

Case number:	Vj-23/2005
Party:	Rába Group and Integris
Type of case:	agreement restricting competition
Decision:	Termination of proceedings
Date:	9 June 2005

Vj-23/2005

Rába Group and Integris (agreement restricting competition)

Summary

The Competition Council of the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) started proceedings against the Rába Group and Integris, and investigated whether their entering into a nine-year exclusive agreement restricted competition. In absence of any violation the proceedings were terminated.

The decision

The Competition Council established that there are no grounds for action concerning the agreement concluded between the Rába Group and Integris.

The notification

The undertakings concerned submitted a notification for under national law. Firstly they requested the establishment that the exclusivity and optional clauses of their agreement do not fall under the prohibition of the national provision (Article 11) which is the counterpart of Article 81. As a second option they have claimed the establishment that the agreement falls within the block exemption regulation on vertical restraints (Government Decree No 55/2002. (III.26.)), the national equivalent to Regulation (EC) No 2790/1999 of the Commission. Later during the proceedings, recognising the conflicting views of the GVH on these issues they also submitted a request for individual exemption.

Procedural issues

The GVH first established that the said agreement was capable of affecting trade between Member States and therefore Article 81 should be applied to the agreement. However as procedures under EC competition law can not be based on notifications it was not possible to extend the ongoing procedure based on national law. Therefore a new, ex officio procedure was initiated parallel to the first one. The two proceedings were closely coordinated in order not to contravene the prohibition of Article 3(2) of Regulation (EC) No 1/2003. Consultations under Article 11(5) of Regulation 1/2003/EC

were also held with the Commission concerning the interpretation of the Community BER.

The parties

The Rába Group, one of the greatest Hungarian vehicle manufacturer firm consists of undertakings active in the commercial vehicle, undercarriage and spare part business. Its activity is mainly export oriented, it is a supplier of many leading car and commercial vehicle manufacturer e.g. BPW, DaimlerChrysler, Caterpillar, Dana Corp., ArvinMeritor, John Deere & Co, MAN, Suzuki and ISUZU. Rába is among the greatest independent undercarriage constructors of the world.

Integris was originally established by a member of the Rába Group for the provision of IT, other telecommunications, financial and accounting and investment services for the Group. At the beginning of 2003 the acquisition of Integris was put on tender. The winner was Magyar Telekom (at that time called MATÁV), which submitted an offer envisaging the long term, cost efficient operation of Integris for the benefit of the Rába Group and it also undertook the continuous development of Integris so as to enable it to provide the best offer available on the market on a long term basis. The acquisition was subject to approval of and cleared by the GVH. Integris remained active in the same business after the transaction was carried out.

Magyar Telekom, which controlled Integris was an indirect participant of the agreement. Magyar Telekom is the greatest Hungarian fixed telecom undertaking and it is active in all the segments of this industry. It owns the leading mobile phone company, and provides both broadband and narrow band Internet services. Magyar Telekom itself is owned by Deutsche Telekom.

On the other hand Magyar Telekom does not provide private (automatic) branch exchange¹ services. Such agreements are concluded only as parts of integrated service contracts like the one in question. Its share on this market is therefore negligible. However as regards other services provided by Integris, Magyar Telekom is also active on the market.

Markets affected by the agreement

One of the relevant product markets is the market for IT. According to established practice of the GVH it can be divided into the market for IT devices and that for IT services. The agreement primarily affected the latter. This is a highly developing market as new IT services become more and more indispensable for business in general. Many undertakings are present on the market and entry from one segment into the other is easy. The share of the undertakings affected by the agreement is below 10 per cent. The share of Integris itself is quite low within this overall share of Magyar Telekom.

The second relevant market is that of private (automatic) branch exchange services. Many competitors are present on this market too. The main competitors of Magyar

¹ A private telephone switchboard that provides on-premises dial service and may provide connections to local and trunked communications networks

Telekom are Synergon, Albacomp, Hewlett-Packard and Siemens. The market share of the parties affected by the agreement was far above 15 per cent.

The third market affected by the agreement is the market for HR, financial and accounting services. HR does not constitute a separate segment as it is closely related to financial and accounting services. The activity of Integris does not contain the provision of classic HR services, as it is mainly restricted to wage accounting and the administration of social insurance payments. The market is saturated, the main competitors, owning 75-80% of the market are PricewaterhouseCoopers, Deloitte & Touche, Ernst & Young and KPMG. The share of Integris was surely below 5% and there were no other Magyar Telekom owned firms active on this market.

The agreement

The agreement on the provision of IT, other telecommunications, private (automatic) branch exchange, HR, financial and accounting services on an exclusive basis was concluded for nine years. It was agreed that the exclusivity of the provision of IT and other telecommunications services would be re-negotiated every three years and a mutual consent would be required for the maintenance of it. It was also agreed that in the case of need in the future for certain supplementary and supportive services defined in an Annex to the agreement, Rába would have the obligation to make use the services of Integris. In relation to a third group of services as defined in an other Annex, Rába was bound by the “Last Call Option” clause meaning that Integris has the option to provide the service under the best available conditions.

The agreement itself was concluded for a period of nine years. It can be cancelled by Rába with a 12 months notice but only concerning the entire agreement, a separate cancellation of different services is not possible. Integris undertook not to apply ordinary cancellation during the validity of the agreement. For the case of an ordinary cancellation by Rába, a contractual penalty was stipulated.

The decision

The decision established that the agreement qualified as an agreement restricting competition under Article 81(3) EC due to the clauses on exclusivity and on the option of Integris to provide certain services under the best conditions available on the market.

Having considered the contract as an agreement relating to a complex but still a unified service, it was established that though on the first and third relevant markets the parties market share did not exceed 15 per cent while on the second market it is above that level it can not be considered as an agreement of minor importance.

The agreement is not covered by the vertical block exemption regulation (EC) No 2790/1999. This is due to the fact that as the Commission notice – the Guidelines on Vertical Restraints² - also underline, agreements concluded for indefinite times or for periods exceeding 5 years are not covered by the BER. Though non-compet

² 2000/C 291/01

obligations are covered by the BER if the renewal beyond five years requires explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period, it was considered that this was not the case in the present agreement, as the contractual penalty stipulated for the termination of exclusivity was too burdensome.

In addition it was also established by the GVH that the contract did not contain rules for a possible termination of the exclusivity during the envisaged re-negotiation. This means that such a scenario was not foreseen by the parties in reality. Taking into account that such a termination would in fact result in a change in the person of the supplier, the termination of the exclusivity would be equal to the termination of the contract as a whole, as the contract does not allow the individual termination of the supply of the different services. The termination of exclusivity would therefore trigger the obligation of Rába to pay contractual penalty to Integris as stipulated in the agreement. The amount of this penalty diminishes year by year but at the end of the third year it is still so high that it would clearly be a serious obstacle to quit the agreement. The only viable possibility for the termination of the contract before its expiration opens at the end of the sixth year when the level of the contractual penalty is already reduced and the exclusivity clause can also be re-negotiated. However by that time the agreement's duration would already have passed the five year term established in the BER. Therefore it is further upheld that the agreement did not fall within the exemption granted by the BER.

The GVH considered that the conditions laid down in Article 81(3) are fulfilled.

- a) *Contribution to the improvement of production or distribution of goods, promotion of technical or economic progress:* the contract ensures a long term, cost efficient operation of the relevant services. It also secures the continuous development of Integris to enable it to make the best offer available on the market. This is underlined by the fact that outsourcing is a generally applied solution for the provision of these services.
- b) *The consumers' fair share of the resulting benefit:* the Magyar Telekom Group won the tender for the provision of the services with the best offer. The Last Call Option constantly secures the highest available quality.
- c) *The indispensability of the restrictions:* the exclusivity is justified by the benefits of the uniform provision of these closely connected services and the unambiguous settlement of responsibilities. The contractual penalty, though constitutes a hindrance of the termination of the non compete clause, is considered proportional to the advantages enjoyed by the Rába Group.
- d) *The lack of possibility for the elimination of competition:* taking into account the actual size of Integris and the relatively low importance of the agreement within the overall market there is no possibility for the exclusion of competition in respect of a substantial part of the products in question as the high market share

in private branch exchange derives not from the significance of the agreement itself but from the market power of Magyar Telekom, the owner of Integris.

The analysis of the fulfilment of Article 81(3) requires the investigation of the joint effect the present agreement has together with other agreements already concluded on the market. This analysis targeted only the market for private (automatic) branch exchange and other telecommunication services where the parties had a more considerable market share than on the two other relevant markets. Competitors submitted that on that market the conclusion of fixed term agreements was normal, mainly for 1-5 year periods. It was also clearly stated by the questioned firms that exclusivity was not common on the market. Only two similar agreements were concluded, namely between Siemens TraffiCOM and BKV (the public transport company of Budapest) and PanTel Technocom and MOL (the Hungarian oil company). In the views of the GVH even the cumulative effect of these agreements is insignificant on the market.

Taking into account the above circumstances the GVH terminated the proceedings and established that there was no ground for further action under Community law.

The parallel national proceeding was concluded by granting an individual exemption valid until the end of May 2006.