MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS
SOCIEDADE DE ADVOGADOS

BRIEFING

1 JUNE 2010 | 01

EUROPEAN LAW AND COMPETITION

NEW REGIME FOR VERTICAL COMMERCIAL RELATIONS ENTERS INTO FORCE TODAY

As of today, undertakings involved in so-called "vertical" commercial relations (*maxime*, distribution agreements) are under a new EU legal framework applicable both to existing agreements and to new ones. This new legal framework consists of Commission Regulation (EU) n.º 330/2010[1] (the "Regulation") adopted last April, 20 and which shall be in force until 31 May 2022. The Regulation provides for a *safe harbour* - presumption of legality - for agreements that fall within its scope of application. The Regulation was adopted together with accompanying Guidelines which, although binding only on the Commission, enjoy a relevant role for companies and all other economic agents in interpreting the Regulation and providing guidance for the assessment of agreements outside the safe harbour.

Even though, at first sight, no major amendments are introduced, the new framework clarifies and develops certain fundamental concepts and also tries to adapt the 10 year old' legal rules to increasingly important new realities, such as online sales and increasing buyer power in some sectors of activity. Equally relevant is the more extensive guidance provided in situations that may benefit from individual exemption to the prohibition of article 101 of the Treaty on the functioning of the European Union ("Treaty").

The most significant change introduced by the Regulation concerns its scope of application. Under the previous rules, the first requirement to take into account when checking whether a vertical agreement could benefit from the safe harbour was the market share of the supplier, which could not exceed 30% (with only one exception for exclusive supply agreements, in which the buyer's market share was relevant). The new rules require, however, that both the market share of the supplier and that of the buyer do not exceed the above-referred threshold. Powerful buyers and their counterparts in agreements should thus carefully re-assess the former's market position as this new rule potentially leaves "unprotected" agreements previously benefiting from the safe harbour. The relevant markets to be considered for the purpose of market share assessment are distinct: for the supplier, the relevant market is the sales market; as for the buyer, the (upstream) purchase market is the relevant one. Even though an agreement outside the safe harbour shall not be automatically deemed anti-competitive, a thorough individual assessment of the agreement must be undertaken in order to

[1] Commission Regulation (EU) N 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

check whether or not it constitutes a potentially restrictive agreement and, if affirmative, whether it generates efficiencies capable of justifying it, under article 101 (3) of the Treaty.

The new framework clarifies and develops certain fundamental concepts and also tries to adapt the 10 year old' legal rules to increasingly important new realities, such as online sales and increasing buyer power in some sectors of activity

The Regulation further limits the situations in which vertical agreements between competitors can benefit from the safe referred harbour.

In what concerns hardcore restrictions, although there are no material changes to the cases foreseen in the Regulation, some changes are introduced, which give the supplier additional ability to limit its distributors' active sales. In particular, a supplier is now able to impose restrictions on the buyer's place of establishment (eg: location of distribution outlets and warehouses) no matter what type of distribution system is in place. Also, in the specific case of a selective distribution system, the supplier is able to order its authorized dealers not to sell within territories where the supplier does not yet sell the contract goods, but which the latter has reserved to operate that system.

On the other hand, even if the Regulation did not bring about any substantial change in the area of hardcore restrictions, the reading of the Commission's Guidelines on the interpretation and practical application of these restrictions gives rise to a wide variety of new issues, in particular in what concerns Internet sales and the extent to which a distributor's use of the Internet may or may not be limited by its supplier.

Even if the Regulation did not bring about any substantial change in the area of hardcore restrictions, the reading of the Commission's Guidelines on the interpretation and practical application of these restrictions gives rise to a wide variety of new issues, in particular in what concerns Internet sales

In principle, every distributor must be allowed to use the Internet to sell products, regardless of the type of distribution in place. The fact that a distributor has a website on which it sells its products and which could be accessed and visited by customers located anywhere shall, as a rule, be regarded as a passive sale, and therefore, not subject to limitations by the supplier, in particular in order to protect another distributor's exclusive territory or exclusive customer group. The Guidelines of the Commission elaborate extensively on the types of conduct that limit passive sales and can be regarded as hardcore restrictions and are, therefore, not admitted. Despite the above, it is recognized that a supplier may, in some cases, impose restrictions on the use of the Internet by its distributors, for example, when such use leads to active sales in the territory of another exclusive distributor.

Undertakings should take advantage of the one-year transitional period to assess and amend, if necessary, current agreements and practices

In addition, in the context of a selective distribution system, any obligations which dissuade appointed dealers from using the Internet to reach more and different customers by imposing criteria for online sales not overall equivalent to criteria imposed for sales at bricks and mortars shops are - according to the Guidelines - also regarded by the Commission as hardcore restrictions.

Two final issues should be highlighted. Firstly, despite the vivid debate that has arisen in Europe over the past years in favor of a more lenient approach to Resale Price Maintenance (RPM), the practice remains within the hardcore list of the Regulation. Still, the wording of the Guidelines in this regard indicates that the Commission is more willing to actually consider pro-efficiency arguments in favor of RPM in the context of an article 101 (3) assessment. Secondly, the Guidelines introduce two new types of restrictions: upfront access payments and category management agreements, both of which of significant relevance in modern retail trade. Upfront access payments and category management benefit from the safe harbour when neither the supplier nor the buyer's market share exceeds 30%. Above that threshold the Guidelines provide guidance on assessment of individual cases.

IMPLICATIONS OF THIS NEW LEGAL FRAMEWORK

Undertakings which take part in preexistent agreements enjoy a one-year transitional period to amend them according to the new set of rules. It is thus advisable to undertake an assessment notably in order to:

- Check whether or not the agreement continues to benefit from the safe harbour under the new rules - for example, because of the (new) buyer's market share threshold - and if not, to undertake an individual assessment of the agreement in light of article 101 (1) and 101 (3);

- Review existing agreements and practices concerning online sales in the light of the new Guidelines.

The Portuguese Competition Act establishes the applicability of the safe harbour provided by the Regulation even if there are no effects on intra-community trade, thus purely internal agreements are also covered

In the same way, it is timely to fully understand the new framework and consider it in the context of negotiation of new agreements as well as when envisaging potential redrafting of existing agreements

It should be stressed that the Portuguese Competition Act establishes the applicability of the safe harbour provided by the Regulation even if there are no effects on intra-community trade, thus purely internal agreements are also covered. In addition, the recently-concluded review of competition rules undertaken by the European Commission on the sector of motor vehicle distribution and repair has made it clear that the Regulation shall also apply to that same sector, either exclusively (for vertical agreements concerning new motor vehicles as of 01.06.2013) or concurrently with another sector--specific regulation (for vertical agreements for spare parts and maintenance services for motor vehicles, as of 01.06.2010).

Contacts
Margarida Rosado da Fonseca | margarida.rfonseca@mlgts.pt
Inês Gouveia | igouveia@mlgts.pt