Comments by the Hungarian Competition Law Research Centre on the Draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices

Contributors: NAGY Csongor István, NÉMETH András and SZILÁGYI Pál

General remarks

The amendments to the currently prevailing regulation are limited. It is welcomed that the European Commission is not proposing a completely recast regulation, since that might cause unwanted compliance costs for business operators. On the other hand it is also welcomed that the European Commission is adapting the prevailing regulation to the technological and market developments.

The definitions do not contain the definition of ‘exclusive supply agreements’ any more, but include a definition for ‘know-how’ and ‘customer of the buyer’.

The fact that the ‘know-how’ definition was included into the list under the definition of ‘intellectual property rights’ is a beneficial development, since by this it is expressly recognized as an intellectual property right. These developments are particularly relevant in relation to the excluded restrictions described in Article 5 (b) and it is also obvious that the exemption granted by Article 2 is applicable to it. These developments increase legal certainty.

The definition on the ‘customer of the buyer’ is a clarification of the currently existing text, so that it is unambiguous that the relevant buyers are the buyers of the parties to the vertical agreement. Here the Hungarian translation is a bit confusing regarding the terms ‘megállapodás’ (translation back from Hungarian: agreement; English original: contract) and ‘szerződés szerinti áruk’ (contract goods).

The fact that the definition of the ‘connected undertakings’ was moved from Article 11 to Article 1 (2) is logical. Nevertheless we think that competition law has a specific definition in several legislations on the group of undertakings for example in Regulation 139/2004/EC Article 5 (4). The

1 The views expressed in this document might not reflect the views of all contributors or the view of the Hungarian Competition Law Research Centre in general. This document was prepared by the working group of the centre.
inclusion of different wording creates confusion. It would be beneficial to use the same wording for same notions.

The fact that from Article 2 (4) the first condition of the current regulation is lacking narrows the applicability of the exemption.

As regards the market share threshold in Article 3 of the Draft BER

It is a welcome change that the Draft BER breaks with the now prevailing concept that from the point of view of the market share threshold it is, in principle, the supplier’s market share that is relevant, except in case of exclusive supply agreements, as defined in Article 1(c) of the current BER.

The purpose of the market share threshold is to assess, in numerical terms, the market power of the parties to the agreement; nevertheless, market power can be interpreted only in the context of the restraint at stake. The proposition that it is, in principle, the supplier’s market share that should matter seemed to have been an over-simplification, and intuition suggests that the market share of the party should be taken into account, which is relevant from the point of view of the restrictive clause and the potential anti-competitive effects. For instance, market foreclosure may occur both on the seller and buyer side. In case of an exclusive purchasing clause it is reasonable to take into account the buyer’s market share as it is the latter’s market power that in fact determines whether such effects materialize. Nonetheless, in case the supplier undertakes to supply only one buyer regarding a particular territory (exclusive distribution), foreclosure effects (i.e. the danger that competing purchasers cannot have access to supplies) can be assessed only on the basis of the supplier’s market share.

Article 3 of the BER does not make obvious whether the parties’ market share on both the seller and buyer side of the market is to be taken into account or not. The supplier’s market share as a seller and the distributor’s market share as a buyer could be different and Article 3 does not make any indication, which market share is relevant. Intuition suggests that both seller and buyer market share figures are to be taken into account. Nevertheless, the requirement that in such a context the market shares of both parties are to be taken into account, irrespective of the restriction at stake, may under certain circumstances entail the taking into consideration of the market share of the party the market position of which has no reasonable connection to the alleged or potential anti-competitive effects and, hence, which could preclude the application of the BER to an agreement where the relevant party lacks the market power. For instance, if supplier “A” with 10 % market share undertakes to deliver only to distributor “B” in a particular Member State, which has 35% market share, the agreement would not be covered by the Draft BER, even though no appreciable foreclosure effects can be expected (provided there are no parallel networks of similar agreements). Foreclosure could occur only on the supplier level, where the parties have no strong
position; although the parties do have such a position on the buyer level, this has no direct connection to the potential foreclosure effects in this case. It would be another situation, if the buyer committed itself to purchase from only one supplier, as in this case it would be doubtful whether competing suppliers can have access to the distribution channels. In this case, of course, it could be a problem that a distributor with buyer power uses its market power in order to anchor sources of supply and conclude exclusive supply agreements with several producers. Nevertheless, this would be a case for Article 6 of the Draft BER.

As regards Article 4 (a) of the Draft BER

Article 4 (a) of the current and draft regulations are the same. Although resale price maintenance is a heavily disputed issue since the developments in the US, the fact that the regulation did not exempt RPM as a general matter is welcomed. In theory an RPM could be justified under Article 81 (3) in general, but in this case the beneficial effects have to be demonstrated in an unambiguous way, even though the general attitude of the Community institutions is against the permission of RPM schemes. This is expressly recognised the Draft Notice on the Guidelines on Vertical Restraints in para. 219.

As regards the first indent of Article 4(b) of the Draft BER

Article 4(b) of the Draft BER reiterates Article 4(b) of the BER. While the most important issue concerning Article 4(b) is certainly the treatment of absolute territorial protection, Article 4(b) has a rather technical shortcoming, as well.

Essentially, restrictions on active sales are not hardcore if they relate to a territory or consumer group reserved to the supplier or to another buyer (while restrictions on passive sales are always hardcore). Accordingly, this requirement is not met if the territory or customer group is reserved to a licensee.

The language of Article 4(b) fails to take into account the perspective of vertical arrangements where technology-transfer and distribution are combined. This failure deprives also vertical structures of the benefit of block exemption that are perfectly in conformity with the principles of the BER. For instance, the owner of a particular technology may decide to license the technology regarding certain Member States, while in other Member States it may produce the goods and employ exclusive distributors. Nevertheless, the restriction on the distributors’ active sales outside the contract territory would not be covered by the Draft BER, since the applicability of the block exemption fails at the point of ‘reservation’: the territories of the licensees are not reserved to the supplier or a buyer. In the above described situation the condition that the territory is reserved to the supplier or another buyer would not be met, because the territory is in fact reserved for a licensee.
As regards Article 4 (c) of the Draft BER

The wording of the draft and the current regulation is the same. The Draft Notice on the Guidelines on Vertical Restraints in para. 52 describes several situations where sale over the Internet in a selective distribution system amounts to passive sales and so the restrictions on such behaviours are serious. The development that the Commission adapts the currently prevailing regulatory framework to the technological and market developments is more than welcomed. Nevertheless it is sensible to take a cautious approach regarding the sale of luxury goods in a selective distribution system via the Internet and take into account the effect that this might cause to the existing distribution networks or the level of market integration of the producers.