

COMPETITION BRIEFING: Special Edition

## New Era for Vertical Agreements in the EU: Revised VBER and Guidelines

This Briefing provides an overview of the main changes brought about to the application of competition rules to vertical agreements by the new VBER and accompanying Guidelines, which aim to provide market players with clearer and up-to-date rules, having regard to the increasingly important role of e-commerce in the distribution of goods and services

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#### A. Introduction

1. The new Vertical Block Exemption Regulation 720/2022 (VBER) and the accompanying Vertical Guidelines (the Guidelines) were adopted by the European Commission on 10 May 2022 and entered into force on 1 June 2022. The revised VBER and the accompanying Guidelines are designed to regulate arrangements between businesses operating at different levels of the supply chain, such as a supplier and a buyer.
2. The adoption of the revised rules applicable to vertical agreements has arisen as a corollary to the developments in the market dynamics. The rapid growth of e-commerce,

even more so during the Covid-19 era, the prevalence of online platforms as a marketing and distribution channel, the increasing use of non-traditional distribution models, such as dual distribution, as well as the need to address sustainability concerns, resulted in the introduction of revised rules under the new VBER.

3. The updated provisions are effective as of 1 June 2022, with a one-year transition period (until 31 May 2023) for existing arrangements to be aligned with the new rules. They will be valid for a maximum of 12 years and will be assessed by the European Commission after they have been in place for 8 years.
4. The revised VBER continues to provide a safe harbor to vertical agreements where the parties to the agreement have each a market share that does not exceed 30% and the agreement does not contain any so-called hardcore competition restriction. The scope and application of competition restrictions has, however, been revised to take account of evolving market conditions and practices, especially e-commerce.
5. An overview of the most important changes brought about by the new VBER are presented under Sections B-K below.

#### B. Clarifications on Existing and New Distribution Systems

1. The new VBER adds flexibility to existing distribution systems.
2. As regards exclusive distribution, it provides for a form of “shared exclusivity”, allowing suppliers to appoint a maximum of 5 “exclusive” distributors for a given territory or customer group, compared to the single exclusive

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distributor allowed under the former regime.

3. Under the revised rules, the active sales restriction to the territory or customer group exclusively allocated by the supplier (or reserved for itself) can be imposed on all other distributors of the supplier, and not just on other exclusive distributors. The supplier can equally require its distributors to pass-on the active sales restriction to their direct (immediate) customers, something which was expressly excluded under the previous rules.
4. As regards selective distribution, it benefits from enhanced protection under the new VBER, with suppliers having the possibility to prevent all their distributors (wherever located and whether part of an exclusive or selective distribution system or free distributors) from making sales, both active and passive, to unauthorized resellers located within the selective distribution territory. This restriction can be passed-on further down the distribution chain to customers of the distributors, in order to ensure effective protection of the network.

## C. Active and Passive Sales

1. Under the new regime, the notions of active and passive sales have been updated to take account of e-commerce developments:
  - a. The setting up of an online store or the operation of a website is a form of passive selling. The same applies in cases where a customer opts to be kept automatically informed by the seller and this leads to a sale. Similarly, the use of search engine optimization tools, or techniques to improve the visibility or ranking of the online store in search engine results, or offering an app in an app store, are forms of passive sales.
  - b. Conversely, the offering of a language option in the online store other than the one commonly used in the distributor's territory (and other than English) is a form of active selling.
  - c. Likewise, while online advertising addressed to customers located in the distributor's territory, without the distributor being able to restrain this advertising from being seen by customers in other territories or customer groups as well, is a form of passive sale, if such general advertising is made in a language other than that commonly used in the distributor's territory (English excluded), this may correspond to active selling by the distributor.
  - d. Also, establishing an online store with a top-level domain corresponding to a territory other than the one in which the distributor is established is a form of active selling, whereas offering an online store with a generic and non-country specific domain name qualifies as a passive sale.
  - e. Participation in public or private procurement procedures always constitutes a form of passive selling.

## D. Dual distribution

1. Due to the extended use of dual distribution by suppliers - whereby the suppliers also directly sell to end customers in direct competition with their distributors - the updated rules extend the dual distribution exemption to non-reciprocal vertical agreements also entered into by wholesalers and importers. In particular, under the new rules, not only the suppliers that are at the same time manufacturers may benefit from the VBER, but also those that are wholesalers or importers, provided that the vertical agreements in place do not contain hardcore competition restrictions.
2. On the other hand, to ensure no unwanted (or unwarranted) information exchange takes place between the supplier and the buyer in this case, the exception of the VBER shall only apply where the information exchanged is both:
  - a. directly related to the implementation of the vertical agreement; and
  - b. necessary to improve the production or distribution of the contract goods or services.

Therefore, depending on the particular model of distribution in place, technical information relating, for example, to the use and maintenance of the contract goods or services, logistical information concerning the inventory, stocks and returns, as well as aggregated information relating to customer purchases, preferences and feedback, may fall within the scope of the exemption.

3. On the other hand, according to the non-exhaustive list set out in the revised Guidelines, information on future prices, identified end-users and products sold by the buyer under its own brand will not, in principle, be considered as directly related to and necessary for the distribution of the contract goods or services and will not be exempted if exchanged between a supplier and a buyer in dual distribution.

## E. Online Intermediation Services/ Online Platforms

1. The revised VBER includes a new definition of "online intermediation services" as those services that are provided for remuneration, at a distance, by electronic means and at the services' recipient's request, which, for the purposes of the VBER, allow undertakings to offer goods or services:
  - a. to other undertakings in order to facilitate the initiating of direct transactions between those undertakings, or
  - b. to final consumers in order to facilitate the initiating of direct transactions between those undertakings and the final consumers.
2. Examples of online intermediation services include marketplaces, app stores and price comparison tools.
3. With respect to online intermediation services, the VBER expressly provides that, in a dual distribution scenario, vertical agreements between competitors will not be

covered by it where the online platform provider, besides hosting third-party resellers, also sells the intermediated goods or services on its own behalf.

## F. Dual pricing and Non-Equivalence Clause

1. The new VBER has introduced an approach that acknowledges the differences in the characteristics between offline and online sales. Under the previous regime, charging higher wholesale prices for products sold online was considered as a hardcore competition restriction aimed at unjustifiably limiting online (passive) sales (principle of equivalence). Under the new rules and in response to the developments resulting from the growing online platform economy, the differentiation of wholesale prices between brick and mortar and online stores - known as dual pricing - is no longer prohibited given the asymmetry of costs and investments between offline and online sales.
2. However, where the difference in the wholesale price is intended to prevent the effective use of the internet by the distributor in order to sell in a particular territory or customer group, a hardcore restriction is triggered. This would be, in particular, the case where this difference makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the distributor for sale online.
3. Likewise, suppliers using a selective distribution system are no longer obliged to impose on their authorized distributors selling online criteria that are "overall equivalent" to those applicable to sales by brick and mortar stores.

## G. Non-compete Obligations

1. The new VBER largely follows the previous regime concerning non-compete clauses in vertical agreements, including single branding. Hence, a single branding obligation imposed on the distributor in excess of 5 years will still not be exempted under the VBER. If tacit renewal of the agreement beyond 5 years is provided for, the distributor must be able to effectively renegotiate or terminate the agreement at 5 years with a reasonable period of notice and at reasonable cost to benefit from the VBER.

## H. Parity Obligations

1. These clauses, also known as Most-Favored Nation (MFN) clauses, require a seller to offer its goods or services to another party on no less favorable terms than those offered to other sales/marketing channels. The key substantive change introduced by the new VBER is a prohibition of across-platform retail parity obligations, meaning that retail parity clauses imposed by platforms relating to the conditions offered by the buyer on other platforms are not

exempted. Therefore, these so-called "wide parity obligations" that require a party that sells through an online platform not to sell its products on better terms on any competing platform, are not covered by the VBER.

2. On the contrary, "narrow retail parity clauses", which refer to the application of equivalent terms on direct sales through the buyer's own website, continue, in principle, to benefit from the block exemption. The reason is that such narrow parity obligations can result in significant efficiencies by reducing for example the free riding by sellers on investments made by a platform.

## I. Hardcore and Online Sales Restrictions

1. The new VBER approaches the topic of hardcore restrictions by inserting provisions related to the new digital era. Restrictions contained in vertical agreements, either direct or indirect, having as their object the prevention of buyers or their customers from effectively using the internet to sell their products, are considered as hardcore. This provision extends to both direct and indirect restraints concerning online sales and advertising channels, such as search engines or price comparison services.
2. In particular, the following are considered as hardcore online restrictions:
  - a. a direct prohibition to use the internet to sell the contract goods or services;
  - b. a requirement on the buyer to terminate consumers' online transactions where their credit card data reveals an address outside the buyer's "territory";
  - c. a prohibition on the buyer from establishing or operating one or more online stores;
  - d. a requirement of prior approval from the supplier for each individual online sale; and
  - e. a prohibition on the buyer from using the supplier's trademarks on its own online store.
3. Additionally, restricting the buyer's ability to use an entire online advertising channel, such as search engines or price comparison tools overall, or to use the supplier's brand names to advertise on such tools, is considered to limit the effective use of the internet by the buyer and is therefore prohibited.
4. However, restrictions related to the manner in which the contract goods or services will be sold online and aimed at ensuring minimum quality standards for online sales may be legitimate. In this realm, besides requirements imposed by the supplier on the buyer relating to the quality of the services, such as the display of the products online, or restrictions in the use of a particular online advertising platform, the European Commission has taken into account the case-law of the Court of Justice, notably in the *Pierre Fabre* and *Coty* cases, as well as its own findings in *Guess*.

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Consequently, online sale restrictions which permit the buyer to operate its own online store and to advertise online benefit from the VBER. A direct or indirect ban on the use of online marketplaces is allowed as it relates to a particular online sales channel and does not amount to a general prohibition to sell online.

5. In addition, requirements such as the operation of an offline store and a minimum absolute volume of sales offline (but not as a proportion of total sales) to ensure the efficient operation of the offline store can benefit from the safe harbor.

## J. Resale Price Maintenance (RPM)

1. The approach of the new provisions on RPM remains unchanged. The new Guidelines address and clarify further the notion of Minimum Advertised Prices (MAPs), whereby a prohibition on the distributor to advertise prices below a certain level set by the supplier constitutes indirect RPM which as such is not allowed. MAPs may however come under the scope of Article 101(3) TFEU and benefit from individual exemption where it can be shown that they are used to prevent a particular distributor that regularly sells below the wholesale price, to the detriment of the supplier's brand image, from using the product of the supplier as a loss leader.

## K. Sustainability

1. In line with the recently issued draft revised Guidelines on Horizontal Cooperation Agreements, the Guidelines accompanying the new VBER address sustainability issues as well.

2. While vertical agreements that pursue sustainability objectives, such as the limitation on the use of natural resources, the combat of climate change, or waste reduction, do not constitute a distinct category and are subject to the same rules, these agreements, to the extent they do not fall within the scope of the block exemption, may benefit from an individual exemption in case efficiencies are recognized. In this respect, the new accompanying Guidelines mention for example that non-compete obligations exceeding 5 years can benefit from an individual exemption, if they are necessary to enable green energy investments. In addition, in the context of selective distribution, suppliers may use qualitative criteria for the selection of their distributors that aim at sustainability objectives, such as a requirement to provide recharging services or recycling facilities in the outlets of distributors.

## L. Conclusion

1. The new VBER, as further elaborated upon by the accompanying Guidelines, aims at consolidating past experience and adapting competition rules to deal with evolving distribution formulas and the increasing importance of the online platform economy.
2. Given the transition period of one year until 31 May 2023, companies operating within the EU must timely assess their distribution practices to bring them in line with the new reality of things.
3. Vertical agreements that were covered by the previous block exemption regime will continue to benefit from the safe harbor at least during the transition period.

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