

COMMENTS OF MONARD-D'HULST 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. This document contains MONARD-D'HULST'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**"].
2. MONARD-D'HULST wishes to emphasize that it is satisfied with the application of Regulation 2790/1999 and that it supports the vision of the European Commission that there is no need for a drastic modification of the Regulation.
3. MONARD-D'HULST wishes to focus on the following provisions of the draft BER and the draft guidelines:
 - a. Article 3 of the draft BER and the proposed dual market share threshold of 30%.
 - b. Article 4, a of the draft BER with regard to resale price maintenance ["RPM"].
 - c. Article 4, b of the draft BER and paragraphs 51 to 54 of the draft guidelines with regard to online sales.

I. 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. 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.
5. MONARD-D'HULST understands that the Commission wishes to take the market share of the buyer into consideration, also in situations where the vertical agreement does not contain any exclusive supply obligations.
6. However, the application of a dual market-share threshold could raise concerns for small and medium sized companies pursuing business in a cross-border context with

undertakings whose market share exceeds 30%. These small and medium-sized companies are very often unaware that their agreement is incompatible with Article 81 EC and will be unable to benefit from the application of the draft BER or the *de minimis* exemption under the given circumstances. MONARD-D'HULST understands that since competition law aims to protect free competition and not the parties to an agreement as such, it will be difficult to apply the block exemption regulation to undertakings with a market share exceeding 30%, only because of the limited market share of the contractual counterpart. Nevertheless, MONARD-D'HULST would like the Commission to give an indication of how such situations of "inequality between contracting parties", i.e. a powerful supplier and a small distributor, will be dealt with in the BER.

II. Comments on Article 4, a of the draft BER with regard to resale price maintenance ["RPM"]

7. MONARD-D'HULST understands that RPM is still regarded as a hard-core restriction within the meaning of Article 4, a of the draft BER and, as a result, it may be presumed to be an infringement of Article 81, 1 EC. However, MONARD-D'HULST observes that the Commission specifically states in § 219 of the draft guidelines that "*[w]here the parties substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that 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 and consumers before deciding whether the conditions of Article 81(3) are fulfilled*".
8. Account should be taken to the fact that, in practice, RPM has been considered as a *per se* infringement which is automatically prohibited and cannot benefit from an exemption under Article 81, 3 EC. It is therefore significant that the Commission reminds that an individual exemption may also be applicable to hard-core restrictions, as it has been acknowledged by the European Courts' case law [For example, Case T-168/01, *Glaxo SmithKline v Commission* [2006] ECR II-2969].
9. The above is also inline with the more economics-based approach already assumed by the Commission in the current BER and guidelines for the treatment of vertical restraints. It is also in-line with sound legal and economic theory that has recently advocated the analysis of vertical restraints in EU competition law and similar to the "rule of reason" applied in the US. This does not necessarily mean that the Commission should turn to the "rule of reason" as established by the US Supreme Court in the *Leegin* judgment, but should effectively apply the mechanism of Article 81, 3 EC to RPM and to make a balance between substantiated efficiencies and anti-competitive effects evidenced by complainants or by the Commission itself.
10. It is for these reasons that MONARD-D'HULST 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 not consistent not only with the above-mentioned 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 to the benefit of the consumers.

11. 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*". It is questionable here why this would apply only to franchising and not to other forms of distribution implementing a temporary retail promotion. 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 types of distributors when conducting a similar operations.

III. Comments on Article 4, b of the draft BER and paragraphs 51 to 54 of the draft guidelines with regard to online sales.

12. It is questionable whether the Commission should impose, as a general rule, that in cases of selective distribution systems, suppliers may require their distributors to have a brick and mortar shop or showroom before engaging in online distribution [§ 54 of the Draft Guidelines].
13. For particular categories of goods, it may be justified that these are only sold when the supplier has explained to the consumer the particularities regarding the usage of the product or has provided the consumer with any other useful information. However, imposing a condition on the distributor to have a brick and mortar shop or showroom before engaging in online distribution seems to be disproportionate to the objective that is being pursued such as the protection of the reputation of a particular brand.
14. Supporters of this requirement to have a brick and mortar shop or showroom before engaging in online distribution are often arguing that this is necessary to prevent "*free rider*" behaviour of genuine online-shops. They argue that genuine online-shops would be able to offer more competitive prices than their competitors who have a brick and mortar shop or showroom and/or who are offering pre-sales services to customers because they are profiting from the investments made by their competitors. Customers would first obtain pre-sales information at a high-priced outlet and then purchase the product a low-priced online store.¹
15. This assumption cannot be upheld as a general rule and may well work the other way round, when a consumer obtains information from the internet [on pricing for example] and then decides to purchase the product at a regular shop. In this

¹ T. BUETTNER, A. COSCELLI, T. VERGÉ and R.A. WINTER, "An Economic Analysis of the Use of Selective Distribution by Luxury Good Suppliers", *European Competition Journal* 2009, 209.

scenario, the brick and mortar shops are benefiting from the investments made by the online stores.²

16. Paragraph 54 of the Draft Guidelines provides that: *"In an individual case, besides the possibility to plead an efficiency defence under Article 81(3) EC, an outright ban on Internet or catalogue selling may be objectively necessary and fall outside Article 81(1) EC and will thus not be considered to be a hardcore restriction if it does not restrict competition that would take place in its absence given specific circumstances in which the agreement operates, such as when its purpose is to align on a public ban on selling dangerous substances over the internet or by mail order for reasons of safety or health."* Would it not be better, when taking into consideration this line of reasoning, to include an absolute prohibition of internet or catalogue selling in Article 5 of the Draft BER on excluded restrictions?

Monard-D'Hulst
September 2009

² See S. KINSELLA OBE, H. MELIN and S. SCHROPP, "Comments on the CRA Paper Entitled "An Economic Analysis of the Use of Selective Distribution by Luxury Goods Suppliers", *European Competition Journal* 2009, 253 and further.