

Munich, 25 November 2016

## BSH Position Paper regarding Preliminary Report on E-Commerce Sector Inquiry

### 1. Executive Summary

The BSH Home Appliances Group (“**BSH**”) places the highest importance on the compliance with its legal duties in relation to all applicable laws, including vertical arrangements under competition law. Hence, consistent and clear standards at European level are key for BSH. BSH therefore welcomes the European Commission’s preliminary findings resulting from the E-Commerce Sector Inquiry and, more specifically, takes the view that the Sector Inquiry offers the Commission the opportunity to:

- Re. **selective distribution** generally, take an economically sensitive approach that allows companies to implement their business strategies and that focuses on clear-cut competition law infringements;
- Re. **product and service quality, and brand image**, clarify that it is legitimate to use a selective distribution system to protect and maintain the image of a brand;
- Re. the **brick and mortar shop requirement**, avoid introducing uncertainty regarding the well-established mechanisms of the Vertical Block Exemption Regulation and the Vertical Guidelines;
- Re. **restrictions to use online marketplaces**, provide clearer guidance with respect to the circumstances under which a marketplace ban is considered to restrict competition within the meaning of Article 101 (1) TFEU<sup>1</sup> and is incompatible with Article 101 (3) TFEU; and
- Re. **pricing policies**, clearly differentiate between recommended resale prices and fixed resale prices in order to avoid confusion.

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<sup>1</sup> Treaty on the Functioning of the European Union (the “**TFEU**”).

## 2. Comments on the Preliminary Report and Recommended Actions

On 15 September 2016, the European Commission (the “**Commission**”) published its Preliminary Report on the electronic commerce (“**e-commerce**”) Sector Inquiry (the “**Preliminary Report**”). The Preliminary Report is the result of an in-depth analysis into the e-commerce of consumer goods and digital content in the EU.

BSH agrees with many of the findings in the Commission's Preliminary Report and appreciates the opportunity to comment on those findings in this position paper.

BSH first comments on the Commission's findings regarding selective distribution generally (in Section 2.1), specifically on the importance of product and service quality, as well as the brand image, for manufacturers (in Section 2.1.1); the brick and mortar shop requirement (in Section 2.1.2); and restrictions on the use of online marketplaces (in Section 2.1.3). In Section 2.2, BSH comments on the Commission's findings regarding pricing policies.

### 2.1 Selective Distribution

BSH welcomes the Commission's confirmation of the legal approach that the “*Vertical Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned and regardless of the nature of the selection criteria as long as none of the hardcore restrictions listed in Article 4 are present*” and “*as long as the market share of both supplier and buyer each do not exceed 30 %*”.<sup>2</sup>

As is well-established, one of the possible competition risks of selective distribution is reduction in intra-brand competition, which can only be harmful to consumer welfare if inter-brand competition is limited, because of (1) the strong position of the supplier; and/or (2) many parallel selective distribution networks existing in the market.<sup>3</sup>

Consumer welfare cannot be limited to low prices. Incentives by the manufacturer to stimulate service can benefit the consumer, even if they impact intra-brand competition to a certain extent.<sup>4</sup> In the case of brands or luxury goods, a consumer might be willing to pay a higher price for the product for many reasons, e.g., luxury image, customer service, design or innovative features. As long as inter-brand competition is sufficiently strong, selective distribution systems that fail to add value in the eyes of the consumers will not harm consumers. Such systems will not be competitive and consumers will choose alternative products. Also, selective distribution systems are often only introduced for a selected number of products (e.g., premium product lines) while most of the products are sold in open distribution.<sup>5</sup>

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<sup>2</sup> The Preliminary Report, para 225.

<sup>3</sup> The Guidelines on vertical restraints [2010] OJ C 130/10 (“**Vertical Guidelines**”) paras 175-178.

<sup>4</sup> See in a different context: Dutch Authority for Consumers and Markets, “ACM's strategy and enforcement priorities with regard to vertical agreements”, p. 20.

<sup>5</sup> The Preliminary Report, para 212.

The decision on whether and, if so, which products to sell via a selective distribution system to meet customer expectations, therefore depends on the emphasis that a manufacturer puts on the availability of technical information, brand image, or pre- and post-sale services. The importance of such criteria does not only vary with the product, but also depending on the overall business strategy of a company.

Consequently, BSH believes that each company should be free to decide in a non-discriminatory manner how to best organise and structure its selective distribution system, e.g., whether brick and mortar shops are necessary for the efficient sale of its products (see further Section 2.1.2).

Except for cases where there are clear indicators for a non-functioning market or unjustifiable restrictions, selective distribution systems do generally not pose a major threat to competition and consumer welfare and should therefore, in BSH's view, not be an enforcement priority of the Commission.

### **2.1.1 Product and Service Quality, and Brand Image**

BSH welcomes the Commission's conclusion that product quality and brand image are key for manufacturers and the Commission's observation that manufacturers have adopted a variety of business strategies in order to better control the distribution quality and the image and positioning of their brands, including in the context of and against the background of increased e-commerce.<sup>6</sup>

**Product and service quality.** As a manufacturer and supplier of domestic appliances, which for consumers generally amount to a substantial expense when purchased, BSH is particularly interested in ensuring that consumers make the right choice and are satisfied with the products on a long-term basis. Due to the substantial cost, high frequency of usage and longevity of most of its products, creating an environment where the technical features, innovations and other important product characteristics are explained and presented to consumers, is key to ensuring long-term satisfaction of the customers. In BSH's experience, this environment can be created both in brick-and-mortar shops and online. Since consumers nowadays make use of both channels and switch between channels to collect information, compare offers, and ultimately make a purchase, BSH pursues an omni-channel strategy, i.e., BSH strives to offer its products to the consumer wherever the consumer looks for home appliances, be it online, be it offline. What matters to BSH is that the quality and service standards are met.

**Brand image.** BSH shares the Commission's finding that building and maintaining brand image and quality reputation are important and legitimate elements informing a manufacturer's distribution strategy, whether in the context of brick-and-mortar or online distribution. In this respect, BSH understands from the Preliminary Report that the Commission does not interpret the *Pierre Fabre* judgment<sup>7</sup> in the rigid way proposed by

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<sup>6</sup> The Preliminary Report, para 903.

<sup>7</sup> C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-000.

some, *i.e.*, that the protection of the image and reputation of a brand can never justify any type of vertical restraints.

BSH shares and fully supports this interpretation. It submits that the wish to protect and maintain the image of a brand and to ensure the coherent presentation of products according to this image across all distribution channels is a legitimate reason underlying a manufacturer's decision to use selective distribution and to impose objective criteria of a qualitative nature, applied in a non-discriminatory manner and relating to, for example, the presentation of products on dealer websites or on online marketplaces.

### **2.1.2 Brick and Mortar Shop-Requirement**

Currently, the Vertical Guidelines clearly state that manufacturers can exclude pure online retailers from selective distribution systems.<sup>8</sup> One of the preliminary conclusions of the Commission is that the requirement for retailers to operate at least one brick and mortar shop to qualify for a selective distribution system may in some cases go beyond what is necessary for ensuring high quality distribution.<sup>9</sup> The Commission has therefore decided to further assess certain product categories or lines of products, which pure online retailers could be just as well qualified to sell, on an individual basis.<sup>10</sup>

In BSH's view, it is important that companies can themselves assess whether their selective distribution systems are exempt under the Vertical Block Exemption Regulation or not. The well-established mechanisms of the Regulation and the Vertical Guidelines should not be undermined. The clarity provides legal certainty and is very valuable in the system of self-assessment.

So far companies have based their selective distribution systems on the well-established mechanism to comply with competition law.

BSH submits that if the clarity of the guidance provided so far was blurred, this would create a considerable amount of unnecessary uncertainty for companies and potentially a substantial workload for the Commission.

### **2.1.3 Restrictions on the Use of Online Marketplaces**

BSH welcomes the approach of the Commission regarding online marketplace bans in the Preliminary Report and hopes that this clarification will provide the needed guidance to the courts and competition authorities, including at national level, on how to apply Articles 4 (b) and (c) of the Vertical Block Exemption Regulation correctly. This will hopefully result in a consistent application of these provisions of the Vertical Block Exemption Regulation when national competition authorities or courts are reviewing

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<sup>8</sup> Vertical Guidelines, para 54.

<sup>9</sup> The Preliminary Report, para 228.

<sup>10</sup> *Ibid.*

online marketplace bans and much overdue clarity regarding the subject matter for companies.<sup>11</sup>

The Commission has made it clear that online marketplace bans should not and were never intended to be automatically considered hardcore restrictions within the meaning of Article 4 (b) and/or (c) of the Vertical Block Exemption Regulation, as confirmed by paragraph 54 of the Vertical Guidelines.<sup>12</sup> Marketplace bans restrict the ways in which distributors can sell the products and therefore do not equal total online-sale bans,<sup>13</sup> as confirmed by the sector inquiry:

*"[Marketplace bans] concern the question of how the distributor can sell the products over the internet and do not have the object to restrict where or to whom distributors can sell the products."*<sup>14</sup>

The authorised retailer is the link between the brand and the consumer. This link can be lost on platforms, as the consumers generally can be under the impression that they are buying from the marketplace. As indicated by some manufacturers, online marketplaces may also limit the possibilities for retailers to differentiate between the service level and quality offered, providing limited possibilities to explain to a customer the added value of a product, technical differences or other special features when compared to products of lower quality.<sup>15</sup>

Therefore, BSH welcomes the Commission's confirmation that only marketplace bans in agreements where the parties' market shares exceed the thresholds in Article 3 or that include any of the listed hardcore restrictions in Article 4 of the Vertical Block Exemption Regulation should not fall within the scope of the Vertical Block Exemption Regulation.

While BSH firmly supports the Commission's preliminary conclusions regarding marketplace bans, BSH suggests providing clearer guidance regarding the circumstances under which a marketplace ban is considered to restrict competition within the meaning of Article 101 (1) TFEU and is incompatible with Article 101 (3) TFEU. Since it is up to each company to ensure that its selective distribution arrangements are in line with competition law, the Commission should use the opportunity to create more certainty for companies with clear guidance in the final report that guarantees a consistent approach across Member States.

## **2.2 Pricing Policies**

BSH welcomes the Commission's investigation into the pricing policies of retailers and the role manufacturers play in this regard. As confirmed in the Preliminary Report,

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<sup>11</sup> Peepkorn/Heimann, "Keine Neuigkeit für Drittplattformverbote", GRUR 2014, 1175.

<sup>12</sup> The Preliminary Report, para 467.

<sup>13</sup> The Preliminary Report, paras 468-472. See also Peepkorn/Heimann, "Keine Neuigkeit für Drittplattformverbote", GRUR 2014, 1175.

<sup>14</sup> The Preliminary Report, para 472.

<sup>15</sup> The Preliminary Report, para 449.

manufacturers are allowed to recommend resale prices.<sup>16</sup> Resale price-fixing on the other hand amounts to a restriction of competition by object under Article 101 (1) TFEU and a hardcore restriction within the meaning of Article 4 (a) of the Vertical Block Exemption Regulation.<sup>17</sup> “Recommended” resale prices, which are not actually recommended, but fixed, therefore are also considered a restriction by object and a hardcore restriction.<sup>18</sup>

The distinction is not always as clear cut in practice. Nonetheless, the consequences are severe if an infringement can be established. This is in particular so, because national competition authorities introduced very strict standards regarding the question as to when a non-binding recommendation becomes binding and therefore violates competition law.

While the Preliminary Report draws a clear distinction between the permitted and the strongly opposed conduct initially, the difference between recommended resale prices and price-fixing is not always emphasized throughout the report, and headings like “Pricing restrictions” include permitted conduct. In addition, the section on price setting at retail level includes the statistics on retailers that report that manufacturers recommend retail prices.<sup>19</sup>

In light of the very different treatment of recommending and fixing resale prices under competition law, BSH suggests that the Commission draws a clear distinction between the two terms in the final report and addresses the permitted conduct separately from the prohibited behaviour to avoid confusion and provide useful guidance.

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<sup>16</sup> The Preliminary Report, para 506.

<sup>17</sup> The Preliminary Report, para 507.

<sup>18</sup> The Preliminary Report, para 508.

<sup>19</sup> *Ibid.*