



GAZDASÁGI
VERSENYHIVATAL

Agreements of Hungaropharma under review

I. Facts of the case

- 1) Hungaropharma is a wholesaler of pharmaceutical products and operates in the whole territory of Hungary. It supplies all types of drugs and not confined for specific brands. It is not active in the retail level. Its turnover in 2007 was HUF 205 billion.
- 2) Hungaropharma has a share of [31-44] % on the market of wholesale of drugs in Hungary. The other major operators on this market are Phoenix Pharma [34-47]% and Teva Magyarország [9-16]%. There are other smaller wholesalers as well.
- 3) At the beginning of 2007 Hungaropharma decided to enter into strategic cooperation with pharmacies. It entered into agreement with [400-500] pharmacies, representing [18-25]% of retail supply. The agreements concluded contained the following provisions relevant for competition law.
 - a) Pharmacies undertook to order 80% of their needs from Hungaropharma.
 - b) Hungaropharma undertook to negotiate favourable conditions with producers to enable the contracted pharmacies to have coordinated promotion of drugs at least six times a year. Pharmacies undertook to maintain the prices established by Hungaropharma for these promotions.
 - c) Pharmacies undertook not to start individual promotions without the permission of the council of the members of the network.
 - d) Hungaropharma undertook to collect the orders of the pharmacies for non-pharmaceutical products and materials and thereby to get better prices for the members. It also offered to get favourable services (mobile phone subscriptions, car usage etc.) for the network members
 - e) Pharmacies offered their windows and other display surfaces suitable for advertisements for Hungaropharma for their joint sale for advertisements. Hungaropharma disposes over the use of these surfaces and uses the income for the purposes of the network.

- 4) The agreement was concluded for indefinite period and can be terminated by the end of the calendar years with a notice two months in advance. There were restrictions that the agreement was not subject to termination during the first two years after the initiations of the network.
- 5) The procedures were initiated under national competition law and later extended to EC law as well.
- 6) The council of the members of the network consists of 9 members, 4 delegated by Hungaropharma and 5 by the pharmacies.

II. Arguments of Hungaropharma

- 7) Hungaropharma submitted that the agreement meets the conditions of exemption. It emphasised:
 - That the network provides additional sources for pharmacies by reducing costs due to economies of scale and promotions.
 - Efficiencies are transmitted to customers in the form of lower prices and free services offered by the network members (e.g. medical examinations and tests on the spot).
 - Competition is fierce both in the wholesale and retail levels and other wholesalers also strive to establish networks and increase the level of services.
 - The maintenance of promotional prices does not mean fixed prices but rather a maximisation of the prices applicable.
 - The obligation to submit all individual promotions to the approval of the council of the members of the network serves the purpose that not promotions parallel to the jointly advertised ones could reduce the effectiveness of the uniform marketing campaign.

III.

Assessment of the agreement under EC 81

- 8) The agreement qualifies as a vertical agreement between the wholesaler Hungaropharma and the retailer pharmacies. Meanwhile beside its substantially vertical content, it also has horizontal aspects because:
 - a) the council of the members of the network can entail horizontal cooperation among the pharmacies and,

- b) Hungaropharma offers its contribution to the joint purchase of the pharmacies concerning non-pharmaceutical products and materials.
- 9) Despite the market share of Hungaropharma, which exceeds 15 per cent, it is not clear whether the agreements appreciably restrict competition under EC 81. It is the burden of the GVH to prove that such appreciable restriction is present.

Vertical agreements

Resale price maintenance

- 10) According to the agreement the pharmacies undertake to maintain the prices determined by Hungaropharma within the framework of the special promotions. The GVH considers that this provision actually entails established prices and not just maximum prices as contended by Hungaropharma. According to point 11(2) a) of the Notice of the European Commission on de minimis agreements (2001/C 368/07) such clauses restrict the freedom of the reseller to freely establish its reseller prices and irrespectively of its actual effects, such restrictions qualify as appreciable restrictions of competition within the meaning of EC 81.

Minimum quantity of drug purchases

- 11) According to the agreement the pharmacies undertake to purchase 80% of the drugs from Hungaropharma. This obligation does not qualify in the Notice as a serious infringement and therefore the appreciability of its actual and potential effects is necessary.
- 12) The threat of the obligation on competition is that the affected segment of retail sale will be inaccessible for the competitors of Hungaropharma. The more intense this effect, the greater Hungaropharma's share on the relevant market.
- 13) However despite its [31-44]% share on the relevant wholesale market, it cannot be ruled out that the agreement has no appreciable restrictive effects on the market.
- 14) The appreciability of the restrictive effects of the agreements depends on the share of the supplier and the extent the agreements cover the retail segment. Its temporal scope and the pharmacies' possibility to quit the agreement should also be taken into account. The longer the temporal scope and the more difficult to exit the market the

more likely it is that the agreement would appreciably restrict competition as it captures the purchaser and restricts its possibility to accept better offers from competing wholesalers.

- 15) The agreement covers 80% of the [18-25]% of the retail market so it is considered that it does not have an appreciable effect on competition. Its temporal scope (due to the right to exit by the end of each year with a notice of two months in advance) is also an indicator that the restrictive effects are less substantial.
- 16) The effects of the agreements may however be reinforced by the parallel effects of similar networks. Such effects however were not identified as the network of PharmaNord does not use such limitations on purchases.

The usage of the advertising surfaces

- 17) This provisions qualifies as an exclusive supply agreement under regulation 2790/1999/EC on the block exemption of vertical agreements, irrespectively whether Hungaropharma would use or resale them.
- 18) According to Article 3(2) of the regulation such agreements are exempted if the purchasers share does not exceed 30% on the relevant market. As the agreement covers only [18-25]% of the existing pharmacies, even if the market were defined as “advertising in pharmacies”, Hungaropharma’s share would not exceed the threshold established by the BER.

Horizontal restrictions

Joint purchasing

- 19) The fact that Hungaropharma undertakes to purchase non-pharmaceutical products and materials on behalf of the pharmacies has the same effect should these pharmacies entered into a horizontal agreement on joint purchasing. Though such cooperation establishes a single purchasing price, it does not qualify as a hard-core restriction under point 11.1 a) of the de minimis notice.
- 20) Besides, the GVH considers that this clause has no appreciable effect on competition. The products and materials affected by it are not specific to pharmacies, but used all over the business sphere. It is most likely that the joint quantity to be

jointly ordered by pharmacies would not reach 10% of the quantity sold on the market. It was therefore presumed that this agreement is covered by the de minimis notice.

Prohibition of individual promotions

- 21) According to the agreement, in order to increase the efficiency of the joint promotions, pharmacies are allowed to start their own, individual promotions if the council of the members of the network authorises them. This is not an open restriction of sales prices among competitors, however it does affect the pricing policy of the pharmacies as it reduces their possibilities to advertise their own price reductions as „promotions”, and therefore reduces the efficiency of such price reductions, and therefore the willingness to provide such reductions as well.
- 22) The sharing of information on individual promotions may also have restrictive effects on the market.
- 23) As the share of the pharmacies exceeds the 10 per cent established by the notice on de minimis agreements, it is considered that this clause of the agreement can appreciably effect competition and therefore contravenes EC 81.

Assessment of EC 81(3)

- 24) The GVH does not refute that the agreement has efficiency-enhancing effects and that consumers receive a fair share from these effects.
- 25) However it is considered that two clauses of the agreement do not meet the criteria of proportionality.
 - a) First, it is agreed that the application of an individual promotion parallel to an ongoing joint promotion may have negative effects on the joint promotion itself, however it is considered that the restriction of individual promotions in periods when there are no joint promotions is a restriction that is not required for the envisaged objective.
 - b) Second, it is considered that it is not necessary for the efficiency of the joint promotions to establish the prices applicable during the promotion as a single price maximisation would suffice to ensure that no pharmacies members to the network apply prices higher than the advertised.

Application of EC 81

- 26) Based upon the above considerations, the GVH considers that two clauses infringe EC 81(1) and can not be considered as exempted under (3). These are
- the obligation to maintain the promotional prices, and
 - the obligation to submit all individual promotions to the approval of the council of the members of the network, irrespectively of the fact that during the affected period, no parallel joint promotions are envisaged.
- 27) These two clauses are declared null and void. No fines were imposed.

IV.

Application of the national provisions

- 28) The GVH reached the same conclusions under the applicable national provisions.