



# **Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.**

September 18, 2009

## **Opinion of GRUR by its Special Committee for Antitrust Law**

### **regarding the draft regulation on the application of Article 81(3) of the Treaty to certain categories of vertical agreements and concerted practices**

The German Association for the the Protection of Intellectual Property and Copyright Law (*Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.*) is a recognized non-profit academic association of all practicing professionals and scientists in the area of intellectual property and copyright law as well as competition law. The purpose of this organization according to its charter is to provide academic continual education in the area of intellectual property and copyright law and to aid law-making bodies as well as competent ministries and institutions in the area of intellectual property rights.

The association's opinion regarding the draft regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices is as follows:

The association shares the Commission's opinion that on the whole experience with the application of Regulation (EC) no. 2790/1999 had been positive and the current regulation should be continued through a new BER (block exemption regulation). Even though the current BER has not played a significant role in the decision-making practice of the courts, it is of quite considerable importance for the companies, which rely on the predictability of legal decisions when drawing up their contracts. They provide important considerations especially for the interpretation of Article 81 (3) EC, but also for the interpretation of Article 81 (1) EC; this effect is further reinforced by the guidelines on vertical restraints. In particular, the guidelines on Articles 4 and 5 of the BER give significant indications of what restraints in vertical contracts must be avoided and how a "safe harbour" can be found. However, the market share threshold under Article 3 of the BER has caused difficulties in numerous cases due to a lack of access to the required information.

In detail, the association submits comments regarding the following points:

**1. Market share threshold of 30 % also on the purchase side (Article 3 of the draft regulation)**

According to the proposed new version of Article 3, the exemption shall not only apply if the supplier has a share of more than 30 % of its sales market, but also if the purchaser has more than 30 % of its sales market (and even the subsequent purchaser has more than 30 % of its subsequent sales market, Guideline no. 86). In the new version, this is expressed in such a way that the exemption only applies if none of the companies that are party to the agreement has a share of more than 30 % of a “market affected by the agreement”. The Commission intends to thereby take into account the increase in the market power of large distributors (press release of 20 August 2009: *increase in large distributors' market power; web page of the Commission: public consultations: review of the competition rules applicable to vertical agreements*).

The association considers that a market power (more than 30 %) of the purchaser or purchasers sets rather narrow limits on the supplier's opportunities for getting restraints accepted on the purchaser's market. This already applies even if the supplier has more than 30 % on its sales market (*countervailing power*), but more than ever if the supplier has not reached 30 % on its market, e.g. because it is a small or mid-sized enterprise (SME). Incidentally, the revision of Article 3 only has an effect in this case because the exemption with a supplier's market share of more than 30 % does not apply for this reason alone.

Furthermore, if such a supplier nevertheless succeeds in imposing restraints on the purchaser having market power on its sales market (more than 30 %), it thereby reduces the purchaser's opportunities for using its power on this market; it “puts reins on him”. The contractual restraint may then turn out to have a pro-competitive effect.

Based on these two fundamental considerations alone, the new approach appears to require further review.

Furthermore, it appears to the association that such a regulation is not required. It is not clear either from the draft BER itself or from the recitals or from the guidelines why such an extension to the purchase side should be required; no relevant examples are provided either. While there may well have been individual cases in which agreements between the supplier and the purchaser have had an effect with a purchaser's market share of more than 30 %, however this does not justify a general regulation according to which the advantages of the block exemption with a purchaser's market share of more than 30 % cannot be applied a priori. In this way, buyer markets, on which agreements between supplier and purchaser cannot have any effect at all, are included. It might be recommended to resolve such cases through an application of Article 6 of the BER, which allows for greater flexibility.

In addition, there are serious practical concerns, since the proposed revision is likely to call into question the value of the exemption for the companies. There is reason to fear that in numerous if not in most cases the application of the BER, in any case for the suppliers, is incalculable. The legal certainty pursued by the BER (cf. Article 23 of the Guidelines) would largely disappear not only for small and mid-sized suppliers, but also for larger companies. Namely, as a rule, they do not have the knowledge that is necessary for determining the relevant market share of their purchasers. They

would be compelled to determine the relevant product and geographic market of their purchasers, as provided by Article 84 et seq. of the Guidelines.

In the case of the geographic market definition, this can be hampered by the fact that this also concerns various regional markets. In the case of the product market definition, according to no. 85 of the Guidelines, in the case of the sale and distribution of final products through several market levels, the markets downstream of the buyer markets would also have to be included. According to Article 86 of the Guidelines, this also applies to a vertical agreement regarding several markets. Already with regard to the relevant market definition, the suppliers would be overstretched most of the time. In addition, the market share of the purchasers of a supplier (and where applicable the market share of purchasers on further downstream market levels) frequently constitutes a business secret of the purchasers, to which the supplier has no access. It is then only able to make speculations, which lead to corresponding legal uncertainty when drawing up a contract.

## **2. Internet contracts**

The association welcomes the fact that in the Guidelines the Commission attempts to apply the regulation of the hard core restrictions in Article 4 of the revised Regulation to the various manifestations of internet sales. In its opinion, the relevant passages of the Guidelines however should be further consolidated and explained by real-life examples, so that the legal certainty in this area will be further improved.

A contradiction of the significance existing already according to the current version is revealed once again in the deliberations in the guidelines related to internet sales: according to Article 4 lit. c), the distributor in a selective distribution system may not restrict either its active or its passive sale to final users; such restraints may also not be imposed on it in the case of internet sales. On the other hand, restraints of the active sales in territories and customer groups may not be imposed on the non-selective distributor (Article 4 letter b), first subparagraph); this possibility also applies in relation to the internet sales of such a distributor. The revision of the Regulation should give cause for reconsidering this contradiction of the significance.

As far as the selective distribution is concerned, it turns out to be very difficult to transfer the various permissible marketing conditions in such contracts (advice, best possible presentation of the brand, impressive appearance etc.) to the purchaser's internet sales. In this regard, the relevant deliberations of the Guidelines should go into further detail.

The application of the regulation of Article 4 lit b) first subparagraph causes difficulties for the purchaser's internet sales because the distinction between "active" and "passive" sales poses problems here. If an offer by the purchaser specifically responding to an online request by a customer appears via a link, the border to active sales could be crossed. The association proposes giving examples in order to illustrate the purchaser's various forms of internet communication regarding the distinction between active and passive sales in greater detail.

## **3. Hard core restrictions (Article 4 of the draft regulation)**

The association agrees with the Commission that the current catalogue of hard core restrictions should be retained. In particular, it does not believe that the fundamental

prohibition of the second-hand price fixing – for example following US legal developments – should be restricted.

However, the association welcomes the newly included reference in point 47 of the proposed Guidelines compared with the current version of the Guidelines that the presumption of applicability of Article 81 (1) EC and non-applicability of Article 81 (3) existing due to a hard core restriction can be refuted. For the companies, it is thus made clear that the agreement of a hard core restriction does not necessarily lead to the prohibition of the agreement, but that in appropriate individual cases of the gain in efficiency resulting from the agreement can lead to an exemption pursuant to Article 81 (3) EC.

#### **4. Selective sales and distribution systems (Article 4 letter b, 3rd subparagraph of the draft regulation)**

According to Article 4 letter b of the draft regulation, the hard core restrictions excluded from the exemption also include marketing relationships with regard to well-defined territories or customer groups. By way of the exemption clause, however, marketing restrictions through members of a selective sales and distribution system are to be made capable of being exempted at the expense of non-authorized distributors. This conforms to the current regulations according to Article 4 lit. b, 3rd subparagraph of Regulation (EC) no. 2790/1999.

The revised wording can however lead to uncertainties regarding the scope of the necessary protection of selective sales and distribution systems. An objectively necessary reading would have to suggest that the addendum relates “to markets in which such a system exists”, as a qualifying measure for the selective sales and distribution system organized in these markets and the members active there. The addendum is then no more than a specification of the current regulation; in this interpretation, it also remains in accordance with the understanding of a selective sales and distribution system, as expressed in the definition according to Article 1 (1) letter c of the draft regulation with the exclusion of the supply to non-authorized distributors and coincides with the explanatory notes on the exception in sub-subparagraph 55 sentence 3 of the Guidelines.

However, should the regulation establish a relationship to the non-authorized distributors outside of the selectively served markets, this would significantly restrict the intended exemption. In particular, such a truncated exemption would have to lose its protective effect as an indispensable precondition for the organization and implementation of a selective sales and distribution system. The de-facto prohibition of a restraint of the sale and distribution to non-authorized distributors in a state or territory that is neutral with regard to the sale and distribution system, in which each selection of a sale and distribution system by the supplier is renounced following the failed exemption, also brings about the downfall of the sale and distribution system maintained elsewhere at significant expense by the supplier and its selected sales partners. The non-authorized distributor yet spared from resale obligations in the state or territory that is neutral with regard to the sales and distribution system is presented with a particularly attractive opportunity for a sale to the non-authorized distributors in the selective sales territory. According to this second alternative interpretation, the exception of the hard core restriction of the Article 4 letter b would no longer be preferential treatment for the protection of the selective sales and distributions system advocated under competition policy, but on the contrary an opening clause for avoiding such systems.

The association therefore requests avoiding the obscurities in the 3rd subparagraph of Article 4 letter b of the draft regulation and either leaving the tried and tested version or selecting a formulation, which could read:

“the restraint of the sale through members of a selective sales and distribution system existing in their markets to non-authorized distributors”

## **5. Miscellaneous**

In its German translation, the draft regulation of the BER contains—numerous revisions of a purely linguistic nature compared with the currently valid version. It is the association’s opinion that these revisions have not led to an objective improvement in all cases. Moreover, in comparison to the currently valid version, they give an untrue impression of a revision that has actually not occurred and not even been intended. This speaks in favour of the retention of terms of the earlier version, unless an objective revision is actually intended.

Moreover, terms which do not correspond to those in the English version are used repeatedly in the German version. Thus, for example, the German term “*Käufer*” corresponds to the English term “buyer”; it is also used in the currently valid version of the BER; however, it is replaced by the term “*Abnehmer*” in the German translation of the draft regulation (cf. for example Article 1 (1) (f) and (g) of the draft regulation). The use of linguistically corresponding terms – as far as possible – in the various linguistic versions would facilitate the application of the BER and undermine future attempts to interpret the versions falsely based on the use of different terms.

Dr. Kunz-Hallstein  
President

Dr. Loschelder  
Secretary General