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EUROPEAN BRANDS ASSOCIATION

Specific AIM comments on Territorial Supply Constraints

In section 5.7 of the Green Paper, the Commission expresses its concerns that certain types of territorial supply constraints result in cross-border price differentials for branded products and that as a consequence consumers are negatively affected by higher prices and a narrower product choice. The Commission suggests they should be seen as an unfair trading practice – i.e. a practice that "grossly deviate from good commercial conduct and are contrary to good faith and fair dealing" – and potentially regulated accordingly.

In our comments we will show that:

- Contrary to what the Green Paper implies, cross-border price differentials, where those occur, often reflect the efficient functioning of markets, the characteristics of which considerably differ between Member States. A detailed study of this by competition economists RBB Economics is attached.
- The arguments given by the Commission in support of its concerns do not withstand careful scrutiny.
- Territorial constraints that run contrary to EU market integration are already prohibited under existing competition law rules. A legal note also attached explains how these rules have been developed – and limited as appropriate – by the European Courts over the past four decades.

For all those reasons we strongly feel that the introduction of new rules based on unfair commercial practices is unwarranted and could have adverse consequences for consumers and the Single Market.

AIM comments in complement to the RBB Economics study

Price comparisons are usually made between consumer prices at retail level as this is the data that is publicly available. This is also the case in the table on p. 20 of the Green Paper. The Commission's use of data to underpin its case that brand manufacturers are responsible for excessive price differentials is problematic on several levels.

Firstly, great care must be given to the methodology when doing price comparisons

The European Statistical Office itself has highlighted the limitations of some existing price comparisons, which have fallen short because of insufficient data and many approximations[1]. This has led to a lack of clarity about which type of data can be used in what policy context.

For instance, some of the price data of national statistical offices aims to compare purchasing power based on a basket of "comparable" products. Such data would not be appropriate to determine whether an economic actor, the manufacturer or for that matter

[1] A European Food Prices Monitoring Tool – A first design, Eurostat, European Commission, October 2009

the retailer, is applying a different price across borders for an identical product, and even less whether the differences are justified.

A concrete example of erroneous conclusions drawn from flawed data is the often quoted alleged price difference of 28.4% between food prices in Belgium and the Netherlands[2] based on data from a pilot project of the European Statistical Office referred to again by the Commission in its Green Paper.

Investigating the matter further, the Belgian Economic Ministry compared identical products in a much more reliable way with the help of scanner data purchased from Nielsen, and found an average difference of 10.4% between the prices set by Dutch and Belgian retailers.

Differences between the two countries are estimated by the authors of that report to be due to:

- 2%: indirect taxation (VAT, excise duties, ecological tax);
- 2%: differences in retailers' labour costs;
- 1%: social security differentials;
- 2%: differences in retailer operating costs and profitability (due to a mix of differences in trade/outlets structure, assortment range, productivity and retailer positioning, margin).

Insufficient data was available to quantify the possible effects of direct taxation differentials on enterprises or the differences in purchasing costs. With regard to the latter, it was estimated that "the larger size of the Dutch market and higher market share of the market leader can lead to the belief that Dutch retailers or their buying groups (e.g. Superunie) benefit on average from better conditions than Belgian retailers. We estimate the difference could not be more than 2%"[3].

This data in the Belgian report gives no support to the Commission's concerns. Yet it is cited in support in very few words: "A similar study was conducted in 2012 in Belgium".
The only other example given in the Green Paper is that of Ireland also on page 21. Quoting information provided by a retailer at a meeting of an Irish Parliamentary Committee in February 2009, the Green Paper refers to differences of up to 130% between the prices of products sold in Ireland and in the UK respectively. As the RBB report points out huge currency fluctuations due to the steep devaluation of the pound at the time were responsible for a very complex price environment. Today under more normal circumstances the price gap between the two markets is small again.

According to Irish industry, a remaining price differential between Ireland and the UK (Northern Ireland) can in part be driven by different levels of retailer margin, a lower cost base in Northern Ireland and the volume discounts that are possible with Northern Ireland being part of the larger UK market of 60 million compared with the Irish market of 4.5 million. There can also be cultural and historical differences that can contribute to cost differences, for instance (i) a different approach to servicing the market with a higher service level approach being more costly and affecting consumer prices and (ii) market practices that arise in response to national legislation that affects the sector.

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[2] Retail Market Monitoring Report, European Commission, COM (2010) 355 final, 5 July 2010, p5

[3] Niveau de prix dans les supermarchés, SPF Economie, DG Concurrence, 13/02/2012, p118

More generally on pricing and price structures in the EU, it is important to point out that for fast moving consumer goods, markets and store assortments still tend to be national – the vast majority of products are mainly sold on an national market.

For example, the report by the Belgian Economic Ministry mentioned above found that from a range of 220,000 products sold in Belgium, including both manufacturer and retailer brands, only 8% are also on sale in Dutch stores, 9% in French and 3% in German stores, even though some retailers operate across several markets. According to the same report, the national assortment itself is unevenly distributed locally, depending on store size, local customer profiles and the local competition's offering.

Secondly, the Green Paper seems to overlook the level of influence of retailers on the consumer prices it compares.

The final consumer price is set by the retailer according to many market factors, including its own commercial considerations and interests, not least the retailer's commercial margin and competing retailer brand positioning. The level of sales promotion in a market, over which the retailer has significant control, is another important factor as it offers a rebate on price not registered in the price comparison.

As an illustration of this, the official Belgian report in 2012 referred to by the Commission in the Green Paper found higher average price differences between various retailers on the *national* market than the ones existing with neighboring markets[4].

Conclusion

For the reasons cited in this note and its detailed annexes, retail price differences between one EU country and another, also in cases where some prices are higher in a market with a lower purchasing power, cannot be simply assumed, without evidence, to be the result of unfair practices by brand manufacturers. Significant differences in VAT[5] and retailer-related differences are two of the main other explanations.

We would encourage the Commission to draw inspiration from the data based approach of the Belgian Economic Ministry. Before suggesting the kind of far-reaching measures contemplated by the Green Paper, we would have liked the Commission to investigate in a more comprehensive way the potential reasons for the problem raised. We welcome the opportunity given by the consultation to contribute to assessing if there is a need for intervention and what its impact would be.

Brand manufacturers have always been supporters of the Internal Market and its vision of a gradually more economically-integrated Europe. Brands benefit from the economies of scale of the larger market. The on-going harmonisation of the EU legal framework in areas such as consumer rights, packaging waste, labelling or product composition rules should deal with some of the current territorial supply constraints.

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[4] Niveau de prix dans des supermarchés, SPF Economie, DG Concurrence, 13/02/2012, pp 81-82

[5] taxud.c.1(2013)69198 - EN - VAT Rates Applied in the Member States of the European Union http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf

However, the initiators of the Single Market did not ignore that pricing differently across national markets can be economically efficient and pro-competitive when market conditions differ along national lines for reasons related to demand, supply, costs or regulations (as pointed out in much more detail in the study from RBB Economics).

As the current crisis makes abundantly clear, the EU is for the time being neither a single economy nor a homogeneous market, and national economies differ widely in their rates of growth, cost of doing business and in the purchasing power of their citizens.

Brand manufacturers have to "act locally" as well as, beyond a certain size, to "think European" – and globally. The challenge for those operating across a set of EU countries is to reconcile those two imperatives in the way they manage their innovation, production, logistics, sales, distribution and marketing. Operations are designed to be both economically efficient and well suited to meet the needs and the preferences of consumers in the individual markets concerned.

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