

Vakcentrum is the professional sector organization for independent SME retailers, and represents the interests of retailers who operate supermarkets, cheese shops and delicatessens, health and wholefood shops, convenience stores, off-licences and chemist shops, and retailers selling household articles, cooking utensils, tableware and toys  
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Supporting document to the public questionnaire for the 2018 evaluation of the Vertical Block Exemption Regulation.

## Intro

1. The Vertical Block Exemption Regulation, (“Regulation”) expires. The Commission is evaluating whether the Regulation is still effective, efficient, relevant and in line with other EU legislation. If not, the Regulation and the Guidelines will be revised.
2. Vakcentrum is actively concerned with EU policies and legislation regarding the general interests of its members. Vakcentrum is predominantly concerned with the wide spread problems with Unfair Trade Practices (“UTPS”) and the currently unbalanced competition approach to franchise relationships.
3. Since the adoption of the current Regulation we have seen new market developments, new information on its working as well as new thoughts on competition and coherence with other EU legislation. Especially the increased importance of E-commerce warrants consideration of possible new antitrust issues and a pro-active approach from the EC in order to prevent an increase of UTPS and the aforementioned unbalance.
4. Vakcentrum likes to make reference to the “Follow up to the European Parliament Resolution of 12 September 2017 on the functioning of franchising in the retail sector (2016/2244 INI)”. In the afore mentioned Follow Up, the Commission has stressed that it is committed to ensure the coherent application of the Regulation and will discuss the issues raised by the European Parliament concerning franchising in the European Competition Network.

## Noncompetete

5. The Regulation applies to agreements between companies at a different level in the supply chain. It should be expressly stipulated that franchisees are not part of the same group as - and don't form an economic entity with - the franchisor and or other franchisees. Franchisees are independent entrepreneurs that bear significant financial en commercial risks.
6. Agreements between a franchisor and a franchisee don't fall out of the scope of Art 101 (1) and don't fall automatically in the scope of Art 101 (3), whether or not the franchisor provides know how and invests in marketing and or the franchise can have pro-competitive effects because of joint purchasing.
7. The Regulation, and even more evidently so the Guidelines, support the misconception that franchisors can freely restrict franchisees without antitrust concerns, because those restrictions are deemed necessary to protect the franchisor's intellectual property rights. This misconception is wrongly based on European caselaw (ECLI:EU:C:1986:41, ‘Pronuptia’):
8. Only provisions strictly necessary to ensure that know-how and assistance provided by the franchisor do not benefit competitors and provisions strictly necessary for maintaining the identity and reputation of the network do not constitute restrictions of competition. However

provisions which share markets between franchisees and provisions that constitute Resale Price Maintenance do constitute restrictions of competition.

9. The necessity of certain provisions is never that clear cut as Franchisors are lead to believe on the bases of the Regulation and Guidelines. In fact, theirs is almost never such a necessity to non-compete clauses after termination in the franchise contract. In many cases these franchisees are family companies, owner of their commercial premises for generations whereby the significance of knowhow and support has been low. Always franchisees are contractually obligated to refrain from further using the franchisor's intellectual property rights after termination of the contract, so there are no identity issues.
10. Franchisees have a predominantly local market significance. A Franchisor will claim a (inter)national operation on local markets via the franchisees. Independent of the franchise formula the local market demands a possibility for franchisees to compete free from contractual obligation to purchase more than 80% of the goods from the franchisor. There is no indication as to why such obligations are necessary for ensuring know how and or maintaining identity, whether or not such obligation is limited in years.
11. Non-compete clauses should therefore be limited to the duration of the franchise contract and purchase obligations (>80%) limited to 5 years and should fall outside the scope of the Regulation, unless the franchisor proves that such a restriction is justified by the specific characteristics, proportionate, non-discriminatory and necessary in the specific circumstances.
12. The Guidelines should also be modified (45, 89-191).

#### **E-commerce**

13. As developments in e-commerce have led to greater price transparency, franchisors are keen to focus on monitoring and influencing prices. Fixed resale prices in franchise should however only be allowed for a short period (with a maximum of 2 weeks) and only to help effectively sell and market new products and advertising. Only in those circumstances franchisors should be able to communicate fixed sales prices to franchisees.
14. In respect to the Coty case the scope of the Regulation should be strictly be limited to selective distribution of luxury goods. Only in those circumstances it can be necessary to protect the possibility to require service or advice from qualified staff for the purchase, installation or use of the goods. Protection of identity, image and or knowhow can't justify imposing restrictions on franchisees to sell online.
15. Franchisees usually don't have enough financial means to start their own on-line channel. Marketplaces can be an efficient and cost-effective way to reach customers. A marketplace ban by the franchisor should be a hard-core restriction and prohibited, unless justified by the specific characteristics, proportionate, non-discriminatory and necessary in the specific circumstances.
16. Charging different prices on- and offline and limiting the franchisees possibility to purchase their product by limiting the assortment available to franchisees, while at the same time selling unavailable - mostly new and premium - products online, franchisors directly compete with their franchise networks. These practises raise antitrust concerns throughout the markets and should be considered a hard core restriction, and prohibited unless justified by the specific characteristics, proportionate, non-discriminatory and necessary in the specific circumstances.

17. Besides the abovementioned concerns there is also the fact that franchisors contractually monopolize consumer data collected via franchisees. They contain personal identification data, contact details and even customer profile data of the consumers in the local marketplace. With the help of collected consumer data franchisees would be able to better analyse customer behaviour and demand. Withholding consumer data restrict franchisees in developing business performance, price and product competition and improving customer experience. By doing so franchisors restrict competition in a concerning manner. These practises should be considered a hard core restriction, and prohibited unless justified by the specific characteristics, proportionate, non-discriminatory and necessary in the specific circumstances.
18. The abovementioned concerns can be addressed in art 1, 4 and 5 of the Regulation and 52, 64, 189-191 of the Guidelines.

#### **Coherence**

19. The coherence of the Regulation with overall competition law enforcement policy and practice should also take into account rules and regulations on UTPS and also Sustainability Policies and Initiatives to prevent conflict.

Vakcentrum is happy to further explain its points of view and provide concrete suggestions and examples upon request.

Woerden, 27-5-2019  
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