ROADMAP FEEDBACK BY BUURTSUPER.BE

PUBLIC CONSULTATION

EU competition rules on vertical agreements – evaluation of the Vertical Block Exemption Regulation no. 330/2010

Introduction

About www.buurtsuper.be:

Field Code Changed

Buurtsuper.be is the Belgian organisation for independent supermarkets. Because of the internationalisation and globalisation in retail, 90% of our members are franchisees. Therefore Buurtsuper.be has developed, together with UNIZO, the Flemish SME organisation, and a specialised law firm, the *'Quick Scan Franchise'*. The *'Quick Scan Franchise'* gives, on demand of candidate franchisees, legal comment on the most important clauses of franchise contracts that have been presented by franchisors. In that way in the last 20 years we have developed interesting experience on franchise contracts. Our conclusion is that franchising can be an important lever for retail business in Europe, but that we have to be careful because of a negative trend by means of certain clauses that threatens not only the investments of the franchisee, but also the concept of franchising and some important free-market principles.

About the evaluation of the Vertical Block Exemption:

Buurtsuper.be welcomes the evaluation of the Vertical Block Exemption Regulation which exempts certain practices from the general EU Regulation no. 330/2010 of 20 April 2010 that stipulates a prohibition of vertical pricing. These exemptions are subject to certain conditions. Such deviation is provided for franchising.

This evaluation is also necessary, since after the introduction of this Regulation the market in several EU member states changed drastically over a period of 10 years. Through mergers and takeovers the degree of concentration and market dominance of a number of large international retailers has increased enormously. This also means a higher risk of international market players misusing their dominance vis-à-vis SMEs. In previous reports the European Commission already acknowledged this risk and has been promoting fair trade practices between large multinational retailers and small and medium suppliers. However, Buurtsuper.be also wants to point out that this abuse of power is becoming more and more noticeable as well in the relationship between large international franchisors and small, local and family franchisees. To such an extent that not only the fundamental right to entrepreneurship of those smaller family businesses is violated, but in addition the free market and the free movement of goods and services are jeopardised.

The 'Vertical Block Exemption' and non-compete clauses

The initial intention of EU Regulation no. 330/2010 was to prevent price agreements. With the deviation for franchising the 'Vertical Block Exemption' laid down some 'hard-core restrictions' such as a non-compete principle (in particular maximum 1 year after the end of the contract).

The ‘Vertical Block Exemption’ does not impose mandatory rules, but if (groups of) enterprises such as franchisees want to 'benefit' from the deviation from the prohibition on vertical price fixing (the so-called 'Safe Harbour’), they have to take into account the ‘Excluded restrictions’ (cf. non-compete principle for maximum one year after the end of the contract). If they do not comply, the prohibition of vertical price fixing also applies to them.

Nevertheless, this ‘Excluded restriction’ inspires many franchisors to *de facto* take over that non-compete clause of maximum 1 year after termination in their contract. Therefore at the end of the contract family companies / franchisees, who have been the owners of their commercial premises for two or more generations, are faced with unconditionally continuing the cooperation with the same franchisor or meanwhile closing down their activities and losing their customers.

Why can this happen? In Belgium and other European member states the legislator assumes that in a business-to-business relationship the two parties have the opportunity to negotiate the contracts and clauses in all freedom. But in reality franchisees are the weaker contracting party. The franchisors unilaterally set up the franchise sector and there is little or no freedom of negotiation for the candidate franchisee. Even in the case of any extension of an existing franchise contract there is a primary inhibitory factor for the franchisee to discontinue the existing cooperation: viz. the big investments required to change the formula. If, moreover, certain stipulations such as post-contractual non-competition, it becomes impossible for the franchisee to discontinue the cooperation and in that case he/she is bound to one single franchisor for life. Practical evidence shows in addition that franchisees do not have the financial resources to challenge this kind of unfair practices with endless procedures in court.

In addition, these ‘non competition clauses’ entail that franchisees also have to agree to all other proposals which the franchisor wants to include in the contract. If they do not agree, they know that after the end of the contract they will be obliged to close the business for one year. In this respect such a post-contractual non-compete clause undermines the entire negotiation freedom of the franchisee.

Non-compete clauses because of the protection of industrial and intellectual property?

Franchisors’ defend these non-compete clauses and practices because of the industrial and intellectual property. As regards this: as soon as the cooperation is terminated, the franchisee is obliged to forego any implicit and explicit references to the formula. In this sense the so-called ‘know-how’ and its protection have to be put into perspective. The majority of our members / franchisees are second, third and even fourth-generation supermarket owners, so that this so-called ‘know-how’ is divided between the franchisor and the franchisee.

Post-contractual non-compete clauses should be legally declared void: the ‘know-how’ that the franchisor wants to protect in this way has to be toned down, since many franchisees acquired a great deal of experience and know-how before the cooperation. 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.

Misuse of the dominant position and impediment to the free movement of goods and services within the EU

Apart from misuse of the dominance position which large international franchisors go in for vis-à-vis small and medium enterprises and franchisees, these non-compete clauses have other undesired effects as well. At the moment the Dutch JUMBO wants to enter the Belgian market. JUMBO is a discount formula using the concept 'Low Prices Every Day'. Fifty per cent of the shops in 'mother country' The Netherlands are independent entrepreneurs and franchisees, and at a later stage JUMBO also intends to operate with independent entrepreneurs and franchisees in Belgium. Nevertheless, JUMBO will have to deal with the non-competition clauses used by existing franchisors such as Carrefour and Ahold Delhaize to keep the Belgian market closed to competition.

As feared by the EU Commission in its consideration 16 of the EU Regulation nr. 330/2010 practical evidence show that in the supermarket sector there are anti-competitive effects created by parallel networks of vertical agreements which have similar anti-competitive effects and which cover more than 50 % of a given market. The prices in supermarkets in Belgium are on average much higher than in its neighboring countries.

Comment [A1]: Dit zou verder kunnen worden ondersteund door cijfers hoeveel zelfstandige supermarktuitbaters er zijn onder franchise zijn / hoeveel marktaandeel in België en veronderstellende dat zij ongeveer allen post contractual non compte clause hebben.

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Derogating (stricter) legislation by EU Member States ?

As a representative Belgian interest group we have representing power in advisory governmental commissions. We have suggested adapted national legislation in order remediate typical national problems. We have noticed there exists confusing if Member States could derogate from the Vertical Block Exemption Regulation in their national legislation on some points. For instance we have asked to put stricter requirements to post contractual non-compete clauses then the once listed in the VBER in order to restore proper competition on the Belgian market.

It was contested by other interest groups that Member States could in any case not 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 give the economic importance. We would be grateful if the EU Commission would clarify its stance on this point.

Conclusion / Questions for the Commission

Buurtsuper.be is convinced that franchising can be an important lever for our EU economy: on the one hand the scale of the franchisor and on the other hand the flexibility and local anchorage of the franchisee. But only on condition that unreasonable clauses, such as those described above, are considered to be unlawful.

This is the reason why for Buurtsuper.be it is part of the fundamental principles of a European free market that, once the contract period of a franchise cooperation between two independent parties has legally ended, each party has to be free to continue the business.

Therefore Buurtsuper.be 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.
   - *Article 5*: Excluded restrictions
     1. The exemption provided in Article 2 shall not apply to the following obligations contained in vertical agreements:
        a) …
        b) …
        c) …
     2. By way of derogation from paragraph 1(a), etc…
     3. By way of derogation from paragraph 1(b), etc…
        a) …
        b) …
        c) …
        d) The obligation is limited to the period of the agreement

2. **As a secondary consideration**: clearly state in the explanatory memorandum to the 'Vertical Block Exemption', more specifically in the 'hard-core restrictions' and the article on the 'non-competition clause', that one year after contract is a maximum period, whereby the member states have the possibility of reducing this period on the basis of certain circumstances and insofar as these can encourage free competition.

3. **Question**: Can a national Member State put stricter requirements to post contractual non-compete clauses (for instance: forbid post contractual non-compete clauses of 1 year) then the once listed in the VBER, which works as a Safe Harbour, if it finds that they would be of national public order/importance in order to restore competition on their national market ?

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