



Brussels, 27 May 2019

<p>EU COMPETITION RULES ON VERTICAL AGREEMENTS – EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION NO. 330/2010: PUBLIC CONSULTATION</p>

Dear Sir / Madam,

UNIZO is the largest Belgian representative organisation that champions the interests of independent entrepreneurs and SMEs (www.unizo.be). Also, one of our important members, is the organisation for independent supermarkets In Flanders and Brussels, Buurtsuper.be (www.buurtsuper.be).

The issue that UNIZO wishes to address in the framework of the evaluation of the Vertical Block Exemption Regulation ('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.

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

We have noticed that several family business franchisees 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 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.

2. 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 (Belgian) market for other franchisors.

For example: At the moment the Dutch retailer JUMBO wants to enter the Belgian market. JUMBO upholds 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.

3. Derogating (stricter) legislation by EU Member States ?

We have noticed on a national level that there exists confusing 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 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 given the economic importance. We would be grateful if the EU Commission would clarify its stance on this point.

4. Questions for the Commission

Therefore UNIZO 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 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.

If you have any further questions, please do not hesitate to contact us. (frank.socquet@unizo.be)

Yours faithfully,



Danny Van Assche

CEO