



**PUBLIC CONSULTATION
ON THE REVISION OF THE “DE MINIMIS” NOTICE
– RESPONSE –**

4 October 2013

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UGAL is closely following the process of revising the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union. UGAL has always been actively involved in shaping the content of the guidelines on vertical and horizontal agreements and continues to stress in discussions with the Commission, the many positive effects on competition of certain types of agreements within groups of independent retailers.

In order to function efficiently and be competitive, independent retailers vertically working with a central organisation, in groups need to be able to exchange know-how, have agreements on joint purchasing for goods and services and work on common resale prices, particularly to harmonise the brand image and be able to compete in the fast growing e-commerce market.

Those agreements fulfil the requirements of Article 101(3) because they typically “*contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit*” and should therefore not fall under the scope of the enforcement of European competition law.

As such, UGAL:

- urges the Commission to acknowledge the indispensability of certain types of agreements that would fall within the scope of the draft notice;
- warns that the finalised notice may need to be revised in the light of experiences gained from fast developing means of distribution, e.g. e-commerce where independent retailers, working in groups, require a certain measure of uniformity and quality standardization;
- believes that the Notice should not lead to restrictions by effect being treated as restrictions by object.

The draft Notice reaffirms, in line with the *Expedia* jurisprudence, the difference between restrictions by object and restrictions by effect, excluding agreements having an anticompetitive object from the rules on agreements of minor importance. Therefore, it might be tempting for national competition authorities (NCAs) to identify more systematically an agreement as an agreement creating a restriction by object since the latter now offers a certain procedural flexibility for NCAs. As such, it regrettably will no longer be necessary for NCAs to assess the actual effects of such practices.

For this reason, it is crucial to reiterate, within the Notice, that restrictions by effect should not be assimilated to restrictions by object and that the actual nature of a potentially anticompetitive agreement should always be determined on a case by case basis. This opinion is also shared by the advocate general in the *Expedia* case.

Moreover, the new rules should not lead the NCAs to identify certain types of agreements as restrictions by object "per se", as the true nature of an agreement that has the objective to restrict competition, will always depend on the circumstances of the case.

It is therefore important to emphasize that the new rules will not prevent the benefit of an individual exemption provided for in Article 101 (3) TFEU.

For the aforementioned reasons, UGAL would like to recommend the following actions:

→ **Priority actions**

- ✓ **Specify that the new rules do not create “per se” infringements and will in any case not prevent the possibility of benefitting from an individual exemption provided for in Article 101 (3) TFEU.**
- ✓ **Clearly state in the Notice that it will always need to be determined on a case-by-case basis whether the nature of an agreement that has the objective to restrict competition, would exclude it from the Notice. This is because certain agreements can be indispensable to the proper functioning of certain organisations, especially those characterized by independent SMEs cooperating in vertical structures to attain efficiencies and economies of scale.**
- ✓ **That in any case, price agreements, between independent SMEs cooperating in vertical structures, for the purpose of offering a harmonized offer to the consumer particularly in e-commerce, are considered not to negatively affect competition noticeably in the sense of article 101 (1) TFEU, when the combined market share of the companies concerned does not exceed 5% of the relevant markets affected by this agreement.**

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*Established in 1963, **UGAL – the Union of groups of independent retailers of Europe** – is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.*

These groups are set up like wholesale businesses by independent retailers and craftsmen. Their aim is not only to provide their members with the best purchasing conditions. What they are also seeking is to jointly contribute technical and material resources, together with all the services and the human capacity required to guarantee the operation and development of modern commercial and distribution enterprises for retailers to effectively respond to consumer expectations.

To achieve this, these groups seek economic performance through networks of points of sale – consisting of SMEs usually working under a common brand name.

UGAL represents nearly 300.000 independent retailers, who manage more than 545.000 sales outlets. This represents a total employment of more than 5.000.000 persons.

More information about UGAL under www.ugal.eu