



## newsletter

Competition - September 2009

### Future competition law regime for supply and distribution agreements announced

**In 1999 the European Commission (the Commission) introduced Regulation 2790/1999 the 'block exemption' regulation for supply and distribution agreements (the 1999 Block Exemption) and its accompanying guidelines (the 1999 Guidelines). Having been in force for nearly 10 years, the 1999 Block Exemption and the 1999 Guidelines are generally thought to have been a success.**

The 1999 Block Exemption expires on 31 May 2010. On 28 July 2009 the Commission published for consultation draft versions of the new revised block exemption (the [2010 Block Exemption](#)) and guidelines (the [2010 Guidelines](#)) that it proposes will replace the 1999 Block Exemption and the 1999 Guidelines. The consultation period ends on 28 September 2009.

The 2010 Block Exemption and Guidelines do not make widespread changes to the 1999 Block Exemption and Guidelines. Instead they make a small number of important substantive changes, particularly to reflect the growth of the Internet since 1999 and the buyer power that the European Commission considers is now wielded by large distributors. This article examines the issues.

#### Background

Under EU and UK competition law, agreements that have as their object or effect the prevention, restriction or distortion of competition are prohibited. However, it is possible for certain agreements to benefit from an exemption to that prohibition, for example where they improve production or distribution.

To help businesses to decide whether specific types of agreement can benefit from exemption, the European Commission has introduced a number of 'block exemption' regulations.

If an agreement complies with the terms of a block exemption, then it will be exempt from the prohibition on anti-competitive agreements. That means that it will be within a 'safe harbour' for competition law purposes – any competitive restrictions that it contains will not infringe competition law.

#### The 1999 Block Exemption

The 1999 Block Exemption grants exemption for competition law purposes to agreements for the sale or purchase of goods or services, where (a) the supplier's market share does not exceed 30% and (b) the agreement does not contain 'hardcore restrictions' of competition (such as price fixing or market sharing).

It is a short piece of legislation which sets out the laws concisely. It is accompanied by a detailed set of explanatory guidelines (the 1999 Guidelines), which provide essential clarity on how the 1999 Block Exemption applies to specific types of vertical agreement, and to specific types of competition restrictions.

#### The 2010 Block Exemption – how does it differ?

There is only one noteworthy change in the 2010 Block Exemption: it makes the availability of the exemption conditional on the supplier and the reseller both having market shares less than 30%.

Under the 1999 Block Exemption, the exemption is granted provided only that the supplier's market share does not exceed 30% (and the agreement does not contain hardcore restrictions). (A complication under the 1999 Block Exemption is that where an agreement contains 'exclusive supply obligations' (which oblige the supplier to sell only to the reseller), then the 30% market share threshold is reversed and applies instead to the reseller's share of the purchasing market for the product or service in question).

This will change under the 2010 Block Exemption, which makes the grant of exemption conditional on both the supplier and the reseller having market shares of less than 30% on any relevant market affected by the agreement.



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The 2010 Guidelines explain that (unlike the 1999 Block Exemption) the reseller's market share for these purposes will not be its share of the purchasing market, but its share of the market where it resells what it has bought from the supplier.

This move by the European Commission seems designed to prevent the exemption covering competition restrictions in buying agreements concluded by businesses which have high market shares on the markets where they resell the products that they buy. Such businesses will need to consider the terms of their purchasing agreements as a matter of priority, as the competition law rules that apply from 1 June 2010 will be stricter than before. They may wish to respond to the Commission's consultation in September 2009.

#### How do the 2010 Guidelines differ?

The 2010 Guidelines make a number of revisions to the 1999 Guidelines, a small number of which introduce important substantive changes in how the Commission considers vertical agreements should be analysed.

Examples of the changes are:

- clarification on how to define what is a genuine agency agreement – genuine agency agreements are not caught by competition law at all and do not require any exemption to be lawful
- inclusion of guidance on sub-contracting agreements – explaining that such agreements will generally not be caught by competition law, provided certain conditions are satisfied
- inclusion of guidance on how unilateral policies are to be analysed – unilateral policies are not agreements as such and in general are not caught by the competition law prohibition on anti-competitive agreements; the Commission has provided guidance on the dividing line between a genuine unilateral policy and an agreement
- clarification that the inclusion of a 'hardcore restriction' may be justifiable on a case-by-case basis if it produces economic efficiencies
- specific guidance on how to assess whether restrictions on Internet sales are 'hardcore restrictions' which are likely to infringe competition law
- new guidance on the assessment of 'upfront access payments' (paid by suppliers to resellers to gain access to the reseller's network) and similar arrangements such as 'pay-to-stay fees', all of which are block exempted provided that the market share threshold of 30% is not exceeded by either the supplier or the reseller

- new guidance on the assessment of 'category management agreements' (where the reseller tasks the supplier with the marketing of all the products in a given product category – including both those of the supplier and its competitors) – such arrangements are also block exempted provided that the market share threshold of 30% is not exceeded
- new detailed guidance on 'resale price maintenance' (where the supplier and the reseller agree what the reseller's price for selling the products will be); 'RPM' is generally considered to be a 'hardcore restriction' which produces a competition law infringement, but the Commission explains that in individual cases it may be justifiable if it produces economic efficiencies: for example, where it helps a suppliers and resellers to launch a new brand or enter a new market

#### What this means

The importance of the 2010 Block Exemption and the 2010 Guidelines to businesses trading in the EU should not be underestimated. The rules that will be finalised in the autumn and winter will directly affect more businesses than almost any other set of competition law rules: almost every business has a vertical agreement of some kind.

The 2010 Block Exemption itself will make only one major change to the rules set out in the 1999 Block Exemption – the new requirement that the reseller's (as well as the supplier's) market share on the market where it resells the goods cannot exceed 30% for the block exemption to be available. This measure looks to be targeted at large retailers with the aim of limiting their buyer power, but it will nonetheless apply across all industry sectors.

The 2010 Guidelines show more changes, some of which are driven by legal clarifications delivered by judgments of the European courts (which are binding on the Commission). This article has not examined those changes in detail – please contact a member of the team if you wish to receive more information on any of them.

Morgan Cole has also prepared mark-up versions showing the differences between (a) the 1999 Block Exemption and the 2010 Block Exemption, and (b) the 1999 Guidelines and the 2010 Guidelines: please contact a member of the team for a copy.

**Toby Tyler**  
**Associate & Head of Competition Law**



## The OFT look to use disqualification of directors to boost competition law compliance

**The Office of Fair Trading (OFT) has opened a consultation on its use of director's disqualification, after recognising that sanctions against individuals will act as a more effective deterrent for breach of competition law.**

In a recent newsletter we wrote about the record [€1.06 billion fine](#) imposed on [Intel Corporation](#) by the European Commission for breach of competition law, and commented on the paradox that despite such headlines, company directors ranked fines as only the fourth most important deterrent (out of five) against breaching competition law. Criminal penalties were apparently the most effective, followed by disqualification as a director, bad publicity for the company, fines, and lastly damages awarded to third parties (according to a report by Deloitte).

Recognising that sanctions against individuals are more likely to be effective in ensuring competition law compliance than even large fines imposed on a corporation, the OFT has opened a [consultation on its use of director's disqualification](#), a sanction that can last up to [15 years](#).

The risk of disqualification for wrongful trading in an insolvency situation, for example, is probably well known to most directors. The OFT (and some sectoral regulators) also have the power to disqualify a director for breaches of competition law (through a [Competition Disqualification Order](#) or [CDO](#)). A CDO will be imposed where a company breaches competition law, and the court considers that a director's conduct makes him ["unfit to be concerned in the management of a company"](#).

There are three situations where a director may be found unfit:

- where his conduct contributed to the breach of competition law
- where his conduct did not contribute to the breach, but he had ['reasonable grounds'](#) to suspect that the company was breaching competition law and took no steps to prevent it, or

- where he did not know that that the company was doing was a breach of competition law, but ['ought to have known'](#) that it did.

The current guidance, while not altogether ruling out enforcement in the second and third situations, makes clear that the OFT will focus on the first situation. The proposal is to do away with this distinction, thereby putting greater pressure on directors to monitor their company's competition compliance, and to be aware of whether particular conduct contravenes competition law.

The OFT also hopes that this will focus the minds of directors of larger companies, where individual directors are less likely to be personally involved in a breach than in a smaller companies and thus protected against disqualification under the current regime.

At present, a CDO will not be imposed when a company has benefited from leniency. ['Leniency'](#) in this context covers not only the immunity granted by the OFT to the first participant in a cartel to come forward and disclose its existence, but also lesser degrees of leniency given to other participants for their co-operation in a subsequent investigation.

The proposal is that only directors of the first company to disclose the cartel's existence should be protected from disqualification. The OFT is keen to encourage companies to disclose cartels, and this will put greater pressure on all participating companies to be the first to come forward.

The two other proposals will be of less general impact: the existing guidance that a CDO may only be used once a breach has been proved may be modified to enable their use in a limited number of unproved cases (such as where the company concerned went into liquidation and so no infringement was proved). Finally, the guideline that the OFT will not apply for a CDO unless a financial penalty has been imposed on a company may also be modified. If adopted, these proposals will give all board members a personal incentive to monitor their company's compliance with competition law.

In particular, the possible focus on directors who ['ought to have known'](#) that certain activities were a breach of competition law shows the value both to a company and its directors of regular competition law compliance audits.

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## Commercial contracts – how much liability can we exclude?

**Many businesses use clauses in their contracts that limit their liability where the other party suffers financial loss of some kind. Often such clauses will exclude liability for loss of profit, loss of revenue and loss of goodwill, and they may also cap liability for other losses at an insurable maximum.**

In the recent case of [Internet Broadcasting Corporation and another v. MAR LLC](#) the High Court considered whether such exclusions can protect a party from liability where it has committed a 'repudiatory breach of contract' – that is, a breach which is so serious that it entitles the innocent party to terminate the contract. In those circumstances, can an exclusion clause prevent the innocent party from claiming for its losses?

### Facts

Internet Broadcasting Corporation Ltd (NetTV) builds interactive television platforms. MAR LLC (MARHedge) provided information and services to the hedge fund industry.

In May 2005, NetTV entered into an agreement with MARHedge, agreeing to set up an internet television channel to broadcast MARHedge material. The agreement was to last for three years, unless it was materially breached by either party.

The agreement contained a standard form of liability exclusion clause, which provided that:

"neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage."

In May 2006, MARHedge unilaterally terminated the agreement. NetTV sued for loss of profits, claiming that MARHedge had wrongfully committed a repudiatory breach of the agreement. MARHedge admitted that it had wrongfully repudiated the agreement, but sought to rely on the exclusion clause to avoid liability for loss of profit.

### Decision

The Court found in favour of NetTV, concluding that the exclusion did not cover MARHedge's deliberate personal repudiatory breach of the contract with NetTV. Key points from the judgment are:

- exclusion clauses can apply to such deliberate personal repudiatory breaches of contract – excluding the liability of the guilty party
- BUT there is a strong legal presumption that they will not be read as having that effect – in other words, the Courts will be generally unwilling to give them that effect
- BUT that strong legal presumption can be overturned where very clear and strong words are used that make it clear that the exclusion clause is intended to cover deliberate repudiatory breaches of contract
- particularly clear and strong language is needed where losses arising from the deliberate personal repudiatory breach may not be insurable
- in any event, the Courts will not allow an exclusion clause to prevent liability for deliberate personal repudiatory breach if that would defeat the object of the contract

### What does this mean for you?

If you use contracts that contain an exclusion of liability clause, it is important to review that clause. To reduce uncertainty, decide whether you wish the exclusion to cover deliberate personal repudiatory breaches of contract. Then make clear in the contract whether the exclusion covers losses related to such breaches.

If you take no action, then the legal presumption will be that your exclusion clause does not protect you from liability if you commit a deliberate personal repudiatory breach of contract – for example, if you abandon and cease to perform a contract in the absence of fault by the other party.

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