

21 October 1999

European Commission
Directorate-General for Competition
Avenue Cortenberg 150
B-1000 Brussels

Dear Madam or Sir,

Re: Vertical Restraints

I am writing on behalf of HOTREC (Hotels, Restaurants, and Cafés in Europe). In accordance with the Commission's invitation to interested parties, this letter summarises HOTREC's comments on the draft Regulation on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices.

While bearing in mind the characteristics of the hospitality industry, and specifically the aspects of beer distribution in the EU, HOTREC undertook a careful reading of the draft Regulation's text. HOTREC has come to the conclusion that the draft Regulation's proposed changes, as they pertain to the content of vertical agreements in the beer sector, will negatively affect the hospitality industry as a whole in Europe.

Before addressing more substantive issues, HOTREC would like to bring to the Commission's attention the brief length of the consultation period. It is unfortunate that the consultation period offered by the Commission is so short, especially considering the complexities of the issues involved and the seemingly drastic changes promulgated by the draft Regulation.

I. Title II's Provisions Stabilise the Hospitality Industry

In order to clearly explain HOTREC's concerns regarding the text of the draft Regulation, it is necessary to briefly mention the advantages of the current EU rules, which apply to the conclusion of vertical agreements in the beer sector.

It is our position that Title II of Commission Regulation (EEC) No 1984/83 , on the application of Article 81(3) of the Treaty to categories of exclusive purchasing agreements, has acted to stabilise the beer distribution industry. At the time this Regulation entered into force, the Commission considered it necessary to set forth special provisions for the beer sector, in order to take into account the peculiarities of the market in question. The Commission has since expressed this concern repeatedly in individual cases.

Beer suppliers operating within the EU constitute a powerful oligopoly, giving them a weighted bargaining power in comparison to resellers of beer. As a result, with regard to the beer distribution industry, resellers have often resorted to concluding long-term exclusive purchasing agreements with suppliers, in order to secure quality shipments of beer at fair market prices. In addition, the benefits of these fair market prices are then passed onto the consumer.

The same market conditions, which prompted the Commission to set forth the special provisions in Title II of Regulation (EEC) No 1984/83, still exist in the beer distribution sector. Therefore, it is our position that the special provisions of Title II continue to be necessary.

These rules clearly outline the permissible provisions and obligations, which may be included in a beer supply contract. In contrast, the draft Regulation does not contain any specific rules which relate to the unique characteristics of the beer distribution sector. Instead, the draft Regulation promulgates an all-encompassing regime which sweeps the beer distribution industry into the general block exemption category for vertical agreements.

Consequently, if the draft Regulation enters into force in its present form, confusion is expected to result with regard to the bargaining process of negotiating and concluding beer supply contracts. Furthermore, if the bargaining process for concluding beer supply contracts becomes unstable, this will have adverse effects on the hospitality industry. This industry is an amalgamation of small businesses across Europe facing a few large suppliers with significant negotiating power. It is HOTREC's concern that the current balance between rights and obligations will be completely lost.

Regrettably, Regulation (EEC) No 1984/83 expires on 31 December 1999 and it will be replaced, in effect, by the draft Regulation on the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices.

II. Lengthening the Transitional Period for Implementation

As previously mentioned, the current rules regulating vertical agreements in the beer distribution sector will be replaced by the draft Regulation. A transitional period of approximately two years applies to agreements falling under Regulation (EEC) No 1984/83 and in force on 31 May 2000; this period will end on 31 December 2001. This transitional period is not long enough to allow for the hospitality industry to properly adjust to the new rules contained in the draft Regulation.

In addition, it is our position that contracts entered into during the period of validity for Regulation (EEC) No 1984/83, should continue to be governed by that Regulation until the contract expires.

III. The Draft Regulation Creates Legal Uncertainty

The draft Regulation, regarding the application of Article 81(3) of the EC Treaty to categories of vertical agreements and concerted practices, sets forth a general block exemption for vertical agreements based on a calculated market threshold. The draft Regulation states that vertical agreements will qualify for the block exemption where the supplier or, in the case of exclusive supply contracts, the buyer maintains a market share of 30 percent or less.

In general, the task of accurately calculating market share, in terms of percentages, is often difficult due to the numerous economic and practical factors that must be considered. However, the fractioned nature of the hospitality industry and of the beer distribution sector presents even more complications to the analytical task of

calculating market share. As a result, in selecting a specific market share threshold as the main criterion for determining whether a vertical agreement qualifies for the block exemption, the Commission has chosen a method that is inherently problematic.

Moreover, if it is not possible to accurately calculate market share, then it will also not be possible to precisely determine whether a particular vertical agreement qualifies for the block exemption, thus leading to a situation of legal uncertainty. This concern is all the more acute for a broad group of HOTREC members which as indicated are often small or medium size enterprises, and do not have the resources to obtain sophisticated legal advice on these often complex issues.

IV. The Notification System Provides Legal Certainty

As mentioned above, if the draft Regulation is enacted in its present form, it will likely result in a situation of legal uncertainty. At this time, we would like to make an additional comment on the topic of legal uncertainty, which relates to the proposed termination of the notification and authorisation system.

The White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, envisions numerous reform efforts, which include terminating the notification and authorisation system.

The main advantage of the current prior notification system is, however, that it allows entrepreneurs and companies to obtain an advance ruling from the Commission, regarding whether the proposed agreement violates the EC Treaty. Therefore, even if the ruling is negative and the agreement is found to violate the Treaty, the parties at least have legal certainty.

In contrast, if the proposed reform efforts are carried out and the notification system is terminated, parties to an agreement which contains restrictive practices are left to wonder whether their agreement is valid, according to Community principles. In addition, if a particular agreement becomes the subject of a complaint and is found to violate the EC Treaty, the parties possibly face penalties which could have been avoided by use of the prior notification system.

Thank you for taking the time to consider HOTREC's views.

Yours sincerely,

Jean-François Bellis