, more specifically in the ‘hardcore restrictions’ and the article on the ‘non-compete clause’, that one year after contract is a maximum period, whereby the member states have the possibility of reducing 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.
3. **As a tertiary (subordinate) consideration:** limit non-compete clauses in the ‘Excluded restrictions’ of the ‘Vertical Block Exemption’ to the duration of the contract period in

case the franchisee/buyer is the owner of the premises and land from which the buyer/franchisee has operated during the contract period.

- **As a quaternary (subordinate) consideration:** redefine the definition of “knowhow” in the more strict sense of the Regulation of 1999:

Definition in 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;

Definition in Regulation of 2010 and in the draft of Regulation of 2021:

‘know-how’ means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified; ‘secret’ means that the know-how is not generally known or easily accessible; ‘substantial’ means that the know-how **is significant and useful** to the buyer for the use, sale or resale of the contract goods or services; ‘identified’ means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

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