European Competition Lawyers Forum (ECLF)

Comments on the Draft Block Exemption Regulation and Guidelines on Vertical Restraints

September 28, 2009

INTRODUCTION

1. This Paper is submitted on behalf of the European Competition Lawyers Forum (the "ECLF") in response to the European Commission's public consultation on the review of the Community competition rules on vertical restraints. The ECLF is a group of practitioners in competition law from around 80 law firms across the European Union (see Annex 1).

2. The ECLF makes a number of specific comments and recommendations regarding the draft block exemption regulation (the "Draft Regulation") and guidelines (the "Draft Guidelines") on vertical restraints. They focus on the following themes:

   - The Commission should consider whether the draft Regulation and Guidelines are compatible with the effects-based approach (I);

   - The Commission should ensure that the Draft Guidelines are not more restrictive than, and fully consistent with, the case law of the European Courts, in particular with respect to agency agreements and unilateral conducts (II);

   - The Commission should not apply the market share threshold to distributors, or at least should provide further explanations on the way it should be applied in practice (III);

   - The Commission should clarify its approach to Resale Price Maintenance ("RPM") (IV);

   - As regards on-line sales, some ECLF members consider that the Commission should not introduce an unjustified bias in favour of the Internet in particular in the context of selective distribution. Other members welcome the Commission's clarifications in the Draft Guidelines and consider that the Commission should actively encourage the development of the Internet in the interest of the consumers (V); and

   - The Commission should provide further guidance with respect to the introduction of new brands/entry into new markets, category management and upfront access payment (VI).

I. GENERAL COMMENTS

A. THE REGULATORY FRAMEWORK

3. In general Regulation N°2790/1999 and accompanying Guidelines can be considered a global positive experience for the enforcement of Article 81 EC. In particular, it has been positive for market operators. They have been able to benefit from a clear and simple text, which has facilitated the self-assessment of agreements in force since the legal exemption regime was instituted with the adoption of Regulation N°1/2003. The block exemption regulation and guidelines have also facilitated the work of national courts and competition authorities in the interpretation and consistent enforcement of Article 81 EC regarding vertical agreements. Finally, it has allowed competition authorities to focus on infringements rather than intervene in areas of lesser concern.

4. Nevertheless, after a decade of successful application, it may be time for the Commission to consider whether the EU still needs a block exemption regulation in the area of vertical restraints. Companies have become used to self-assess whether their agreements fall within the scope of Article 81(1) EC and whether they qualify for an exemption under Article 81(3) EC. Moreover, the consensus among contemporary economists is that vertical restraints have pro-competitive effects in most cases.[1] In that context, the co-existence of a regulation and guidelines may lead to unnecessary complications and to an overly formalistic approach, which may discourage investment and innovation.

5. The combination of the legally binding nature of the block exemption regulation and the tendency of regulators to take a conservative approach may lead to a significant loss of flexibility. Moreover, rules contained in legally binding instruments encourage mechanical application by national courts and some national competition authorities. As a result, demonstrating the compatibility of agreements that are not block exempted may often prove difficult (although, in many cases, they do not raise any significant competition issue). Instead of analysing the likely effects of the agreement, the analysis ends up focusing on whether or not the agreement is block exempted. This may further increase the divergence with the U.S. antitrust policy and case law to the detriment of EU companies. Some ECLF members therefore suggest that referring to standalone guidelines for the assessment of vertical agreements may be more satisfactory.

B. THE NOTION OF "HARD-CORE RESTRICTION"

6. In particular, some ECLF members consider that the notion of "hard-core restriction" itself is too directional and rigid. Not only does it exclude the relevant restriction from the scope of the exemption, but it also gives rise to a double presumption that (i) the agreement falls within the scope of Article 81(1) EC and (ii) that it is unlikely to be exempted under Article 81(3) EC. In practice, this means that a case-by-case

[1] See, e.g., P. Rey et T. Vergé, "Economics of Vertical Restraints", *Handbook of Antitrust Economics*, April 2008; Mathewson, Frank et Ralph Winter, "The Law and Economics of Resale Price Maintenance", *Review of Industrial Organization* 13 (nos. 1-2), April 1998: 57-84.

analysis of the particular restraint in its factual, economic and legal context is rarely conducted. This also undermines in practice the possibility for the parties to demonstrate efficiencies in relation to this type of restrictions. In most cases, national courts and some cases national competition authorities are reluctant to accept complex economic justifications and treat hard-core restrictions as *per se* infringements. This seems difficult to reconcile with the effects-based approach that the Commission is generally advocating for the enforcement of competition law, as well as with Paragraph 3 of the Draft Guidelines which explicitly rules out a mechanical application of the standards set forth in the Guidelines.[2] The notion of hard-core restriction is also inconsistent with the doctrine recently adopted by the U.S. authorities for example following the *Leegin* case.[3]

7. Formalism is further reinforced by the wide scope of the "hard-core" list. In principle, hard-core restrictions should be limited to the most severe restrictions of competition. In the guidelines on the application of Article 81(3) EC, they are defined as "(…) *restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules*."[4] The essence of this definition is that the category of hard-core restrictions should encompass only restrictions that are almost always prohibited. However, the list of Article 4 of the Regulation and the Guidelines goes beyond harmful resale-price maintenance and absolute territorial protection. It may also include restrictions that manifestly do not cause any negative effect for competition, in particular with respect to suppliers with a negligible market share. The ECLF submits that the Commission should at least consider the possibility of establishing a *de minimis* rule applicable to hard-core restrictions.

8. The ECLF members welcome the new wording of Paragraph 47 of the Draft Guidelines and the apparent greater willingness of the Commission to consider efficiencies in the context of hard-core restrictions. However, some ECLF members note that the Draft Guidelines send mixed-signals as regard the notion of "hard-core restriction". The Draft Guidelines paradoxically extend the use of the "hardcore" concept – in particular in respect of online sales – while at the same time purportedly limiting its meaning by insisting that it only creates a rebuttable negative presumption.

9. The simultaneous extension of the "hard-core" concept is confusing for at least three reasons. First, it is unlikely in practice that national courts and regulators will give as much weight to the competitive justifications as to the fact that the term "hard-core restriction" implies a highly anticompetitive nature unlikely to be exemptable. The

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[2] See Guidelines para.3: "*The standards set forth in these Guidelines must be applied to circumstances specific to each case. This rules out a mechanical application. Each case must be evaluated in the light of its own facts*".

[3] See Jugement of the U.S. Supreme Court of June 28, 2007, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*

[4] See Guidelines on the application of Article 81(3) EC, para. 21.

result is significantly higher burden of proof for any defendant and a more formalistic approach. Second, the extended hard-core restriction category is likely to result in higher litigation risks in particular in the rapidly growing Internet sector. Third, the greater use of the "hard-core", negative presumption, approach is inconsistent with the Commission's effects-based doctrine since it assumes the restrictive character of entire categories of contractual clauses and it also has the effect of effectively jumping over the analysis under Article 81(1) EC in favour of a restrictive assessment under Article 81(3) EC. While block exemption regulations should normally help undertakings, national courts, and regulators define easily identifiable safe havens, the extension of the hard-core category may lead to the opposite result.

10. Given the above, the ECLF submits that the Commission should ensure that the Draft Regulation and Guidelines are compatible with the effects-based approach and, in particular, that the use of the "hard-core" concept is limited to the most severe restrictions of competition.

II. SCOPE OF THE DRAFT REGULATION

A. VERTICAL AGREEMENTS WHICH GENERALLY FALL OUTSIDE ARTICLE 81(1) EC

1. Agency agreements

11. The Draft Guidelines must not be inconsistent with case law of the CFI. The inconsistencies with case law in the current draft are discussed below.

12. Paragraph 15 of the Draft Guidelines makes the qualification of an agreement as "*genuine*" agency agreement conditional on the agent bearing no, or only "*insignificant*", risks. The ECLF members are concerned that this wording may be unduly restrictive (the term "*insignificant*" constitutes a very low threshold) and does not reflect case law. The ECLF recommends reproducing the case law of the CFI, which has stated in its *DaimlerChrysler* judgment that only activities giving rise to "*exceptional risks*" or "*meaningful economic risks*" do matter.[5] Furthermore, the ECLF recommends reiterating this in Paragraph 16 of the Draft Guidelines. Indeed, Paragraph 16 as currently drafted and when read in isolation could be understood to mean that any risk is sufficient to trigger the application of Article 81(1) EC, which is clearly inconsistent with case law.

13. Turning to the individual bullet points of Paragraph 16, the ECLF members wonder whether it is really correct when it is stated in the first bullet point that an agent may only carry out the transport service when the costs are covered by the principal. The CFI had accepted in its *DaimlerChrysler* judgment (in paragraphs 105 and 106) that an agent may cover the transport costs.

14. The second bullet point of Paragraph 16 states that the agent should not maintain at his own cost or risk stocks of the contract goods. Yet in *DaimlerChrysler* the CFI acknowledged that a principal may oblige his agent to acquire contract goods (paragraph 108 of the judgment).

15. The fifth bullet point states that the agent should not, "*directly or indirectly*", have to invest in sales promotion, such as contributions to the advertising budgets of the principal. The ECLF believes every agent has an interest to invest in sales promotion to increase the number of sales. Therefore, it is inherent in the role of any agent that he is "*directly or indirectly*" obliged to invest in sales promotion.

16. The sixth bullet point states that the agent should not make market-specific investments in equipments, premises or training of personnel. The seventh bullet point provides that the agent cannot be obliged to create or operate an after sales service "*unless these services are fully reimbursed by the principal or unless these services are not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal*". In *DaimlerChrysler* the CFI acknowledged

[5] See CFI, judgement of 15 September 2005, Case T-325/01 – *DaimlerChrysler v. Commission*, para. 111.

that a principal may oblige his agent to set up a repair shop and carry out after sales and warranty services, and acquire stocks of spare parts (paragraphs 107, 111).

17. The ECLF recommends to reproduce here the wording of the CFI in the *DaimlerChrysler* judgment, according to which it is sufficient if the obligation is not "*commercially inadequate*", does not constitute a "*genuine financial risk*", and is not disproportionate.

18. Similarly, in the eighth bullet point, the Commission introduces the concept that, in order to be an agent, an undertaking may not *"operate in other (product) markets unless this is not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal*." The Commission considers such activity by the agent as a third category of risks that is problematic on the market for the contract goods and provides a number of case law references (in Paragraphs 14 as well as 16) in this regard.

19. However, in *CEPSA I and II*, the Court made no reference to such third category of risks,[6] and in *DaimlerChrysler*, paragraph 113, the Court explicitly rejected the Commission's argument that a risk in relation to the provision of after sale services could disqualify an agent in relation to the separate activity of the sale of cars. Therefore, the third category of risks goes beyond the findings of the European Courts.

20. Also, the proposed wording in the eighth indent does not (explicitly) provide that the agent's "operation in other (product) market" must be "required by the principal". Such an explicit contractual requirement[7] would, in any event, be necessary to provide at least some legal certainty as well as consistency with the text in the seventh indent and Paragraphs 14 and 17. The ECLF would also like to highlight that from a policy point of view, it appears very unfortunate to put all agency relationships in doubt where the agent may have business activities also on other markets (where he does not act as an agent). Given that the concept of "indispensable" is vague, it is not clear where boundaries need to be drawn.

21. In Paragraph 18 of the Draft Guidelines, the ECLF proposes that the Commission clarify that an agent does not "*sell or purchase*" goods or services, because otherwise this wording could be misleading. It should be emphasized that the agent concludes or negotiates contracts on behalf of the principal.

22. Paragraph 21 of the Draft Guidelines concludes that where an agent bears some or all of the relevant risks, the agreement between agent and principal will not be qualified as an agency agreement for the purpose of applying Article 81(1) EC. The Draft Guidelines go on to say that in that situation the agent will be treated as an independent dealer and the agreement between agent and principal will be subject to Article 81(1) EC "*as any other vertical agreement*".

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[6] See Case C-279/06 CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL; *Case C-217/05 Confederacion Española de Empresarios de Estaciones deServicio v Compañía Española dePetroleos SA (CEPSA)* [2006] OJ C331/9.

[7] See Case T-325 *DaimlerChrysler AG v Commission* [2005] ECR II-3319, para 112 where the Court referred to "*activities which are contractually linked*" to the sale of vehicles.

23. No doubt, the principle stated in Paragraph 21 is of crucial importance for market operators. However, the current wording is in our opinion misleading, and anyway is very short, which greatly reduces its practical usefulness. As currently drafted the wording could be understood to mean that all restrictions could be caught by Article 81(1) EC. It seems to us, the reality is more subtle. For example, as the Commission rightly points out in Paragraph 49 of the Draft Guidelines, "*in the case of agency agreements, the principal normally establishes the sales price, as the agent does not become the owner of the goods.*" We also wonder whether the Commission intends to make distinctions depending on the nature and extent of the risks that the agent takes upon himself. The ECLF would very much welcome if the Commission could elaborate on the wording in Paragraph 21 to provide clear guidance.

2. <u>Subcontracting agreements</u>

24. The Commission clarifies in Paragraph 22 of the Draft Guidelines that the notice concerning the assessment of certain subcontracting agreements remains applicable. This is an extremely helpful clarification, as this question often arises in practice.

B. SCOPE OF THE BLOCK EXEMPTION REGULATION, INCLUDING UNILATERAL CONDUCT/TACIT AGREEMENTS

25. As stated above in the context of agency agreements, the Draft Guidelines must not be inconsistent with case law of the CFI. The inconsistencies with case law in the current draft are discussed below.

26. Paragraph 25 of the Draft Guidelines discusses the fact that the Regulation only applies to agreements and concerted practices, but not to unilateral conduct of the undertakings concerned. The Draft Guidelines draw conclusions from the case law of the ECJ and state in short that in the absence of an explicit acquiescence, the Commission has to show the tacit acquiescence of one party to the unilateral policy of the other party in order to establish the existence of an agreement. The ECLF agrees that in such a case it is necessary to show first that one party requests the cooperation of the other party and that the other party complied by implementing the unilateral policy in practice. However, the ECLF disagrees that the tacit acquiescence may simply be deduced from the level of coercion exerted by one party on the other party to impose its unilateral policy in combination with the number of distributors who are actually implementing in practice the unilateral policy of the supplier. This would mean that also a unilateral conduct that is not communicated at all but that is – for whatever reason – complied with by a certain number of distributors could be considered an agreement.

27. This contradicts what is said earlier in the Draft Guidelines, *i.e.*, that the Commission has to prove first the request of one party for cooperation of the other party or parties.

28. Moreover, it does not seem to be supported by the case law. Some ECLF members are concerned that the Commission is reintroducing its arguments in *Adalat*. It follows from the *Adalat* judgment of the CFI[8] (confirmed by the ECJ[9]) that an

[8] See CFI, judgement of 26 October 2000, Case T-41/96 – *Bayer AG v. Commission*.

[9] See ECJ, judgement of 6 January 2004, Cases C-2/01 P and C-3/01 P – *BAI and Commission v. Bayer AG*.

agreement on an export ban shall only exist if (i) the supplier seeks to obtain from the wholesalers to abandon their exports, and if (ii) the wholesalers wish - or make the supplier believe that they wish - to apply this policy. Hence, the supplier has to communicate the measure (and the wholesalers have to express an acquiescence). In the *Adalat* case, the supplier did not communicate the unilateral measure to the wholesalers. Consequently, the wholesalers could not acquiesce to the supplier's unilateral policy. The CFI confirmed the *Adalat*-jurisprudence in its subsequent Opel judgment.[10]

29. At paragraph 102 of the Adalat judgment, the ECJ stated that "*for an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers*".

30. In that respect, the existence of a system of monitoring and penalties is not decisive. The ECJ has made clear at paragraph 83 of the Adalat judgment that "(…) *the existence of an agreement does not necessarily follow from the fact that there is a system of subsequent monitoring and penalties* (…)".

31. The current wording of the Draft Guidelines would significantly broaden the notion of "agreement" and reduce the requirements imposed on the Commission to prove a concurrence of wills. This may not be in line with the case law of the CFI and the ECJ. The ECLF therefore suggests that the relevant part of the Draft Guidelines be adapted accordingly.

[10] See CFI, judgement of 21 October 2003, Case T-368/00 – *General Motors Nederland and Opel Nederland v. Commission*, para. 88.

III. THE MARKET SHARE THRESHOLD

32. Article 3 of the new Draft Regulation provides that the 30% market share threshold would become applicable to both parties to the agreement.

33. The extension of the 30% market share threshold proposed by the Commission may be questionable in some respects. First of all, the calculation of market shares both for the supplier and for the distributor in every single distribution agreement and in relation to every single distributor may be an extremely burdensome task for companies, especially where these operate in various markets. The task will be even more complicated if geographic markets were defined very narrowly, in particular at the retail level. This may discourage companies from entering into agreements, in particular small suppliers dealing with large distributors. It is likely to have a chilling effect on small suppliers' businesses.

34. Those practical difficulties may also lead to legal uncertainty and unnecessary litigation that would contradict the objectives of the Guidelines.

35. Further, the ECLF understands that the objective of the Commission is to reflect the increasing market power of large retailers and exclude agreements with such large retailers from the scope of the block exemption. However, in practice, this proposal could also exclude a considerable number of other agreements from the scope of application of the Regulation, which would reduce the effectiveness of the block exemption, as a greater number of agreements would fall outside the scope of the exemption. Again, if geographic markets were defined very narrowly, a large number of distributors at the retail level may exceed the 30% threshold locally (e.g., the only shop in a village may hold a quasi-monopolistic situation). This does not mean that they have any significant market power and that the agreement is likely to raise problems.

36. The ECLF considers that the extension of the 30% market share threshold is an overly formalistic solution to the specific issue of the larger retail chains. It is submitted that the Commission should revert to the current version of the Regulation and apply the 30% market share threshold only to suppliers.

37. At a minimum, the Commission should clarify in the Draft Guidelines that the market shares will not in most cases be analysed locally, and that the market share of the distributor will be considered at the national level only (including for retail distribution).

IV. RESALE PRICE MAINTENANCE

38. Technically under Article 81 EC, RPM has never been *per se* illegal. However in practice it has been regarded by many as being *per se* illegal. The Commission's shift in the Draft Guidelines to stating that there is a rebuttable presumption on hard-core restrictions[11] is welcome. This should give sufficient flexibility for the Draft Guidelines to cope with developments in case law that are likely to come in the US following Leegin[12], and may come in the EU following the Commission's change in tone in the Draft Guidelines.

39. The Commission in its Draft Guidelines emphasises the possibility of efficiencies relating to RPM.[13] However in certain circumstances it may be difficult to satisfy the other limbs of Article 81(3) EC, in particular that the restriction is indispensable. For example the Commission suggests that RPM may be helpful where a manufacturer introduces a new brand or enters a new market. However, given that a restriction on the maximum price would achieve the same objective, RPM in this example does not appear to be indispensable. As such, the Commission should clarify that the examples in Paragraph 221 of the Draft Guidelines are not safe harbours. As a result, the circumstances under which a company could make an efficiency argument are not clear.

40. The Commission should also clarify what situation corresponds to the introduction of a new brand and whether this is different from the introduction of a new product or the extension of an existing range.

41. RPM remains a hard-core restriction. As noted above, the Commission provides examples of efficiencies which may arise from RPM. It does not do so for other hard-core restrictions. But it seems that even when such examples are invoked the parties will have to rebut the negative presumption. The Commission should clarify whether this different treatment is indicative of a difference in the Commission's approach to RPM from the other hard-core restrictions.

42. Though RPM is a complex issue, treated as hard-core by the Draft Guidelines, it may also be appropriate to consider a *de minimis rule* in relation to RPM. For example, it is not clear that it is so important to maintain intra-brand competition between two parties with negligible market share that an RPM clause in an agreement between them is deemed a hard-core restriction. Likewise the Commission's efficiency example in Paragraph 221 relating to short-term promotions may be better treated as *de minimis* as it may be unlikely to have an appreciable effect on competition.

43. Finally, ECLF members would find it useful if the Commission could clarify its position towards price monitoring at the retail level.

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[11] See Draft Guidelines, para. 47.

[12] See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct.2705 (2007).

[13] See Draft Guidelines, para. 221.

V. ON-LINE SALES

A. GENERAL COMMENTS

1. The "Internet exception"

44. This is an area where there was no consensus among the members of the ECLF working committee. Both the majority and the minority views are reflected below.

45. Some ECLF members believe that the Draft Guidelines create an "Internet exception" going beyond the existing principle that "*every distributor must be free to use the Internet to advertise or to sell products*" (para. 52 of the Draft Guidelines) and that "*in any case, the supplier cannot reserve to itself sales and/or advertising over the Internet*" (para. 54 of the Draft Guidelines). They consider that the Draft Guidelines also provide for hard-core restrictions specific to on-line sales (para. 52 and 57 of the Draft Guidelines). The case of the Internet is unique. There is no other distribution channel in relation to which the Draft Regulation or Guidelines provide for such specific provisions. The "Internet exception" is therefore based on the assumption that the Internet is not only another distribution mode, but also a new tool that deserves a special protection.

46. Most ECLF members submit that suppliers should be free to organise their business model as they consider the most efficient. In particular, suppliers should be free to choose their distribution model – and the distribution channels – that is adapted to their preferred business model. It is not the role of the regulator to impose the use of the Internet, or any other distribution channel (e.g., mass-retailing, or mail order). Under EU law, to the extent a supplier is not dominant and can legally refuse to sell, it would seem illogical that the same supplier cannot as a matter of principle refuse Internet sales if he chooses to use third party distributors.

47. Also some ECLF members doubt whether the Commission's economic approach can be reconciled with the qualification of "hard-core" for Internet restrictions, since hard-core restrictions are often treated as *per se* infringements in practice.

48. Therefore, as a matter of principle, certain ECLF members consider that the Commission's economic approach should imply that – subject to specific and unusual market circumstances, which the Commission needs to establish – suppliers should generally be free to organise their distribution as they see fit. In particular, the Commission should not reserve an exceptional treatment to the Internet, as opposed to other distribution channels. Absent clearer economic evidence and a thorough convincing impact study, effectively requiring suppliers to use a given distribution channel – whether mass-retail, mail order, or the Internet – may in fact ultimately harm consumers and restrict competition between different distribution models and strategies.

49. On the other hand, other ECLF members welcome the Commission's clarifications in the Draft Guidelines and encourage the adoption of provisions specific to the Internet. Under the current Regulation and Guidelines, supplier-imposed restrictions on distributors' use of on-line sales channels already amount to hardcore restrictions.

Nevertheless, those ECLF members have seen a spreading practice whereby suppliers try to prevent their authorised distributors from making use of the Internet for sales. The clarifications in the Draft Guidelines will hopefully put a stop such practices by signalling that Internet-restrictions are not exempted: the Internet provides enormous commercial opportunities to both European consumers and companies. Internet-restrictions limit consumers' ability to freely choose and purchase products, and they are often a means of controlling prices and maintaining segmented markets. As such, they cannot simply be assumed to bring about countervailing benefits in the interest of consumers and must therefore in unambiguous language be excluded from the scope of the Regulation.

2. <u>Active and passive sales on Internet</u>

50. Paragraph 51 of the Draft Guidelines aims to clarify the distinction between active and passive sales in the context of the Internet. The Commission distinguishes between active and passive sales over the Internet. It considers that "*as a general rule, a website is not considered as a form of active selling to certain customers, unless it is specifically targeted at these customers*".[14] On-line advertisement specifically addressed to certain customers, or the sending of unsolicited emails, constitutes active selling

51. As a general remark, the ECLF members note that, while the distinction between active and passive sales is still useful, the Internet has blurred the boundaries between the two types of sales. Prior to the development of the Internet, the main criteria for passive sales was the existence of search costs for the consumers. Under this definition, passive sales were unlikely to be a very important issue for retailers. The Internet has fundamentally altered this situation by eliminating search costs: consumers can now check prices on many websites within minutes (through price comparison sites for instance) without any need to restrict their attention to their own geographical area.

52. Given the above, some ECLF submits that the Draft Guidelines should think afresh about the criteria used to distinguish active and passive sales in an Internet context. In particular, the Draft Guidelines should clarify what should be considered as an "*advertisement specifically addressed to certain customers*". For example, the Commission's position that the language options used on a website or in the communication play normally no role in determining what is an active sale is counter-intuitive: plainly websites with multiple language options are actively intended to attract cross-border visitors. It is moreover unclear whether the use of some kinds of technology or software (e.g., ad serving tools or commercial links) should be considered as active selling; and this uncertainty can only get worse in the future as on-line technology evolves. At the same time, it is also important to ensure that the distinction does not limit or restrict the optimal use of the Internet and takes into account the very essence of the Internet – accessibility.

53. Given the above, the ECLF submits that the distinction between active and passive Internet sales should be clarified in the Draft Guidelines in a way that recognises how

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[14] See Draft Guidelines, para. 53.

the world has moved on since the active/passive distinction was devised for a pre-Internet world.

3. <u>Extension of the notion of hard-core restriction</u>

54. Pursuant to Paragraph 52 of the Draft Guidelines, the following restrictions should generally be considered as "hard-core": (i) requiring an (exclusive) distributor to prevent customers located in another territory from viewing its website; (ii) requiring an (exclusive) distributor to refuse credit cards issued outside its territory; or (iii) requiring a distributor to limit the proportion of overall sales made over the Internet, and (iv) requiring a distributor to pay a higher price for products intended to be resold on-line than for products intended to be resold off-line. Paragrah 57 of the Draft Guidelines further provides that, in the context of selective distribution, "*any obligation which dissuades appointed dealers from using the Internet by imposing criteria for on-line sales which are not equivalent to the criteria imposed for the sales from brick and mortar shops*" would be considered as a hard-core restriction.

55. As stated above, <u>some ECLF members</u> welcome this clarification of the current Regulation and Guidelines. Paragraphs 52 and 57 of the Draft Guidelines no more than re-state the current law; nonetheless, practice shows that suppliers have been able to misuse what is perceived as a degree of legal uncertainty. For example (and in addition to the examples given in paragraph 52 of the Draft Guidelines), some suppliers have outright prohibited on-line selling by reference to brand image, made the approval process for websites so unpredictable so as to deter distributors from venturing on-line, imposed conditions making the on-line service too cumbersome for consumers to use or too cumbersome for the distributors to operate, etc. The practical examples in paragraphs 52 and 57 of what amount to hardcore restrictions in an on-line environment should therefore bring helpful legal certainty to all parties and, not the least, legal support to those authorised distributors wanting to offer consumers the option of Internet shopping.

56. On the other hand, <u>most ECLF members</u> consider that the Draft Guidelines identify new Internet-specific hard-core restrictions and, as a result, extend the notion of hard-core restrictions. Those ECLF members submit that the Guidelines should interpret the provisions of the Regulation, but cannot have the effect of amending the Regulation. In other words, the Commission cannot extend the notion of hard-core restriction within the Draft Guidelines without changing the Regulation.

57. Article 4 of the Draft Regulation contains a limitative list of hard-core restrictions. Pursuant to Recital 10 of the Draft Regulation, they are limited to the most severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial restrictions. The aim of the Guidelines is to help companies to make their own assessment and explain the applicable rules. It cannot be to introduce new rules. It therefore questionable whether the Commission can extend the concept of hard-core restrictions to clauses that are not directly related to the hard-core restrictions listed in Article 4 of the Regulation. While the two first restrictions of Paragraph 52 can be related to territorial protection, the last two elements (proportionality and dual-pricing) relate to Internet sales *per se*, not whether the distributor may sell outside a certain territory or to certain customers. The case of Paragraph 57 is even more striking since the link between the concept of equivalence

(of the selection criteria for on-line and off-line distributors) and the restrictions of sales to end-users appears particularly uncertain, if not inexistent.

58. Certain ECLF members assert that qualifying these restrictions as hard-core restrictions would have serious legal consequences, since companies would bear the burden of proof. Further, the extension of the notion of hardcore restriction beyond what is covered by the Draft Regulation itself would give rise to legal uncertainty and create confusion at the level of the national courts and competition authorities. Legal uncertainty may also result in additional litigation. In practice, judges are unlikely to accept complex economic justifications for restrictions deemed to be "hard-core", and, in most cases, it is likely that they will consider that the agreement should be excluded from the benefit of the block exemption or even prohibited.

59. Furthermore, some ECLF members suggest that the extension of the notion of hardcore restrictions is difficult to reconcile with the current effects-based approach of the Commission. The new hardcore restrictions are likely to result in more form-based decisions where companies will have little scope for economic and efficiency justifications.

60. Given the above, some ECLF members submit that the restrictions of Paragraphs 52 and 57 of the Draft Guidelines should not be characterised as hardcore (or should be included in the Article 4 of the Draft Regulation).

B. ON-LINE SALES AND SELECTIVE DISTRIBUTION

61. The European and national courts have recognized for some time that the organisation of certain industries into selective distribution network is legitimate, in particular for luxury and high-technology products.[15]

62. Once there is consumer demand for products which exhibit certain characteristics in terms of quality, image, prestige and service, it is legitimate for the manufacturers of such products to organise their distribution so as meet such expectations. The purpose of selective distribution is described as contributing to the creation and preservation of the brand image and economic value of the products concerned.

63. Most ECLF members consider that, in the absence of a strong consensus among economists, the reform should not lead to undermining the current brick and mortar selective distribution model, in particular by (i) preventing the supplier from protecting its selective network by adequate selection criteria, (ii) allowing on-line distributors to free-ride on the investments of brick and mortar distributors, or (iii) hindering the possibility for the supplier to introduce specific quality criteria for on-line sales.

64. Other ECLF members consider that the use of selective distribution must not serve to (i) limit competition without creating substantial countervailing consumer benefits, (ii) reduce consumer choice in terms of price-service combinations, or (iii) discriminate against on-line sales channels.

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15 See, e.g., cases 26/76, *Metro SB-Großmärkte GmbH & Co. KG c/ Commission,* [1977] ECR 01875; T-19/92, *Groupement d'achat Edouard Leclerc c/Commission* [1996] ECR II-01851; and C-59/08, *Copad Sa v. Christian Dior*.

1. **Protection of the integrity of selective distribution networks (article 4 (b), third bullet point, of the Draft Regulation)**

65. Article 4 (b), third bullet point, of the Draft Regulation specifies that the following does not constitute a hard-core restriction of territory or clients:

    "(…) *the restriction of sales by the members of a selective distribution system to unauthorised distributors in markets where such system is operated.*"

66. The additional words "*in markets where such system is operated*" do not specifically concern on-line sales. The phrase could however call into question one of the fundamental principles of selective distribution: the right of manufacturers to protect the integrity of selective distribution networks by prohibiting resale to unauthorized distributors.

67. The new wording put forward by the Commission could suggest that authorized distributors are free to resell to any unauthorized distributor provided that the latter is located in a market where the manufacturer has not set up a selective network, including when the manufacturer does not sell – or does not yet sell – on the market in question, or when it chooses to distribute his products himself. In other words, should the selective distribution network not cover the entire territory of the European Union, its integrity would no longer be protected.

68. The ECLF understands that the Commission's intent is not to call into question the protection of selective networks but rather to prevent the manufacturer from preventing its authorized distributors to resell to unauthorized distributors, in territories where he himself deals with unauthorized distributors. This should be clarified. Otherwise, there would be a risk that national courts or regulatory authorities would interpret this phrase too broadly, and require suppliers to sell to unauthorized distributors where such distributors are located outside the selective distribution territories. This would put an end to the integrity and consistency of such networks.

69. Furthermore, the use of the word "*market*" lacks precision. For instance, where local markets are involved (which is generally the case in the sector of retail distribution), the modification introduced by the European Commission would risk leading to a partitioning of the territories according to different rules, depending on whether a system of selective distribution has been set up or not. The notion of contractual territory is clearer. This would also avoid questions linked to market definition and would guarantee the uniformity of rules applicable within the single territory of the EU.

70. In order to attain greater legal certainty, and to avoid exposing suppliers to diverging interpretations from national courts and competition authorities, the ECLF suggests a return to the current version of the Regulation. It would be worthwhile if the Commission specified at Paragraph 55 of the Draft Guidelines that the exception of the third bullet point does not cover territories on which the manufacturer himself deals with unauthorized distributors.

2. <u>The free-riding issue (Paragraphs 52 and 54 of the Draft Guidelines)</u>

71. <u>Some ECLF members</u> think that the Draft Regulation and Guidelines should clearly allow suppliers to protect the distributors' incentives to invest in selective distribution brick and mortar networks against the risk of free-riding.

72. The rules defined by the European and national authorities have so far attempted to protect the distributors' investments in brick and mortar networks – which, according to some ECLF members, are key to preserving the economic value of some products. Some national competition authorities have explicitly recognised in the past that the manufacturers should be able to impose reasonable conditions on on-line distributors in terms of investment in brick and mortar shops, of services and of quality, in order to preserve the sustainability of brick and mortar selective networks. In particular, they found that a supplier could legitimately impose to its distributors to operate a brick and mortar outlet.[16] The Commission has implicitly reached the same conclusions in two cases.[17]

73. Certain ECLF members therefore believe that the provisions of paragraph 54 of the Draft Guidelines which provide that the manufacturer can require the distributor to possess an authorized brick and mortar shop before engaging in on-line distribution, are a positive step forward.

74. In order to remain viable, some ECLF members believe it is essential that manufacturers dispose of the means necessary to preserve distributors' incentives to invest in brick and mortar networks. The economic position is that if on-line distributors were not required to have a brick and mortar shop which reflects the image of prestige of the products sold, and thus to bear the related heavy fixed costs that do not apply to pure on-line channels, they would be tempted to reduce their investments, or close their brick and mortar shops in order to sell exclusively on the Internet. The risk is an erosion of brand value and a decline of the services delivered to consumers. This risk has been recognized by the European Commission and some national authorities in past decisions.[18]

75. Certain ECLF members fear that the existing Draft however leaves open the risk that distributors could circumvent them by opening a "sham shop" so that, in reality, they could manage to sell a vast majority of their products over the Internet. The manufacturer must thus be able to require its distributors to effectively contribute to

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16 See Decision of the French Competition Council 06-D-24 of 24 July 2006, *Festina France*; Decision 07-D-07 of the French Competition Council of 8 March 2007 concerning practices implemented in the sector of the distribution of cosmetic and personal hygiene products. See also judgment n°KZR 2/02 of the German Bundesgerichtshof of 4 November 2003.

17 See IP/01/713, 17 May 2001, *Yves Saint Laurent Parfums* et IP/02/916, 24 June 2002, *B&W Loudspeakers Ltd.*

18 See IP/01/713, 17 May 2001, *Yves Saint Laurent Parfums* et IP/02/916, 24 June 2002, *B&W Loudspeakers Ltd.* See also Decision of the French Competition Council 06-D-24 of 24 July 2006, *Festina France*; Decision 07-D-07 of the French Competition Council of 8 March 2007 concerning practices implemented in the sector of the distribution of cosmetic and personal hygiene products. See also judgment n°KZR 2/02 of the German Bundesgerichtshof of 4 November 2003.

the investments in the brick and mortar network and maintain some balance between sales in brick and mortar shops and on-line sales.

76. In particular, the hard-core restrictions mentioned at Paragraph 52 of the Draft Guidelines seem problematic within the framework of a selective distribution network.

77. Paragraph 52, third bullet point, of the Draft Guidelines, provides that the fact that a manufacturer "(…) *requir[es] a distributor to limit the proportion of overall sales made over the Internet*" constitutes a hard-core restriction.

78. In the context of selective distribution, some ECLF members suggest that it would be consistent with Paragraph 54, which recognizes a manufacturer's right to require a brick and mortar shop, that this manufacturer be able to impose a reasonable proportion between on-line sales and sales in brick and mortar shops. This would only maintain the necessary incentives to invest in shops and ensure the sustainability of the physical network. In that respect, the German Bundesgerichtshof considered in the *Lancaster* judgement that a clause requiring from selective distributors to achieve the majority of their sales off-line was legitimate.[19]

79. Likewise, Paragraph 52, fourth bullet point, of the Draft Guidelines, creates a new hardcore "*restriction on dual pricing*". Indeed, within a selective distribution system, it could seem legitimate for the supplier to wish to apply a system of dual pricing in order to compensate the extra costs born by the distributors which have invested in a brick and mortar shop. Such a restriction would not in any way restrict on-line sales but would only maintain distributors' incentives to invest in physical networks.

80. Therefore, certain ECLF members consider that the suppliers should be able to impose reasonable conditions on on-line distributors in terms of investment in brick and mortar shops suggest that the third and fourth bullet points of Paragraph 52 of the Draft Guidelines be deleted.

81. Other ECLF members consider that the inclusion of a brick and mortar provision in Paragraph 54 is inconsistent with the rest of the Draft Guidelines. Rightly so, the Draft Guidelines adopt a forward-looking approach emphasising the wider objective of market integration (Paragraph 7), the importance of consumer choice of price-service combinations and distribution formats (Paragraph 97) and the significance of dynamism and innovation at the distribution level (Paragraph 220). Of course, the Draft Guidelines do not oblige suppliers to impose a brick and mortar requirement. Nevertheless, this provision risks impeding the development of on-line services and foreclosing certain types of distributors.

82. First, operating a competitive, user-friendly and efficient on-line shop requires significant investments and ongoing costs, e.g. for driving traffic, website design, analytical tools, maintaining and updating content, compliance with consumer protection rules, etc. Second, it is often overlooked how intellectually and practically complex it is to operate an on–line shop. The Internet is highly competitive, transparent and without geographical limitations. Consumers are never more than a

[19] See judgment n°KZR 2/02 of the German Bundesgerichtshof of 4 November 2003.

click away from a competitor. The online distributor must not only invest financially in order to remain competitive, but must also be able to dedicate time and effort to maintaining and developing on-line services.

83. A requirement that all distributors must also have a brick and mortar shop would exclude from the distribution network those distributors who are capable of satisfying the supplier's quality standards but do not have the means or desire to operate a brick and mortar shop. This risks holding back the full potential of on-line retailing by slowing down the development of ambitious on-line services. It also limits consumer benefits by not allowing consumers to fully exercise choice in terms of price-service combinations; in other words, what services they need and are willing to pay for.

84. Furthermore, those other ECLF members question the existence of a free-riding problem specific to the Internet. This problem has been described as consumers taking advantage of the services offered by brick and mortar distributors but purchasing the product at a discount from on-line distributors. In reality, consumer behaviour is much more intricate. Consumers use on-line and traditional sales channels for complementing and varying purposes. The Commission acknowledges this in its 2009 Report on cross-border e-commerce in the EU[20] explaining how "*consumers have come to realize that the internet offers a convenient alternative to window-shopping*". Indeed, according to the report, the greater proportion of consumers used the Internet to research products before conducting an actual purchase in a brick and mortar shop. This finding is supported by a recent study by Forrester Research that 70% of US online consumers display multichannel behaviour: they use the Internet to research products but make the purchases offline or both on-line and offline.[21]

85. Those other ECLF members therefore suggest that the so-called free-riding problem is in essence a development where on-line commerce increases the competitive pressure on traditional sales channels, basically by expanding the size of the market and facilitating consumer access and choice.

3. **Quality requirements imposed upon authorized distributors for their on-line activity (Paragraph 57 of the Draft Guidelines)**

86. Paragraph 57 of the Guidelines specifies the conditions under which a manufacturer can impose quality criteria for on-line sales (the Guidelines already provides that "*the supplier may require quality standards for the use of the Internet site to resell his goods*"- this provision has been kept at Paragraph 54 of the Draft Guidelines) :

"(…) *the Commission regards as a hard-core restriction any obligation which dissuades appointed dealers from using the Internet by imposing criteria for on-line sales which are not equivalent to the criteria imposed for the sales from the brick and mortar shop. This does not mean that the criteria imposed for on-line sales must be identical to those imposed for off-line sales, but rather that they should pursue the*

[20] See *Report on cross-border e-commerce in the EU*, SEC (2009= 283), published on 5 March 2009.

[21] See Forrester Research Report, 29 July 2009 and updated 6 August 2009, *Profiling the Multichannel Consumer*, by Patti Freeman Evans.

same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes[31]."

87. Quality criteria applicable to brick and mortar sales and on-line sales are necessarily different given the specificities of each distribution channel. The Commission recognizes the principle according to which criteria imposed on websites in relation to on-line sales follow the same objectives as those applicable to sales in brick and mortar shops, but they could not be identical given the intrinsic difference between the two channels of distribution. However, the notion of equivalence remains particularly difficult to appreciate and risks bringing about difficulties of interpretation as well as significant litigation before national courts and national competition authorities.

88. <u>Some ECLF members</u> believe that this interpretation hurdle is all the more problematic given that the notion of equivalence is linked to the concept of "hard-core restriction". As has been explained above, hard-core restrictions must be limited to the most serious distortions of competition. However, the notion of equivalence implies a subjective appreciation incompatible with the definition of hard-core restriction. Besides, the new hard-core restrictions added in the Draft Guidelines that are not directly linked to the list contained in Article 4 of the Draft Regulation raise issues of legal certainty. Certain ECLF members therefore suggest that the word "hard-core" must thus be deleted from the fourth sentence of Paragraph 57 of the Draft Guidelines.

89. <u>Other ECLF members</u> welcome the clarification provided in Paragraph 57 that there can be no discrimination against on-line channels. As mentioned above in paragraph 55 of this submission, real-life examples show how suppliers make use of criteria to prevent in practice authorised distributors from selling on the Internet. It is therefore helpful that the Draft Guidelines now explicitly state that criteria in selective distribution systems must be non-discriminatory: They must pursue the same quality objective on-line as offline. And in case this is in dispute, the burden must fall on the supplier to explain the objective behind an on-line criterion, the result it achieves or seeks to achieve, and how this is done in a comparable manner offline.

VI. OTHERS

A. New Brands and New Markets

90. Paragraph 56 of the Draft Guidelines provides that, in order to protect the investments of a distributor which will be the first to sell a new brand or the first to sell an existing brand on a new market, a supplier may restrict passive sales into a territory or to a customer group during a period of two years.

91. The clarity provided at Paragraph 56 is welcomed, however some ECLF members consider the time period should be extended to five years, as this is a more realistic assessment of the duration required to ensure that the necessary investments to launch a brand/product can be recouped. In the absence of this, potential partners will not see any benefit in making these investments, which will be harmful to competition if as a result new brands or products fail to be launched.

92. Other ECLF members point to the risk that the interpretation of 'new brands' and 'new markets' might allow suppliers to circumvent the general rules in situations when that was not the Commission's intention. This might for example be the case in relation to mere sub-brands or new product lines.

B. Category Management

93. The Draft Guidelines address category management agreements in Paragraphs 205 - 209. These types of agreements are not addressed in the Guidelines. The ECLF members have a number of observations on these Paragraphs.

94. First, the intended scope of the Commission's guidance needs clarification. The Draft Guidelines define category management agreements as "*agreements by which ... the distributor entrusts the supplier (the "category captain") with the marketing of a category of products including in general not only the supplier's products, but also the products of its competitors*". However, the meaning of "marketing" in this context is unclear. In practice, suppliers and distributors may enter into a variety of arrangements which might be characterised as "category management", but which may have very different effects on competition. For example, there is in particular an important distinction between (i) arrangements (sometimes referred to as "category management") whereby suppliers may provide advice to distributors on, *e.g.*, the range of products displayed, placement and size of product displays, stock management; and (ii) agreements (sometimes referred to as "category captaincy") whereby suppliers are designated by distributors to have full responsibility for the way in which products (including those of competitor suppliers) are selected, presented and sold to customers. The ECLF would recommend that, at a minimum, this range of possibilities be reflected in the Guidelines and greater clarity provided on the types of agreements which are more or less likely, in the Commission's view, to give rise to concerns.

95. The Guidelines state that, above the market share threshold of 30% "*the following guidance is provided for the assessment of category management agreements in individual cases*", before citing a number of reasons why category management

agreements may, on the one hand, distort competition between suppliers or facilitate collusion between distributors and/or suppliers or, on the other hand, lead to efficiencies. However, the draft Paragraphs are not very clear as to the extent to which particular characteristics or mechanisms in such an agreement would be considered to be of sufficient concern to bring the arrangements into Article 81(1) EC in the first place, which is the fundamental issue, before any balancing against efficiencies may be required. This is important in relation to a commonly encountered set of commercial practices which have not generally attracted adverse attention in the past.

96. The ECLF agrees that agreements whereby a supplier has complete control over a sufficient amount of distribution for a period of time may, theoretically, have foreclosure effects. The ECLF also agrees that collusion between suppliers or distributors is anticompetitive. However, the fact of a category management agreement does not necessarily of itself result in foreclosure, or collusion, and the ECLF feels that, if this issue is to be addressed at all in the Guidelines, this must be made more explicit.

97. In this respect, the ECLF notes that the UK Competition Commission ("CC") considered the effects of category management agreements in depth during the recent market investigation into the retail supply of groceries by retailers in the UK.[22] Although it found some evidence of category management facilitating meetings and interactions between suppliers that would not otherwise occur, the CC did not find any anti-competitive effects resulting from the conduct that it observed. In addition, the CC also observed that, in practice, retailers validate and cross-check sales recommendations made by their suppliers because it is in their best interests to do so, and that retailers were generally well placed to identify quickly any sub-optimal recommendation for a category.

98. The CC also found that category management practices may directly benefit consumers, and result in increased total sales for a category from a retailer's perspective and increased efficiency. Ultimately, the CC did not find any adverse effect resulting from category management practices, regardless of the market share of the suppliers or retailers in the UK that may engage in such practices.

99. Arguably, therefore, the inclusion of specific guidance regarding category management is unnecessary given the absence of evidence that agreements of themselves cause anticompetitive effects and the fact that agreements may result in efficiencies. To the extent that discussion of these arrangements remains in the Guidelines, the ECLF would advise that greater detail and comfort is provided in order to avoid innocent (and indeed potentially pro-competitive) arrangements from being unintentionally dissuaded.

C. UPFRONT ACCESS PAYMENTS

100. The ECLF welcomes the Commission's discussion of upfront access payments in the Draft Guidelines at Paragraphs 199 to 204. Our views on the provisions regarding upfront access payments are similar to those set out above in relation to

22 http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm

category management. Again, the UK Competition Commission recently considered these types of payments during its market investigation into the supply of groceries by retailers in the UK.

101. As with category management agreements, the Commission notes that upfront access payments may result in both anti-competitive and pro-competitive effects. However, the draft Paragraphs are again unclear as to the circumstances in which the Commission considers that potential anti-competitive effects are likely to outweigh any pro-competitive effects.

102. In the UK market investigation, the CC found that practices such as the requirement of upfront access payments could result in an adverse effect on competition. Its main concern, however, was related to circumstances in which retailers transferred excessive risks or unexpected costs onto their suppliers, rather than a particular concern about upfront access payments in and of themselves. Where this is not the case, we consider that upfront access payments are in a number of cases a compensatory service charge, e.g., for promotional services, and as such should not fall within Article 81(1) EC at all.

103. On 4 August 2009, the CC made an order requiring 11 grocery retailers in the UK to comply with a Groceries Supply Code of Practice (GSCOP), which contains a number of restrictions and prohibitions on certain supply chain practices. With respect to upfront access payments, the GSCOP provides that such payments may be required by retailers in the context of new products (provided that the payment reflects a reasonable estimate of the risk run by the retailer in stocking the new products), and in the context of promotions. In other circumstances payments may not be "required" by retailers, but may be agreed as a result of negotiations between the supplier and retailer.

104. In ECLF's view, there may be many scenarios in which upfront access payments are the result of normal commercial negotiations between suppliers and distributors for efficiency reasons. In the UK, the CC has been mindful of the unintended consequences that might arise from excessive regulatory intrusion and the ECLF would encourage the Commission to take a similarly prudent approach. To the extent that discussion of these arrangements remains in the Guidelines, the ECLF would advise that greater detail is provided in order to avoid potentially pro-competitive arrangements from being unintentionally dissuaded.

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Submitted on behalf of the European Competition Law Forum, by the Vertical Agreements Working Group,

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ANNEX 1

LAW FIRMS REPRESENTED IN THE ECLF

The ECLF aims to be the principal interface between specialist competition lawyers and the European Commission's Directorate General for Competition. It provides a forum through which members may express views on a range of policy and practice issues. Its current active membership includes competition specialists from the following firms:

A&L Goodbody

Addleshaw Goddard

Allen & Overy

Arnold & Porter

Ashurst

Baker & McKenzie

Beachcroft

Berwin Leighton Paisner

Bird & Bird

Bonelli Erede Pappalardo

Bredin Prat

Brick Court Chambers

BIICL

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Čechová & Partners

Cleary Gottlieb Steen & Hamilton LLP

Clifford Chance

Cuatrecasas

De Brauw Blackstone Westbroek

Dechert

DLA Piper

Dr. Georg Legat

Foley & Lardner

Freshfields Bruckhaus Deringer

Garrigues

Gibson Dunn & Crutcher

Gerrit Schohe

Gianni, Origoni, Grippo & Partners

Gide Loyrette Nouel

Gleiss Lutz

Hengeler Mueller

Herbert Smith

Homburger

Howrey

Janežič & Jarkovič

Jeantet Associes

Jones Day

Kemmler Rapp Böhlke

Latham & Watkins

Linklaters LLP

LMR Attorneys

Lovells

Mannheimer Swartling

McCann FitzGerald

McDermott Will & Emery

Monckton Chambers

Morrison & Foerster

Nauta Dutilh

Norton Rose

O'Melveny & Myers

Olswang

Orrick Herrington & Sutcliffe

Panagopoulos Vainanidis Schina

Plesner

PLMJ

Procopé & Hornborg

Raidla Lejins & Norcous

Reed Smith

Roschier

S J Berwin

Schulte Riesenkampff

Shearman & Sterling

Sidley Austin

Simmons & Simmons

Skadden Arps Slate Meagher & Flom

Slaughter and May

Squire, Sanders & Dempsey

Stibbe

Sullivan & Cromwell

Thommessen

Thompson Hine

Uría Menéndez

Van Bael & Bellis

Vieira de Almeida

Vinge

Wardynski and Partners

White & Case

Willkie Farr & Gallagher

Wilmer Cutler Pickering Hale and Dorr