

**SUBSIDIARY LEGISLATION 379.02**

**VERTICAL AGREEMENTS AND CONCERTED  
PRACTICES (BLOCK EXEMPTIONS)  
REGULATIONS**

1st November, 2001

*LEGAL NOTICE 271 of 2001.*

**1.** (1) The title of these regulations is the Vertical Agreements and Concerted Practices (Block Exemptions) Regulations. Citation.

(2) These regulations came into force on the 1st November, 2001 and shall have effect until the 31st October, 2006.

**2.** These regulations specify the block exemption subject to such conditions and limitations and as applicable to categories of vertical agreements and concerted practices in terms of article 5(1) of the Act. Scope.

**3.** In these regulations, unless the context otherwise requires - Interpretation.  
"Act" means the Competition Act, which regulates competition and provides for fair trading in Malta; Cap. 379.

"buyer" includes an undertaking which, under an agreement falling within article 5(1) of the Act, sells goods or provides services on behalf of another undertaking;

"the Commission" means the Commission for Fair Trading as provided for under the Act;

"competing undertakings" means actual or potential suppliers in the same product market; and, for the purpose of these regulations, product market includes goods or services which are regarded by the buyer as interchangeable with the contract goods or services by reason of the products' characteristics, their prices or their intended use;

"connected undertakings" are:

- (a) undertakings in which a party to the agreement, directly or indirectly:
  - has the power to exercise more than half the voting rights; or
  - has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings; or
  - has the right to manage the undertakings' affairs;
- (b) those undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in paragraph (a);
- (c) undertakings in which an undertaking referred to in

- paragraph (b) has, directly or indirectly, the rights or powers listed in paragraph (a);
- (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in paragraphs (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in paragraph (a);
- (e) undertakings in which the rights or the powers listed in paragraph (a) are jointly held by:
- parties to the agreement or their respective connected undertakings referred to in paragraphs (a) to (d); or
  - one or more of the parties to the agreement or one or more of their connected undertakings referred to in paragraphs (a) to (d) and one or more third parties.

For the purposes of these regulations, the terms "undertaking", "supplier" and "buyer" shall include their respective connected undertakings.

For the purposes of regulation 6, the market share held by undertakings referred to in paragraph (e) above shall be apportioned equally to each undertaking having the rights or powers listed in paragraph (a) above.

"Director" means the director of the Office for Fair Competition as provided for under the Act;

"exclusive supply obligation" means any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer in a designated territory or territories in Malta for the purposes of a specific use or for resale;

"intellectual property rights" includes industrial property rights, copyright and neighbouring rights;

"know-how" means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified; and, for the purpose of these regulations, "secret" means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; "substantial" means that the know-how includes information which is indispensable to the buyer for the use, sale or resale of the contract goods or services; "identified" means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;

"non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than eighty *per centum* of the buyer's total purchases of the

contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year;

"selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors.

4. (1) Subject to the provisions of these regulations, agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to conditions under which the parties may purchase, sell or resell certain goods or services shall be exempted from the provisions of article 5(1) of the Act. Block exemption.

(2) The exemption contained in subregulation (1) shall apply to the extent that the vertical agreements contain restrictions of competition falling within the scope of article 5(1) of the Act.

(3) For the purposes of these regulations:

- (a) the agreements or concerted practices specified in subregulation (1) shall be referred to as "vertical agreements"; and
- (b) the restrictions specified in subregulation (2) of this regulation shall be referred to as "vertical restraints".

5. (1) Without prejudice to the generality of regulation 4 and regulation 6, the block exemption shall apply to: Applicability of block exemption.

- (a) vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding Lm 150,000, provided that vertical agreements entered into by such associations shall be covered by these regulations without prejudice to the application of article 5(1) of the Act to horizontal agreements concluded between the members of the association and decisions adopted by the association;
- (b) vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights:

Provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers:

Provided further that in respect of paragraph (b), the exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object or effect as vertical restraints which are not exempted under this regulation.

- (2) The block exemption shall not apply to -
- (a) vertical agreements entered into between competing undertakings; provided that it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and -
    - (i) the buyer has a total annual turnover not exceeding Lm 300,000, or
    - (ii) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor not manufacturing goods competing with the contract goods, or
    - (iii) the supplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases the contract services;
  - (b) vertical agreements the subject matter of which falls within the scope of any other block exemption regulations.

(3) For the purpose of calculating total annual turnover within the meaning of this regulation, the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together, and no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

(4) The block exemption shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than ten *per centum*.

Market share.

6. (1) The block exemption shall apply on condition that the market share held by the supplier does not exceed thirty *per centum* of the relevant market on which it sells the contract goods or services.

(2) Where a vertical agreement contains exclusive supply obligations, the block exemption shall apply on condition that the market share held by the buyer does not exceed thirty *per centum* of the relevant market on which it purchases the contract goods or services.

(3) The market share specified in subregulation (1) shall be calculated on the basis of the market sales value of the contract goods or services and other goods or services sold by the supplier, which are regarded as interchangeable by the buyer, by reason of the products' characteristics, their prices or their intended use; provided that if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the undertaking concerned.

(4) The market share specified in subregulation (2) shall be calculated on the basis of either the market purchase value or

estimates thereof which shall be used to calculate the market share.

(5) For the purpose of applying the market share under this regulation, the following rules shall apply:

- (a) the market share shall be calculated on the basis of data relating to the preceding calendar year;
- (b) the market share shall include any goods or services supplied to integrated distributors for the purposes of sale;
- (c) if the market share is initially not more than thirty *per centum* but subsequently rises above that level without exceeding thirty-five *per centum*, the block exemption shall continue to apply for a period of two consecutive calendar years following the year in which the thirty *per centum* was first exceeded;
- (d) if the market share is initially not more than thirty *per centum* but subsequently rises above thirty-five *per centum*, the block exemption shall continue to apply for one calendar year following the year in which the level of thirty-five *per centum* was first exceeded;
- (e) the benefit of subregulation (5)(c) and (d) may not be combined so as to exceed a period of two calendar years.

7. The block exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

Non-applicability  
of block  
exemption.

- (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that this does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except -
  - (i) the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer;
  - (ii) the restriction of sales to end users by a buyer operating at the wholesale level of trade;
  - (iii) the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
  - (iv) the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those

produced by the supplier;

- (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an authorised place of establishment;
- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;
- (e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;
- (f) the restriction requiring the reseller to purchase exclusively from the supplier in an agreement concerning the sale of certain beers, and/or other beverages:

Provided that the block exemption shall apply to the exclusive purchasing obligation imposed on the reseller by the supplier in agreements involving the resale of beers and other beverages where such beers and beverages are sold in premises used for the sale and consumption of drinks therein;

- (g) the imposition on the buyer or distributor in an exclusivity agreement of any form of penalty other than the forfeiture of the benefits envisaged therein, for breach of an exclusivity agreement which otherwise benefits from exemption under these regulations.

Severable clauses.

**8.** The block exemption shall not apply to any of the following obligations contained in vertical agreements:

- (a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years:

Provided that a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration:

Provided further that the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, and the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer;

- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture,

purchase, sell or resell goods or services, unless such obligation -

- (i) relates to goods or services which compete with the contract goods or services;
- (ii) is limited to the premises and location from which the buyer has operated during the contract period; and
- (iii) is indispensable to protect know-how transferred by the supplier to the buyer:

Provided that the duration of such non-compete obligation is limited to a period of one year after termination of the agreement. This obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain; and

- (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of competing suppliers.

**9.** The Commission is hereby being granted the power to withdraw the benefit of this block exemption when it finds in a particular case, on a request by the Director, that any agreement which is exempted by these regulations nevertheless does not contribute towards the objective of improving production or distribution of goods or promoting technical or economic progress and which does not allow consumers a fair share of the resultant benefit, and in particular where access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers.

Withdrawal by  
Commission.