
**COMMENTS ON THE DRAFT REGULATION AND THE DRAFT GUIDELINES ON
VERTICAL RESTRAINTS**



Boulevard Brand Whitlock 165
1200 Brussels
Belgium

Tel: +32 (0)2 645 14 11
Fax: + 32 (0)2 645 14 45
<http://www.jonesday.com>

INTRODUCTION

Jones Day welcomes the opportunity to submit observations on the draft block exemption regulation (“Draft BER”) and draft guidelines on vertical restraints (“Draft Guidelines”).

Jones Day encompasses more than 2,400 lawyers resident in 32 locations worldwide and ranks among the world’s largest and most geographically diverse law firms. Jones Day’s European Antitrust & Competition Law Practice is comprised of over 40 competition lawyers across Europe’s major hubs. The European practice is a seamless component of a network of 140 Jones Day antitrust counselors and litigators located in all major business centers in the U.S., Latin America, Europe, and Asia.

The following four areas have been identified as the focus of our comments: (i) agency agreements, (ii) subcontracting agreements; (iii) hardcore restraints, and (iv) selective distribution agreements.

This submission does not necessarily represent the position of any individual client of Jones Day.

I. AGENCY AGREEMENTS

The Draft Guidelines (paragraph 16, last two indents; paragraph 17, last sentence) state that an agreement would constitute an agency agreement for the purposes of Article 81(1), even if the agent carries out activities other than negotiating/concluding the sale of the contract goods on behalf of the principal, provided that these activities “*are not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal.*”

According to the Draft Guidelines (footnote 11), this condition is purportedly based on paragraph 113 of the judgment of the Court of First Instance (“CFI”) in *Daimler Chrysler v. Commission*.¹ However, when examined in full, this passage actually states:

“It follows that the categorisation of the status of the German Mercedes Benz agent under Article 81(1) EC set out in paragraph 102 above is not undermined by the fact that the German Mercedes-Benz agents are required to undertake certain activities and assume certain financial obligations under the agency agreement. It should also be noted that the activities are carried out on markets other than the market at issue in the present case. Even if it must be recognised that those obligations expose the agent to certain limited risks, they do not of themselves operate to affect the

¹ Case T-325/01, *Daimler Chrysler v. Commission*, [2005] ECR II-3319. Footnote 11 of the Draft Guidelines states “*In [paragraph 113 of the judgment in Case T-325/01, Daimler Chrysler v. Commission] the CFI states that the risks taken by the agent for after-sales services are in principle not relevant to assess the risks for selling or purchasing the contract goods or services on behalf of the principal. Those risks however become relevant if they are indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal.*”

relationship between the applicant and its agents under competition law as regards the market at issue in these proceedings.”²

This paragraph must also be read in conjunction with other remarks from the same judgment, which state:

“ [...] the Commission merely lists the obligations imposed under the agency agreement that are linked to the sale of vehicles and mentions the alleged significance of the revenue obtained by the agent from those activities which are contractually linked to the sale of vehicles compared with the revenue he obtains from the sale of cars themselves, without showing how those obligations represent material risks for which the agent is responsible. The Commission did not carry out a correct assessment of the extent of those obligations in practical terms. In the view of the Court, those obligations do not represent a commercial risk which would justify a Mercedes-Benz agent being categorised as an independent operator.”³

As reflected in the above-cited passages, the Court concluded that the agreement between Mercedes-Benz and its German agents was an agency agreement for the purposes of Article 81(1), since the commercial risks were not significant in relation to the activities carried out by the German agents in addition to the negotiation/conclusion of contracts on behalf of Mercedes-Benz.⁴ The Court did not analyse whether the additional activities could be qualified as “*not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal.*” Therefore, contrary to what the Draft Guidelines suggest, whether the agent’s additional activity is indispensable or not to act on behalf of the principal does not appear to constitute a relevant criterion, according to the case law, in determining whether an agreement is an agency agreement for the purposes of Article 81(1). Apart from being inappropriate, this condition would also be very difficult to apply in practice.

We therefore propose to suppress the last sentence of paragraph 17 of the Draft Guidelines, as well as to amend the last two indents of paragraph 16 as follows (amendments appear in bold):

*“- does not create and/or operate an after-sales service, repair service or a warranty service **exposing the agent to significant commercial risks required by the principal unless these services are fully reimbursed by the principal or unless these services are not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal** ;*

*- does not **assume significant commercial risks arising from activities operate in other (product) markets connected with** ~~unless this is not indispensable to engage~~ **the sale or purchase of in-selling or purchasing the contract goods or services on behalf of the principal.**”*

² Case T-325/01, *Daimler Chrysler v. Commission*, cit., paragraph 113.

³ Case T-325/01, *Daimler Chrysler v. Commission*, cit., paragraph 112.

⁴ See also Case T-325/01, *Chrysler v. Commission*, cit., paragraphs 103 to 111.

II. SUBCONTRACTING AGREEMENTS

The Draft Guidelines (paragraph 22) state that subcontracting is covered by the Commission's Notice of 1979 on subcontracting agreements. In the interests of consistency, we would recommend that reference also be made to the block exemption regulation on technology transfer agreements ("TTBER").⁵ The Commission's Guidelines on technology transfer agreements⁶ (paragraph 44) make clear, in fact, that:

"[t]he TTBER covers "subcontracting" whereby the licensor licenses technology to the licensee who undertakes to produce certain products on the basis thereof exclusively for the licensor. Subcontracting may also involve the supply of equipment by the licensor to be used in the production of the goods and services covered by the agreement. For the latter type of subcontracting to be covered by the TTBER, the licensed technology and not the supplied equipment must constitute the primary object of the agreement."

III. HARDCORE RESTRAINTS

The Draft Guidelines (paragraph 47) set out various presumptions of anticompetitive conduct under Article 81 EC. In this regard, when an agreement includes any of the hardcore restrictions listed in Article 4 of the Draft BER, the Draft Guidelines consider that this in itself:

"[...] gives rise to the presumption that the agreement falls within Article 81(1). It also gives rise to the presumption that the agreement is unlikely to fulfil [sic] the conditions of Article 81(3), for which reason the block exemption does not apply. However, this is a rebuttable presumption which leaves open the possibility for undertakings to plead an efficiency defence under Article 81(3) EC in an individual case."

The Draft Guidelines also contain almost identical wording in relation to resale price restrictions (paragraph 219).

Thus, the Draft Guidelines (paragraphs 47 and 219) contain two propositions, namely that agreements containing hardcore restraints are presumed: (i) to fall within Article 81(1), and (ii) not to satisfy the conditions of Article 81(3). Only the latter presumption would be rebuttable. As explained below, both propositions are inaccurate.

1. No agreement can be presumed to fall within Article 81(1)

As a matter of law, no agreement can be presumed to fall within Article 81(1). The burden of proof on the application of Article 81 is laid down in Regulation 1/2003 (Article 2):

⁵ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.04.2004, p. 11.

⁶ OJ C 101, 27/04/2004, p. 2.

“In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.”

Therefore, the party claiming that an agreement falls within the scope of Article 81(1) must provide evidence in that respect, *i.e.*, no agreement can simply be presumed to fall within Article 81(1). To invert the burden of proof in applying Article 81(1) to certain categories of agreements, as proposed in paragraphs 47 and 219 of the Draft Guidelines, would clearly be contrary to Regulation 1/2003 (Article 2).

A presumption of incompatibility with Article 81(1) in relation to certain categories of vertical agreements would also be contrary to established case law. With regard to resale price maintenance, for instance, the European Court of Justice (“ECJ”) recently stated in Case C-260/07 that:

“although the fixing of a retail price constitutes a restriction of competition expressly provided for in Article 81(1)(a) EC, it causes that agreement to be caught by the prohibition set out in that provision only where all the other conditions for applying that provision are met, that is to say, that the object or effect of the agreement is perceptibly to restrict competition within the common market and that it is capable of affecting trade between Member States.”⁷

The judgment in *Cepsa v. Tobar* (Case C-279/06) also clearly sets out that no presumption of illegality can apply to vertical agreements, even when these contain fixed or minimum sale price obligations:

“If the referring court were to conclude that Tobar was, in reality, required to charge the fixed or minimum sale price imposed by CEPSA, that contract could not qualify for the block exemption established by Regulation No 2790/1999. However, where an agreement does not satisfy all the conditions provided for by an exempting regulation, it will be caught by the prohibition provided for in Article 81(1) EC only if its object or effect is to restrict appreciably competition within the common market and it is capable of affecting trade between Member States [...]”⁸

It is notable that the ECJ’s rulings in Case C-279/06 and C-260/07 were subsequent to the much debated US Supreme Court judgment in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, which overruled its own long-standing precedent (*Dr. Miles Medical Co. v. John D. Park &*

⁷ Judgment of 2 April 2009, Case C-260/07, *Pedro IV Servicios c. Total España SA*, not yet published, paragraph 82.

⁸ Case C-279/06, *Cepsa v. Tobar*, [2008] ECR I-6681, paragraph 72; see also, in the same respect, paragraph 42.

Sons) to hold that minimum resale price agreements should no longer be considered *per se* illegal. Thus, it is all the more surprising that the Draft Guidelines state exactly the contrary to the convergent views of the ECJ and the US Supreme Court that resale price maintenance should not be presumed illegal.

According to the case law, cross-border sales restrictions also cannot be presumed to fall within Article 81(1). As the CFI stated in *GlaxoSmithKline v Commission*:

*“the application of Article 81(1) EC to the present case cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines or to partition the common market, which leads to the conclusion that it affects trade between Member States, but also requires an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer. As may be seen from the case-law cited at paragraphs 111 and 112 above, that analysis, which may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition, as the Commission observed at the hearing, must, on the other hand, be supplemented, depending on the requirements of the case, where that is not so.”*⁹

Indeed, the Draft Guidelines themselves recognize that in certain circumstances, absolute territorial restrictions (*i.e.*, restrictions of active and passive sales imposed by a supplier upon its distributors) may fall outside Article 81(1),¹⁰ even if these clearly constitute “hardcore” restrictions pursuant to the Draft BER (Article 4).¹¹

2. No agreement can be presumed not to satisfy the conditions of Article 81(3)

Similarly, as a matter of law it is also inaccurate to assert a presumption that agreements containing hardcore restraints fail to satisfy the conditions of Article 81(3).

Under established case law, “*in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 85(3) of the Treaty are satisfied.*”¹² Presuming that certain agreements cannot benefit from Article 81(3) is therefore incompatible with this case law.

⁹ Case T-168/01, *GlaxoSmithKline v Commission*, [2006] ECR II-2969, paragraph 119. Advocate General Trstenjak substantially concurred with the Court of First Instance in the opinion delivered on 30 June 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline v Commission*, not yet published, in particular at paragraph 91

¹⁰ See Draft Guidelines, at paragraph 56, which state: “*Where substantial investments by the distributor to start up and/or develop the new market are necessary, restrictions of passive sales by other distributors into such a territory or to such a customer group [...] generally fall outside Article 81(1) during the first two years that this distributor is selling the contract goods or services in that territory or to that customer group.*”

¹¹ Article 4(b) of the Draft BER only allows restrictions on active sales; restrictions on passive sales are always “hardcore” (see also Draft Guidelines, at paragraph 51).

¹² Case T-17/93, *Matra Hachette v Commission*, [1996] ECR II-595, paragraph 85.

The Draft Guidelines' purpose is unclear when setting out the presumption's rebuttable nature: "*this is a rebuttable presumption which leaves open the possibility for undertakings to plead an efficiency defence under Article 81(3) EC in an individual case.*"¹³ Regulation 1/2003 (Article 2) already provides that the undertaking claiming the benefit of Article 81(3) carries the burden of proving the fulfillment of the necessary conditions under that provision. Therefore, there is no need to establish any presumption to make clear that the party invoking Article 81(3), even in cases of agreements containing hardcore restraints, must prove that all four of its conditions are satisfied.

3. Proposed amendments of paragraphs 47 and 219 of the Draft Guidelines

In light of the above, the following amendments to paragraph 47, and accordingly paragraph 219, of the Draft Guidelines are proposed (in bold):

"The Block Exemption Regulation contains in Article 4 a list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the Block Exemption Regulation. Agreements including any of these hardcore restrictions are also likely to fall within the scope of Article 81(1). However, the burden of proving that vertical agreements containing hardcore restraints have the object or effect to restrict appreciably competition within the common market and are capable of affecting trade between Member States shall rest on the party or the authority alleging the infringement of Article 81(1). Conversely, the undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled. ~~Including such a hardcore restriction in an agreement gives rise to the presumption that the agreement falls within Article 81(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 81(3), for which reason the block exemption does not apply. However, this is a rebuttable presumption which leaves open the possibility for undertakings to plead an efficiency defence under Article 81(3) EC in an individual case. In case the undertakings substantiate that likely efficiencies result from including the hardcore restriction in the agreement and that in general all the conditions of Article 81(3) are fulfilled, this will require the Commission to effectively assess - and not just presume - the likely negative effects on competition before making the ultimate assessment of whether the conditions of Article 81(3) are fulfilled.~~"

¹³ Draft Guidelines, paragraphs 47 and 219.

IV. SELECTIVE DISTRIBUTION

Pursuant to the current text of Article 4(b) third indent of the BER, suppliers that have established a selective distribution system can prevent members of this network from selling to any unauthorized distributor across the EU. However, under the proposed new text of Article 4(b) third indent, this possibility is limited to only “*markets where such a system is operated.*”¹⁴

It is submitted that the proposed new text of Article 4(b) might prevent, or at least discourage, the adoption of legitimate commercial strategies. For instance, a company may wish to commercialize a new product by means of selective distribution only in a restricted number of countries, e.g. France and Italy, while selling it directly (through its wholly owned subsidiaries) or not selling it at all, in all other Member States. Under the terms of the proposed new text of Article 4(b), this commercial strategy, which is permitted by the currently applicable BER, would no longer be possible for the following reasons:

- (i) the authorized distributors in France and Italy must be allowed to sell the contract products to unauthorized distributors in any other market where such a system is not in operation (*i.e.* any Member State other than France and Italy);
- (ii) in turn, these unauthorized distributors must be allowed, according to Article 4(b) first indent of the BER, to resell the same products to unauthorized distributors in France and Italy. This, of course, would cause the collapse of the selective distribution system in these two countries.

To avoid this risk, a supplier seeking to set up a selective distribution system would be obliged to establish such system across the entire EU territory from day one.

Therefore, it is proposed to leave unaltered the current text of Article 4(b) of the BER. Suppliers should be afforded sufficient flexibility to choose the territories that they consider to be more suitable for a selective distribution system.

Jones Day

Brussels, 28 September 2009

¹⁴ Draft BER, article 4 (b) third indent.