



POSITION PAPER DETAILHANDEL NEDERLAND (DUTCH RETAIL ASSOCIATION) ON THE REVIEW OF  
THE EUROPEAN COMPETITION RULES APPLICABLE TO VERTICAL AGREEMENTS

(final version of 28 September 2009)

Introduction:

Detailhandel Nederland (DN) has reflected on the draft European Commission regulation and guidelines on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, as published by the European Commission on the 28th of July. DN would like to make a number of remarks regarding the drafts and requests the European Commission to seriously consider these while preparing the formal proposal for the new regulation and guidelines.

Remarks:

1) Necessity to clearly specify retail concepts in new rules on vertical restraints

DN regrets that the European Commission not explicitly in the draft regulation states that, for example, franchise falls within its scope. This only becomes clear in the draft guidelines. DN recommends that there is a reference to the main retail concepts to which the revised rules will apply in both the (draft) regulation and guidelines. Moreover, DN is in favour of a definition of retail concepts which is broad enough to ensure that the rules will also be applicable to comparable (new) retail formats. This approach would take into account that retail is a highly competitive industry with many new formats emerging. This approach would at the same time create more legal certainty for Dutch retailers. Furthermore, DN considers that in the definition of retail concepts should be included that retailers do not only sell goods but increasingly also provide services (insurances, mortgages, energy contracts etc).

## 2) Need to make regulation and guidelines accessible for retailers

The texts of the draft regulation and guidelines are not easy to understand for retailers. DN believes that this should be avoided. Not only specialised competition lawyers should be able to grasp the essence, but also shopkeepers. For this reason we urge the Commission to provide a text much more readable for laymen, which preferably includes flow charts.

## 3) Call to prolong the specific Dutch legal framework for retailers

In the Netherlands the government has enacted, on the request of retailers, a specific legal framework for organisations of retailers (inter alia franchise groups). As a consequence those retail organisations that strictly limit their activities to the Dutch market have a clear option. They could either choose to adhere to the specific Dutch legal framework, or to live up to the European regulation and guidelines.

The Dutch framework (the so called 'Besluit van 12 december 1997 houdende enige vrijstellingen voor samenwerkingsovereenkomsten in de detailhandel van het verbod van mededingingsafspraken') could be advantageous for it allows retail organisations more leeway regarding the setting of prices (maximum prices during an advertising campaign) and concerning obligations of a franchisee to buy certain products of the franchisor. The Dutch framework came into force in 1998, expired in 2008 and was subsequently extended by the Dutch ministry of Economic Affairs.

DN would urge the European Commission and the Dutch government to not in any way limit the freedom for national governments to set their own competition rules for those retail organisations which do not operate cross-border. DN is strongly in favour of the prolongation of the Dutch framework. It has worked well in practice and both retail organisations and consumers have benefited. The arrangement for example that retail organisations are allowed to set maximum prices during an advertising campaign which last no longer than eight weeks and concerns not more than five percent of the assortment, provides the only economic rationale for a retail organisation for advertising campaigns on a national scale. Moreover, such large scale campaigns offer retail organisations the leverage to buy products from suppliers at really sharp prices. This price advantage can at least partially be transferred to the consumer.

DN would also be in favour to incorporate the arrangement that retail organisations are allowed to set maximum prices during an advertising campaign which last no longer than eight weeks and concerns not more than five percent of the assortment in the revised European rules on vertical agreements. This would offer more legal certainty to Dutch franchisors and franchisees with cross-border operations in other European countries.

#### 4) Proposed change in application 30% threshold could easily turn out to be unworkable

The European Commission states that two major developments have marked the ten-year period following the entry into force of the current set European rules on vertical agreements: a further increase in large distributors' market power and sales on the internet. Against this background the Commission proposes that for a vertical agreement to benefit from the block exemption, not only the supplier's market share (as is currently the case) but also the buyer's market share should not exceed 30%.

DN considers this an important change compared with the present rules. Currently a franchise with a market share of 30% or more can not automatically benefit from the block exemption. The proposed modification would mean that to benefit from the block exemption the market shares of both the franchisor and its franchisees must remain below 30%. This causes huge legal uncertainty.

DN agrees with the European Commission that over the last ten years in a number of retail segments the market has become more consolidated and concentrated. This however leads not necessarily to a further increase in large distributors' market power. In practice this will for example depend on the size of suppliers. Given the fact that in many producer markets there has also been a marked trend of consolidation and concentration, DN believes that a further increase in large distributors' market power is an inaccurate generalisation. Whether the balance in market power has changed can only be assessed on a case-by-case basis.

DN also foresees practical problems. The impact of this proposed modification will depend to a large degree on how market share is defined. A very narrow definition of the relevant market could mean that a significant number of franchisees would have a share of 30% or more of the relevant market and therefore have to turn to the competition authorities for an individual assessment. DN believes this could cause a considerable regulatory burden for many



franchisees. For this reason DN would be against a (too) narrow definition of the relevant geographical and product market.

The proposed change of threshold is also of importance for relatively large retailers that buy from large suppliers. A narrow definition of the relevant market could mean that numerous retailers would have a share of 30% or more of the relevant market and therefore have to turn to the competition authorities for an individual assessment. This should be avoided. DN therefore is against the proposed modification. If the Commission nevertheless persists it should come forward with a workable definition of the relevant geographical and product market.

DN would also like to draw the attention of the European Commission to the fact that in the proposed new rules associations of retailers will not be block exempted if one of its members has a turnover of more than euro 50 million per year. Such a limitation could cause huge uncertainty for the members of an association of retailers, if for example one of them starts to buy one or two shops and nears or surpasses the 50 million threshold. DN considers this proposed new rule discriminatory for the reason that other retail formats are exempted from it and calls for its deletion.

#### 5) Use of internet should not be micro managed by competition law

The European Commission is strongly in favour of protecting consumers' possibilities to purchase to their advantage across borders, which is facilitated by the Internet. On the other hand the Commission agrees that certain sales restrictions that aim at limiting or preventing distributors from taking unfair advantage of marketing and brand promotion undertaken by others may enable consumers to benefit from better services.

DN considers that the granting by a franchisor to a franchisee of a geographically bound region to exclusively exploit the formula of the franchisor is part and parcel of a franchise agreement. The use of a website is an integral part of the communication with (potential) customers. Therefore it is in the interest of both the franchisor and the franchisee to incorporate the agreed arrangements concerning online selling into the franchise agreement.

In practise these arrangements vary widely. A franchisor could reserve the right to use its trade name for his own website, a franchisor and franchisee could go for a common website, they



could decide to both run their own websites and they could go for a concept which combines a 'brick and mortar' shop with a website or which concerns solely a website.

The European Commission seems to be willing to micro manage these arrangements, by creating distinctions between sales made as a result of active marketing and sales made as a result of the consumer taking the initiative (active and passive sales) and by, for example, restricting requirements such as that the distributor should have a 'brick and mortar' shop before engaging in online sales.

DN believes that competition law is not the right tool to promote the internet. Franchisors and franchisees (and also suppliers and distributors in general) should maintain a large degree of freedom to agree on the use internet, as to allow tailor made solutions.

#### 6) New vertical restraints are disadvantageous for both retailers and consumers

The European Commission introduces in the draft guidelines a number of new vertical restraints. DN has objections against the newly proposed vertical restraints on upfront access payments and category management agreements.

The European Commission defines upfront access payments as fixed fees that suppliers pay to distributors in the framework of a vertical relationship at the beginning of a relevant period, in order to get access to their distribution network and remunerate services provided to the suppliers by the retailers. This category includes various practices such as slotting allowances the so called pay-to-stay fees and payments to have access to a distributor's promotion campaigns. Upfront access payments should according to the European Commission be block exempted when both the supplier's and buyer's market share on their respective downstream markets does not exceed 30%. Above the market share threshold the Commission proposes guidance for the assessment of upfront access payments in individual cases.

DN considers access payments as a normal part of the negotiations between a supplier and retailer. A retailer continuously has to consider how to make best economic use of its (scarce) shelf space. Restricting the retailer in demanding payments for an important services as providing shelf space would only be to the advantage of suppliers, for it would effectively strengthen their bargaining positions. Most likely consequence of such a restriction would be lower margins for the retailer, higher consumer prices or a combination of both. For this reason we urge the Commission to scrap this new restraint on the contractual freedom of retailers.



The European Commission defines category management agreements as agreements within a distribution agreement in 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. Category management agreements are block exempted when both the supplier's and buyer's market share on their respective downstream markets does not exceed 30%. Above the market share threshold the Commission proposes guidance for the assessment of upfront access payments in individual cases.

DN believes that category management agreements are a method to optimize the return on shelf space. Category management is often based on extensive market research. This research allows the category manager to optimize supply and demand. Restricting category management would not only be to the detriment of the retailer and supplier, but would also have negative effects for the consumer. He or she would be confronted with category of products which he or she is less likely willing to buy. This would certainly be detrimental to consumer satisfaction.

***Detailhandel Nederland (DN) is a joint agreement between the National Retail Council of MKB Nederland, the Dutch federation of SMEs, and the Raad Nederlandse Detailhandel, the Dutch association of large retailers. DN represents all retailers in the Netherlands. There are 110.000 retail companies with a combined annual turnover of approximately euro 85 billion. Dutch retailers employ more than 750.000 people, making retail trade the largest industry in the Netherlands. DN is a member of EuroCommerce, the European umbrella organisation for the retail industry, wholesale and international trade.***

***For questions and/or remarks concerning this position paper you may contact Hendrik Jan van Oostrum, head of the Brussels office of Detailhandel Nederland. Dial 0032-2-7365830 or mail to [Hendrikjan.vanoostrum@dedetailhandel.nl](mailto:Hendrikjan.vanoostrum@dedetailhandel.nl)***