Cooperation agreements between suppliers and large-scale distributors for the application of uniform supply conditions

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In this issue of Market Place issue, I will examine, in the light of the competition rules, the following case: a consumer electronics supplier enters into an agreement with a purchasing group (e.g. a syndicate/consortium) headed by several large-scale distributors, in order to supply to the group a product tailored to the needs of such distributors and/or apply to the said group bonuses, rebates, discounts, based on certain purchase volumes. This agreement constitutes (1) a form of horizontal cooperation between competing companies (resellers) and, at the same time, (2) a vertical agreement between non-competing companies (the supplier and the large-scale distributors).
The question arising is whether this is legitimate or not.

Are agreements between producers and purchasing groups of large-scale distributors legitimate?

The legitimacy of such agreements must be assessed by taking into account all aspects of EU and Italian competition law, which prohibits any agreements that have as their object or effect the "*prevention, restriction or distortion of competition*", unless such restriction is justified since it contributes " …*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*…" (Article 101 Treaty on the Functioning of the European Union - TFEU; Article 2 Law 287/1990).

In order to better identify the specific rules relevant for performing such assessment, it must first be emphasised that is not actually one agreement, but two agreements:

(1) The first falls under a category of agreements that, at EU level, have been identified as "*horizontal cooperation agreements*"; these type of agreements are dealt with and partly

regulated – in addition to the abovementioned legislation – by the "*Guidelines on horizontal cooperation agreements*" published by the EU Commission in the Official Journal C 11 of 14/01/2011, which contain a large part dedicated to "*Purchasing agreements*".

(2) The second falls under a under a category identified as "*vertical cooperation agreements*" covered by Regulation 330/2010/EU, which, in fact, regulates such cases.

As for the relationship between the two types of agreements, the EU Commission holds the view that "*Joint purchasing arrangements may involve both horizontal and vertical agreements. In these cases a two-step analysis is necessary.* ***First, the horizontal agreements between the companies engaging in joint purchasing have to be assessed according to the principles described in these guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, a further assessment will be necessary to examine the relevant vertical agreements.*** *The latter assessment will follow the rules of the Block Exemption Regulation on Vertical Restraints and the Guidelines on Vertical Restraints".*[1]

The 'horizontal' component

In the light of the above, in the same manner as the first of the two regulations mentioned above (horizontal cooperation agreements), an agreement is restrictive of competition and prohibited if it pursues the promotion of forbidden anti-competitive arrangements and/or – even though this is not its purpose – has in practice the effect of causing a restriction likely to have a negative impact on at least one of the following competition parameters: *price, production, quality, products' variety or innovation*.

Of all these parameters, the most sensitive and relevant one is the fixing of the resale price, whose determination must necessarily be excluded to any vertical or horizontal agreement. The impact of purchasing agreements on these parameters is assessed on the basis of their actual content and, upstream, on the ground that on the relevant markets (i.e. the purchase market and the corresponding sales market, both understood as referring to a defined

[1]Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (2011/C 11/01)

geographical area and to a particular type of products) the companies that are part of the agreement should not have a market share of more than 15%.

The Italian Competition and Antitrust Authority (AGCM) has in the relatively recent past dealt with this type of agreements in a proceedings started in 2013 and concluded at the end of 2014 (*Decision No. 24649 - Purchasing group for large-scale distributors*) where the goods supplied/purchased were sold directly to end consumers. In this case, the purchasing group, called *Centrale Italiana* (legally founded as a limited liability cooperative company), consisted of the companies *COOP*, *Despar*, *Sigma*, *Il Gigante* and *Disco Verde*, and had the purpose of enabling the above companies to agree their purchasing policies (by exchanging during the preparatory stage – as pointed out by the AGCM – commercially sensitive information) and above all obtain particularly advantageous prices and conditions from a wide range of very different suppliers.

Following the investigations conducted as part of the proceedings, the AGCM found the existence of two relevant markets geographically covering the Italian territory: a procurement market of which *Centrale Italiana* had a 23% share, and a sales market of which the companies part of the purchasing group had a share that varied widely across regions, but nevertheless much higher than that of the procurement market, which, as the case may be, went from 31% to 65%. In the case of *Centrale Italiana*, the AGCM held that, on the basis of the findings of the investigation, the purchasing group infringed the competition rules, with the result that all companies concerned agreed to negotiate with the Antitrust Authority specific commitments aimed at putting an end to the distortion of competition at issue (the infringement procedure was subsequently terminated on 17/09/.2014).

The ‘vertical’ component

While what has been said so far concerns horizontal agreements, I will now examine the vertical agreements. As mentioned above, the assessment must be carried out in accordance with the Block Exemption Regulation on Vertical Restraints (Commission Regulation 330/2010 of 20 April 2010), with a focus on the ‘Guidelines on Vertical Restraints’.

Like all Regulations, Regulation 330/2010 is directly addressed to citizens, individuals and legal persons resident in the different Member States of the EU, and has binding status on national governments and on all authorities of each Member State, thus including national

courts which are required to interpret and apply national laws in compliance with the Regulations.

In particular, Regulation 330/2010 *" …contains certain requirements that must be fulfilled before a particular vertical agreement is exempt from the prohibition of Article 101(1) TFEU. The first requirement is that the agreement does not contain any of the hardcore restrictions set out in the Regulation. The second requirement concerns a market share cap of 30% for both suppliers and buyers".*[2]

More specifically, by referring to our example, the supplier must hold less than 30% of the market on which he sells the products covered by the agreements between him and the purchasing group and the latter group, taken as a whole, must hold less than 30% of the relevant market on which it buys the contract good or services.

As to the fundamental restrictions, Regulation 330/2010 allows, under certain conditions, to derogate from the prohibition of exclusive rights and other restrictions otherwise provided for by European and national competition law, as follows:

- **Examples of clauses generally prohibited <u>but exempted</u> under the Regulation:**
  - Possible obligation of the supplier to sell the contract products only to the purchasing group.
  - Possible obligation of the purchasing group to buy the contract products only from the supplier.
  - Prohibition to the resellers (i.e. the large-scale distributors heading the purchasing group) to sell to other resellers that are NOT part of the purchasing group.
  - Prohibition to the above resellers to actively seek customers outside any allocated territory.
- **Examples of <u>clauses that are still prohibited</u> under the Regulation:**
  - Prohibition to resellers to sell to end users (except in the case of wholesalers).
  - Prohibition to meet unsolicited orders from customers outside the contract territory.
  - Concerted policies of maintaining resale prices to the public, which must be freely established by the resellers.

[2] http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=uriserv:cc0006

In conclusion, if the various ‘traffic lights’ that we have seen so far for in connection with both horizontal and vertical agreements give the green light, the horizontal and vertical cooperation agreements between suppliers and large-scale distributors for the application of uniform supply conditions are legitimate, valid and binding.

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