



LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

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Comments of the Ligue International du Droit de la Concurrence on the draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices and the draft Commission notice - guidelines on vertical restraints

Dear Sirs,

The Ligue International du Droit de la Concurrence (“LIDC”) welcomes the opportunity to participate in the public consultation launched by the European Commission with regard to the draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices and the draft Commission Notice - Guidelines on vertical restraints.

This submission has been elaborated by the working group of the LIDC that has been formed in response to the abovementioned public consultation¹. The LIDC and the working group hope that the submissions enclosed hereto in **Annex 1** would contribute usefully to the preparatory works for the amendment of Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices and the Commission Notice - Guidelines on vertical restraints.

Yours faithfully,

Marco Francetti
President of the LIDC

A handwritten signature in black ink, appearing to read 'Marco Francetti', is written over the typed name and title.

¹ The Working Group responsible for this submission comprises: Iñigo Igartua Arregui and Concepción Ruixo (Gómez-Acebo & Pombo Abogados, S.L.P.); Bruce Kilpatrick and Amy Gatenby (Addleshaw Goddard LLP); Carmen Verdonck (Altius); Gert Zonnekeyn (Monard-D'Hulst); Jeanne-Marie Henriot-Bellargent and Mary-Claude Mitchell (LMBE SCP Larangot Henriot-Bellargent Le Douarin & Associés); and, Marta Brichetto and E.A.Raffaelli (Rucellai & Raffaelli).

ANNEX 1

COMMENTS OF THE LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE ON THE DRAFT COMMISSION REGULATION ON THE APPLICATION OF ARTICLE 81(3) OF THE TREATY TO CATEGORIES OF VERTICAL AGREEMENTS AND CONCERTED PRACTICES AND THE DRAFT COMMISSION NOTICE - GUIDELINES ON VERTICAL RESTRAINTS

1. The Ligue Internationale du Droit de la Concurrence¹ ("LIDC") is an international forum bringing together national groups and associations of competition law experts from more than 15 countries around the world².
2. This document contains LIDC's comments submitted in response to the public consultation launched by the European Commission with regard to the draft Commission Regulation on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (the "Draft BER") and the draft Commission Notice - Guidelines on vertical restraints (the "Draft Guidelines").
3. LIDC's comments focus in the following provisions of the Draft BER and the Draft Guidelines:
 - I. The new dual market share threshold established in Article 3 of the Draft BER;
 - II. The treatment of the resale price maintenance restrictions;
 - III. Territorial restrictions, internet and selective distribution.
 - IV. New specific vertical restraints;
 - V. Tying;
 - VI. Article 4(b) of the Draft BER does not mention possible restrictions on the supplier, would it be necessary?
4. **Comments on the new dual market share threshold established in Article 3 of the Draft BER**
4. One of the most significant changes proposed by the Commission in its Draft BER is its proposal to apply the 30% market share threshold to both the supplier and the buyer.
5. Article 3 of the Draft BER makes it clear that the revised block exemption is only intended to apply where the market share held by each of the undertakings party to the agreement does not exceed 30% on any of the relevant markets affected by the agreement. For these purposes, the buyer's relevant market share is its share on the "market where it resells the contract goods or services or where it sells its product produced with the help of the contract goods or services" (§ 23 of the Draft Guidelines).
6. The Commission has made it clear that this amendment is intended to address concerns it has regarding the increased buying power of large retailers and the potential distortions of competition that arise from their ability to exert pressure on their suppliers.³

¹ www.ligue.org

² In particular from: Austria, Belgium, Brazil, Czech Republic, France, Germany, Hungary, Italy, Japan, Luxemburg, the Netherlands, Nordic Countries, Spain, Switzerland and the United-Kingdom. See for contact details: http://www.ligue.org/en/homepage/national_groups

³ Commission's press release IP/09/1197, dated 28 July 2009.

However, the application of a dual market-share threshold raises a number of concerns in our opinion:

(a) The application of the 30% market share threshold to buyers will restrict significantly the ability of companies to benefit from the block exemption's safe harbour. Agreements which currently benefit from the block exemption will no longer be covered if they concern buyers with a market share of 30% or more. The agreements will therefore need to be assessed on an individual basis to determine whether or not they comply with Article 81 of the Treaty. Affected parties will therefore face:

- (i) a considerable degree of legal uncertainty in respect of agreements that are currently readily identifiable as exempt under the existing block exemption; and
- (ii) significantly increased compliance costs. Parties to vertical agreements where the buyer has a market share which exceeds the threshold will be required to review their existing vertical agreements to determine whether they can enjoy the benefit of the Draft BER or not. If they cannot, they will need to go on to consider whether they can benefit from exemption under Article 81(3) of the Treaty.

(b) A further difficulty with the dual market share approach is that suppliers will often not be in a position to know the market shares of their customers and so will be unable to determine whether certain restrictions are likely to fall within the scope of the block exemption or not. This raises particular difficulties where a buyer is active on a number of different local markets. Furthermore, parties will almost inevitably have to exchange market share information when negotiating their vertical agreements to determine whether the agreements will be able to benefit from the Draft BER. This could result in the exchange of commercially sensitive information between actual or potential competitors and increases the risk of the information being passed on to a competitor of the parties.

(c) These challenges are exacerbated by the fact that the Draft BER does not make provision for a transitional period for its implementation. As currently drafted, Article 10 of the Draft BER makes it clear that the new block exemption is intended to apply from 1 June 2010 and will therefore immediately replace the current regulation which expires on 31 May 2010. There will not therefore be any comfort period during which affected parties will have the opportunity to become accustomed to the new regime and revise any affected agreements. All affected agreements will have to be re-evaluated under the new block exemption regime at the same time, which will be a resource-intensive and costly process for affected parties.

7. As noted above at paragraph [5], it is intended that the 30% market share threshold will apply to the buyer's market share in any downstream market in which it resells the contract goods or services, or where it sells products produced with the help of the contract goods or services. By focusing on the market share of the buyer in these downstream markets, the Commission risks defining the scope of the safe harbour too narrowly. There is a risk that a large number of inoffensive agreements will be excluded from the benefit of the block exemption (particularly contracts for the supply of goods or services that are required to produce a number of other goods or services). It is not difficult to imagine scenarios in which a buyer may have high market shares in the market for a product it produces using the contract goods or services but where its purchase of such inputs is unlikely to result in any foreclosure effects.

8. If the proposed dual market share threshold is intended to focus on anti-competitive foreclosure effects, then the Draft BER should instead seek to exclude from its safe harbour agreements of real concern, which are more likely to exist where the buyer has high market shares on the upstream market for purchasing the contract goods or services. For example, foreclosure effects are more likely to arise where a number of competing suppliers use the same exclusive distributor. For these reasons, it would be more appropriate for the Draft BER to focus on the buyer's market- share in the *upstream* market for purchasing the contract goods or services.

II. Comments on the treatment of the resale price maintenance restrictions

9. The following remarks focus on the new aspects characterizing the regulation of resale price restrictions outlined in the Draft BER and in the Draft Guidelines.
10. The Draft Guidelines, rather than the Draft BER, seem to speak up for resale price restrictions, in particular for resale price maintenance ("RPM") agreements (*i.e.* agreements between manufacturers and distributors/retailers setting a fixed resale price or a minimum resale price or price-floor).
11. Indeed, although the restriction of the buyer's ability to determine its sale price - specifically by means of a direct or indirect imposition of fixed or minimum resale prices on him - continues to be listed among the hard-core restrictions set forth by Article 4 of the Draft BER (see also § 219 of the Draft Guidelines), the Commission expressly acknowledges that RPM agreements, as well as other hardcore restrictions, may sometimes lead to efficiencies which can be assessed under Article 81(3) of the Treaty (§ 221 of the Draft Guidelines).
12. Therefore, notwithstanding the fact that a RPM agreement is presumed to infringe the antitrust law, the Commission will have to effectively assess its actual or likely anti-competitive and harmful effects (with respect to both the market and the consumers) before prohibiting such agreement, if an undertaking succeeds in demonstrating that a RPM agreement will have or has had likely or actual pro-competitive effects and that it fulfills all the conditions set by Article 81(3) of the Treaty.
13. The new wording of the Draft Guidelines seems to open the doors to a more economics based approach even in assessing the agreements containing a RPM hard-core restriction that, to date, have rarely implied a balance of their positive and negative effects provided that the Commission, "*in the case of restrictions by object as listed in Article 4 of the Block Exemption Regulation*", was not "*required to assess the actual effects on the market*" of such agreements (§ 7 of the Guidelines in force).
14. Expressly providing for a rebuttable negative presumption concerning in particular RPM agreements and specifying the possible positive effects and efficiencies that might come from such agreements, the Commission makes a sharable choice that, even if it does not imply a substantial innovation of the matter, could encourage legal certainty on RPM.

15. Indeed, according to a well-established EC practice and case-law⁴, hardcore restrictions listed in Article 4 of the current BER, especially the imposition of fixed or minimum prices, have always been closely interpreted, *de facto* becoming *per se* or *quasi per se* infringements of antitrust law. In reality, there has never been a general ban on assessing RPM agreements under Article 81(3) of the Treaty but the content of the Guidelines, literally stating that “*individual exemption of vertical agreements containing [...] hardcore restrictions is [...] unlikely*” (§46), and the trend resulting from the Commission and EC Courts’ enforcement led to consider the possible positive effects of RPM as non-existent or negligible.
16. Therefore, the modifications introduced in the Draft Guidelines, even though (correctly) preserving a presumption of illegality with reference to RPM, have to be favourably considered as a useful instrument granted to undertakings in order to clearly assess the cases (still limited) in which a RPM agreement can lead to pro-competitive results.
17. There could be the temptation to base the announced position of the Commission on the recent decision of the Supreme Court of United States in the *Leegin* case, but it is true that many of the pro-competitive justifications used by the Supreme Court to open the doors to the rule of reason in assessing the RPM, had already been outlined by the Commission in its *Communication on the application of the Community competition rules to vertical restraints (Follow-up to the Green Paper on Vertical Restraints)* (98/C 365/03) (e.g. RPM is an effective way to solve the free-rider problem as well as the “double marginalisation”).
18. The (apparently) new position of the Commission as regards RPM agreements could rather be connected to an awareness that markets and commercial techniques continuously evolve and have probably created the conditions for softening - in exceptional cases - the RPM prohibition.
19. In our opinion, it is worth highlighting a specific positive effect of RPM, perhaps not sufficiently stressed by the Commission.
20. Imposing fixed or minimum resale prices on distributors/retailers can be a valuable tool for manufacturers to “protect” their products from the risk of a devaluation arising from lower-services and discount retailers, so maintaining a high standard of quality.
21. Indeed, it can be useful to set a fixed or minimum resale price to limit discounted sales carried out by large-scale or internet retailers as well as free-riding, so that a – at least temporary – RPM agreement can be necessary to give consumers a high quality image of a brand, even if it can entail a temporary price increase. In these cases, competition on elements other than prices (pre-sale and post-sale service quality, promotion, etc.), at both manufacturer and distributor levels, can be enhanced, ultimately increasing the quality and choice of products⁵.

⁴ Starting from the Commission Decision of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen), in Official Journal L 262, 02/10/2001 P. 0014 – 0037.

⁵ This is confirmed by the following quote of the *Leegin* decision, where it is stated that “*resale price maintenance also has the potential to give consumers more options so that they can choose among low-price; high-price, high-service brands; and brands that fall in between*”.⁶ Granting undertakings the possibility to resort to a RPM agreement, should all the conditions required by Art. 81(3) be fulfilled, can also prevent them from taking commercial decisions more negative from an economic point of view (e.g. creation of an integrated distribution network).

22. Moreover, a RPM can be an effective means of safeguarding the existence of medium-sized and small-sized shops (e.g. traditional stores, boutiques) which are increasingly threatened by the spread of department stores and e-shops. The new Commission position regarding RPM could help to effectively contrast the overwhelming power of large-scale retail traders and discounters that often hides several serious inefficiencies (e.g. poor services/assistance) behind low prices.
23. We deem that, at least referring to specific kinds of products (such as luxury and high-tech goods), fair competition on quality is as important as competition on prices, so that undertakings should be free to enter into a RPM agreement, if it is likely to lead to demonstrable efficiencies⁶.
24. In conclusion, a rebuttable presumption of illegality and a sufficiently heavy burden of proof weighing on undertakings that want to prove the fulfilment of the conditions provided for by Article 81(3) are, in our opinion, an effective solution to continue to seriously evaluate the anticompetitive effects that generally arise from a RPM, but, in the meanwhile, to make undertakings more aware of the possible legal and pro-competitive use of such hard-core vertical restriction.
25. This could be regarded as the "European" remedy to the uncertainty which has characterised first applications of the rule of reason to RPM by American judges after the *Leegin* decision to date.
26. It is for these reasons that LIDC considers that references in the text of the Draft Guidelines to RPM as being "*unlikely to fulfil the conditions of Article 81(3)*" of the Treaty should be removed. This would be consistent not only with the abovementioned considerations but also with the wording of § 221 of the Draft Guidelines, which lists a number of actual possible efficiencies that RPM may lead to, and cases where RPM may be necessary for carrying out commercial practices benefiting the consumers.
27. Moreover, in accordance with § 221 of the Draft Guidelines, RPM, "*and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system a coordinated short term low price campaign which will also benefit the consumers*". LIDC considers that it would be convenient that this point includes a definition of "*similar distribution system*". Would it only encompass distribution systems structured under requirements identical or very similar to those imposed in the framework of a franchise agreement (e.g. provision of know-how)? Would the Commission admit the application of RPM in "normal" distribution agreements not containing requirements such as those normally incorporated in franchise agreements? Account should be taken to the fact that economic efforts made by franchisors and franchisees as a consequence of a short-term low price campaign should not be different from those borne by other type of distributors when conducting a similar operation.
28. A final remark concerns the consequences that the above-mentioned modifications to the BER and the Guidelines could have on national legal systems. Indeed, the majority of national antitrust laws provide for a strict interdiction of RPM agreements that in some cases are also relevant under criminal law. Therefore there would be a risk for national Authorities and Courts to handle in a discriminatory way RPM agreements which may affect trade between Member States (so falling into the scope of EC competition law) and those having an exclusively national relevance.

29. In Italy, the provision (Art. 1.4 Law no. 287/1990) according to which national anti-trust law "*shall be interpreted in accordance with the principles of the European Community competition law*" could limit the problems of inconsistency between EC law and national law. In any case, we deem it advisable not to underestimate the risk that such problems will lead the Commission to re-assess its sensitivity towards RPM

III. Comments on territorial restrictions, internet and selective distribution

30. LIDC generally welcomes the clarification regarding sales over the Internet and the introduction of a two-year period during which restrictions on active and passive sales can be imposed when launching a new product or introducing an existing product to a new market. LIDC also approves the change made to Article 4 (b) of the Draft BER, to allow the imposition of certain restrictions on any "*buyer party to the agreement*", thus explicitly allowing the supplier to impose restrictions on sub-dealers, to the extent that a tripartite agreement is reached.
31. LIDC believes, however, that the Commission missed an opportunity to re-examine and clarify issues which have proved impractical under the existing rules. LIDC believes that these rules, especially the rules on territorial restrictions, should be liberalised so as not to impose business and distribution models that may reduce, rather than increase intra-brand competition.
32. Disappointingly, these strict rules on territorial sales restrictions, that have proved to be impractical and burdensome for undertakings and are more inspired by the single market objective than by sound economic analysis, remain almost unchanged in the draft regulation and guidelines. LIDC believes the Commission should take the opportunity of the current review of its policy on vertical agreements to improve its policy in this area by aligning it more to market reality.
33. First, LIDC thinks that the Commission should change the rule that an active sale restriction is only allowed to the extent that the territories to which the prohibition applies have been exclusively reserved to the supplier or exclusively allocated to another distributor. LIDC doubts whether sufficient economic grounds exist for the strict application of this rule. Distribution systems are dynamic and often develop gradually. Thus, when setting up a distribution system, the supplier may prefer (at least in the early years) to continue supplying certain territories itself, while granting an exclusive distributor protection from other distributors. Similarly, restricting the number of exclusive distributors in a certain territory to two or three may be sufficient to avoid the "free rider" problem and still provide a sufficient incentive to the appointed exclusive distributors to invest in the development of the supplier's products. LIDC thinks that it should be up to the suppliers to freely choose the most appropriate distribution method for its products, given that economic theory confirms that generally vertical restrictions are usually more pro-competitive than anti-competitive, and thus they should only be prohibited where clear anti-competitive effects can be seen.
34. Moreover, this requirement of a parallel imposition of exclusivity requirements, which did not exist under Regulation 1983/83, may require the amendment of existing distribution agreements and the imposition of unnecessary complexities and compliance burdens on distributors. This is even more so given that meanwhile the Regulation applies in 30 EEA Member States. The distribution and commercialization of products in one (or more) Member State(s) may well be further developed than in other Member States, meaning that different distribution methods are required. The current rules do not reflect

the dynamic nature of economic reality, which may sometimes differ greatly from one Member State to another. For example, while in some Member States the market may be ripe for a selective distribution system,; in others an exclusive distribution system may still be more appropriate. Under the draft regulation and guidelines, suppliers would face considerable hindrances to the introduction of such differentiated distribution systems which simply correspond to market reality and the dynamic nature of distribution systems and generally do not have an anti-competitive object nor an anti-competitive effect. Indeed, under the current rules, suppliers cannot prohibit their exclusive distributors from selling products in territories in which the supplier operates a selective distribution system.

35. Secondly, it is disappointing that the Commission continues to “black lists” restrictions on active and passive sales in selective distribution systems at all levels of supply, implying that authorised dealers must be free to sell actively and passively to all authorized dealers in the network at wholesale and retail levels and to all customers. The combination of exclusive distribution at the wholesale level, granting the wholesaler protection from active sales into its territory by other wholesalers, with selective retail distribution should be allowed.
36. Finally, it is regrettable that the Commission did not take this opportunity to clarify its position on clauses in agreements relating to trade outside the EEA, in particular territorial restrictions that prevent sales in the EEA.

IV. New specific vertical restraints

37. The Draft Guidelines include new comments on specific vertical restraints, i.e. category management agreements and upfront access payments (see §199 and following as well as §205 and following of the draft document).
38. Firstly, the introduction of such new comments in the Draft Guidelines may cause surprise, given that the purpose of the Draft Guidelines is to assist companies in the assessment of the validity of their agreements, by relying on the prior decisions of the Commission and upon case law developed by the by the European Courts. Anyway, there are neither such prior decisions, nor such case law in the present case.
39. Secondly, it is regrettable that the Draft Guidelines do not emphasize more the pro-competitive effects of the contemplated practices. Indeed, the Commission starts outlining the negative effects of such practices and then analyses, only summarily, the possible positive effects. Such comment does not only apply to specific vertical restraints, such as category management agreements and upfront access payments, but illustrates the general approach of the Commission, which outlines insufficiently the pro-competitive effects of vertical agreements.
40. This is particularly true for category management agreements. We should keep in mind that the Commission itself acknowledged, in a recent decision in the field of concentrations that *“category management policy (...) may be seen as largely procompetitive, as it makes it easier for retailers to stock the most-demanded brands and easier for consumers to find them in sufficient quantities on the shelves. Hence there is no elimination of competition.”* (Procter & Gamble/Gillette decision July 15, 2005).

41. As far as upfront access payments are concerned (slotting allowances or pay-to-stay fees), such practices are prohibited by some legal systems, apart from the cartel regulations. This is, notably, the case under French law.
42. If we want to deal with such practices relying on cartel law, it is important to take into account the real effects of such practice on competition, in the real market situation in which the practice is implemented. Considering the negative assessment of this practice - except when it relates to new products -, the comments of the Commission may be understood as defining a new *per se* restraint. To avoid such misunderstanding and considering that such practices may induce the same negative effects as exclusive supply or single branding obligations, the Commission should simply refer to upfront access practice in the comments on exclusive supply or on single branding obligations, rather than making specific developments in this respect.

V. Tying

43. Some additional specifications and modifications were brought to the part related to tying (§210 and following of the Draft Guidelines) compared to the previous guidelines. The quite simple example of shoes and laces could be favorably deleted or replaced by another example.
44. It is to be noted that the main modification introduced by the Draft BER, which consists of a double threshold, concerning both the market share of the supplier and the market share of the buyer, should not concern tying, as the Commission points out that such tying does present a risk, notably when buyers have no buying power. Nevertheless, the application of a double market share threshold, leads to the exclusion of many agreements outside the category exemption, as currently defined.
45. For those agreements which appear to be out of the scope of the category exemption, the Commission seems to exclude the possibility of tying being analyzed through the rule of reason. It only mentions the anti-competitive effects of tying and contemplates them only through individual exemptions after an individual examination. Such exemptions remain theoretical, because it is, in fact, very difficult for a company, to prove that it has fulfilled the four exemption conditions laid down by Article 81(3) of the Treaty, regarding notably the proof of the indispensable nature of the restraint.

VI. Article 4(b) of the Draft BER does not yet mention possible restrictions on the supplier, would it be necessary?

46. Article 4(b) of the current BER prohibits the inclusion in a vertical agreement of a clause whereby no restriction can be imposed on the buyer to carry out passive sales outside his exclusive territory. This provision does not literally prohibit an arrangement whereby a supplier must refrain from selling products to third parties outside a territory exclusively assigned to a distributor for the use in that territory, or clauses with similar object or effect, such as an obligation on the supplier to include in its contracts with other distributors a clause whereby parallel imports into that territory are forbidden.
47. Some members of the Working Group of the LIDC wonder whether by way of a formalistic approach to Article 4(b) of the BER one might consider that an obligation imposed on a supplier to limit parallel imports from one territory to another by distributors would be legal because this situation would not be literally contemplated in this

provision. Let us imagine a provision in a distribution agreement for the territory A, whereby the supplier undertakes the obligation not to sell product to any distributor located outside territory A, when such distributor intends to resell the product into territory A (which could be a passive sale into territory A). Such a clause might be considered as not constituting a hard-core restriction under Article 4(b) of the BER. However, the effect might be, for example, that the supplier would refrain from selling to the distributor of territory B when it is known that he intends to do a passive sale into territory A. A restriction would arise when the supplier decides to include in its agreement with the distributor of territory B a ban on passive sales. Would a restriction arise also when the supplier simply refrains from selling to the distributor of B if and when it knows that he is going to passively sell into A? Would passive sales be then prevented? And this considering that this would not be a unilateral decision of the supplier not to sell, but a decision resulting from the distribution agreement between the supplier and the distributor of territory A.