For Official Use **DAF/COMP/WD(2008)87**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **24-Sep-2008**

English text only

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2008)87
For Official Use

ROUNDTABLE ON RESALE PRICE MAINTENANCE

-- Note by Hungary --

This note is submitted by Hungary to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 22-23 October 2008.

JT03251090

English text only

1. Introduction

1. The 1990 Competition Act of Hungary contained a prohibition of horizontal agreements but no general prohibition was envisaged for vertical restrictions. Only one specific vertical provision was mentioned, prohibiting resale price maintenance "should it result in the limitation or exclusion of competition". Due to the necessity of harmonisation in the process of the accession to the European Union, in 1996 the present Competition Act was adopted containing in line with EC 81(1) a general prohibition of restrictive (horizontal and vertical) agreements.

2. The change in the legislation though altered the applicable legal argumentation, has not considerably transformed the policy applied towards these agreements. This constancy however is not due to the maintenance of an effects based assessment, but to the fact that unless specific circumstances were identifiable, the GVH was always less friendly with fixed and minimum resale prices. A shift in this thinking however can be identified in the latest decision of the authority.

2. Definition

3. As resale price maintenance were identified all forms of contractual rights to establish the resale price, its minimum and/or maximum level, to determine the applicable margin or to propose recommended prices. All these behaviours were assessed under the same heading, but not necessarily with the same outcome.

3. Assessment under the 1990 Act

4. Since under the 1990 Act RPM only qualified as an infringement if it resulted in the restriction of competition, the GVH had to assess the agreement's actual or potential impact on competition in each case. It was considered that it was unlikely that a prohibition to deviate upwards from the proposed price had a negative effect on competition, as it cannot reduce competition among resellers. Therefore maximum retail prices and maximum resale margins were normally considered not to be covered by the prohibition of the Act at all.

5. Recommended prices were also considered legal unless because of other mechanisms the reseller actually lost its freedom to determine the resale price.

6. It was established that competition is not an objective but only a tool for the promotion of consumer welfare as it provides for more efficient economic activity. In such a context price competition is only positive if it does not lead to the reduction of quality. In line with this approach it was recognised that certain, e.g. luxury products and products involving special technological solutions, or the maintenance of goodwill might require distinguished and expensive supply conditions. In such cases it is in the interest of consumers to have the incentives of suppliers maintained for the provision of high-level sales services. The establishment of a minimum price level can contribute to such objectives, securing eligible margin for the provision of these services. Interestingly however, these considerations were taken into account in the assessment of individual exemption though they should have form part of the analysis whether the given contractual provision was covered the prohibition at all.

7. Similarly to this case the GVH also left alone the short term, one-off resale price fixings applied for marketing purposes. The reasoning in these cases however was also somehow erroneous in the sense that instead of establishing that due to its effects it did not fall under the prohibition at all, the GVH established that the agreements in question were of minor importance and thereby not covered by the otherwise applicable provision.

8. Nevertheless the fixing of resale prices and minimum resale prices was in general considered as illegal as in practice the parties could not raise acceptable justifications. Arguments such as that the minimum price helps to avoid ruinous competition among wholesalers, thereby facilitating supply for the benefit of consumers were rejected. Other unsuccessful arguments were that the high price made a distinction between the given beer and the products of small local breweries, which made a trade-off between quality and price giving preference to the latter. It was also unsuccessfully claimed that in the case of certain products traded in great quantities, market mechanisms themselves established a price level below which it was not profitable, while above it was not possible to sell the product and that the established price was exactly at that level. The parties submitted also in vain, that price competition is not an absolute element of competition and that its restriction is not sufficient to establish the exclusion of competition.

4. Assessment under the 1996 Act

9. With the adoption of the 1996 Competition Act the legal background for the assessment of resale price maintenance has changed. The prohibition of restrictive agreements now applies generally to all vertical agreements. It is not strictly mentioned anymore that an RPM (or any other vertical agreement) is illegal only if it results in the limitation or exclusion of competition, but the text of the provision does not necessarily entail *per se* prohibition either. Nevertheless the GVH established that agreements fixing the retail price are *per se* illegal. This "*per se"* illegality however only means that the actual and potential effects of the agreement on RPM are not assessed while evaluating its illegality (as it was according to the former Act) but only in a second stage when the GVH decides on the compliance of the agreement with the conditions of exemption. RPM agreements may therefore be exempted and do not qualify as hard core agreements as the *de minimis* rule also applies to them.[1] Besides a "*per se"* illegal resale price fixing agreement with insubstantial effects could avoid punishment if ceased during the suspension of the procedure.

10. The present approach upholds that recommended prices are not anticompetitive if they leave open the possibility for the reseller to decide independently on its pricing strategy, but should they be accompanied by other measures resulting any actual resale price fixing, or the undue restriction of the applicable margin, the prohibition applies. Maximum resale prices are normally not considered as anticompetitive either.

11. The rationale of the present approach, while accepting the eminence of inter brand competition, is to protect intra brand competition as well. It is claimed that the restriction to freely set prices might lead to the complete elimination of intra brand competition, increase transparency facilitating horizontal collusion among producers or sellers, it establishes a minimum level of profit for the reseller while maximising the discount that can be given to consumers. It may also effect the lessening of competitive pressure on the upstream level, thereby reducing incentives to increase efficiency and innovation.

12. The latest decision elaborates on the effects of RPM agreements and applies an effects based interpretation though it does not explicitly and generally overrule the "*per se"* approach. In the decision the GVH accepts the argumentation that the establishment of varying resale prices of an energy drink in different HoReCa premises cannot result in the establishment of a uniform price level and that there were no signs that this selective price fixing had any exclusionary effects. The case was terminated, meaning that despite the presence of resale price fixing, there was no restriction of competition and therefore there was no need to evaluate the four conditions for exemption. Such an interpretation could signal a return to the original, effects based approach.

---

[1] The Hungarian Competition Act does not contain a definition of hard core agreements, only establishes that horizontal price fixing and market sharing does not fall under the *de minimis* rule.

5. Conclusion

13. As it was seen above the starting point in 1990 was a clearly effects based legal provision, in the application of which however, the GVH was already willing to bear in mind a kind of *per se* approach towards resale price fixing, while remaining lenient with other forms of RPM, like maximum or non binding recommended prices. The legislative change made possible a more formalistic approach and the GVH did in fact declare a kind of *per se* illegality of minimum and fixed resale prices, while maintaining the lenient approach towards maximum and non binding recommended prices. It seems therefore that there was no real change in the policy considerations during the first 15 years. The latest decision however entails the possibility of the future application of a real, effects based assessment of fixed and minimum resale prices.