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European Union: Updated rules on vertical agreements

Oliver Heinisch and Michael Hofmann
Sheppard, Mullin, Richter & Hampton LLP
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In summary

This article provides key takeaways from the European Commission's recent review of its Vertical Block Exemption Regulation including Vertical Guidelines. The new rules were adopted on 10 May 2022 and entered into force on 1 June 2022, and bring important amendments to the current rules by partly narrowing the safe harbour but also allowing for more flexibility.

Discussion points

- Revised rules of the VBER
- Revised sections of VBER Guidelines
- Update on VABEO in UK

Referenced in this article

- CJEU cases *Coty Germany GmbH v Parfümerie Akzente GmbH*;*Metro I, Metro SB-Großmärkte v Commission*; *Pierre Fabre Dermo-Cosmétique SAS*
- CMA decisions *Digital Piano and Digital Keyboard*; *Dar Lighting*)
- Commission decisions *E-books*; *E-book MFNs and related matters (Amazon*); *Video Games*
- Czech Office for the Protection of Competition, decision of 4 January 2022 (*Garland*)
- French Competition Authority, decision *Lego*
- German Federal Cartel Office, decisions *Bose*; *Gardena*; *Bosch Siemens Hausgeräte*
- Italian Competition Authority, Case No. I842 (*Amazon/Apple*)

VBER 2010 and Vertical Guidelines 2010

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between companies that significantly restrict competition unless they can be exempted under article 101(3) TFEU. The European Commission (the Commission) is empowered to identify categories of agreements that normally satisfy the exemption conditions in article 101(3) TFEU, and the Commission has identified exclusive supply agreements as part of that category as early as 1967. [1] With the modernisation of the antitrust enforcement rules and procedures in 2004 and the abolishment of the notification requirements, block exemptions and related guidelines became the legal framework for the industry to self-assess their agreements.

The outgoing Vertical Block Exemption Regulation [2] (the VBER 2010) exempted agreements between manufacturers and distributors from the article 101(1) TFEU prohibition provided their agreements did not contain hardcore restrictions and the parties to the agreement did not have market shares above 30 per cent. Hardcore restrictions include resale price maintenance (RPM), bans on passive sales and certain territorial restrictions. Although possible, they are considered unlikely to satisfy the general exemption under article 101(3) TFEU. In addition, the VBER 2010 identified that certain restrictions (eg, non-compete clauses lasting more than five years) were excluded from the safe harbour and had to be assessed on an individual basis, while the remaining part of the vertical agreement could still benefit from the block exemption (if severable from the excluded clause). [3] The VBER 2010 was accompanied by the Guidelines on Vertical Restraints [4] (the Vertical

Guidelines 2010), which assisted with the interpretation of the VBER 2010 and the assessment of agreements outside the safe harbour. The regime on vertical agreements has generally worked well but an overhaul of the law was necessary to bring it in line with significant market developments over the past decade.

Consultation and review

On 9 July 2021, on its website for public consultation, the Commission published its Draft revised Vertical Block Exemption Regulation and its Draft revised Vertical Guidelines. [5] On 10 May 2022, the new Vertical Block Exemption Regulation (VBER) and the new Vertical Guidelines (the Vertical Guidelines) were adopted. [6] This was preceded by a lengthy evaluation phase with an open public consultation period from 18 December 2020 to 26 March 2021. This confirmed that the VBER 2010 and the Vertical Guidelines 2010 were useful tools that helped to reduce compliance costs for businesses. On the other hand, it also identified the need for improvement and the following sections discuss the key changes both to the VBER and the Vertical Guidelines.

New VBER and new Vertical Guidelines

The basic principle of the new VBER has remained unchanged. An agreement between supplier and buyer (vertical agreement) that meets the requirements of the VBER is 'exempted' and therefore permissible under antitrust law. The Commission has, however, made substantial changes both to clarify the wording and in terms of substance. The highlighted changes, on the one hand, give companies opportunities to implement tighter controls over their distribution systems (eg, passive sales, selective or exclusive distribution). On the other hand, they require more careful implementation, as is the case, for example, with dual distribution systems.

The interplay with other block exemptions [7] remains unchanged, and the Commission has decided against including agreements for the purchase, sale or resale of new motor vehicles into the scope of the VBER. Rather, the Motor Vehicle Block Exemption Regulation [8] covers these agreements separately. This Regulation is not further analysed in this article. The sale of spare parts and the provision of repair and maintenance services for motor vehicles, however, falls within the scope of the VBER. Such agreements only benefit from the VBER if, in addition to the conditions for exemption set out in the VBER, they comply with the additional requirements of the Motor Vehicle Block Exemption Regulation. [9]

The VBER 2010 expired on 31 May 2022, with the new regime entering into force on 1 June 2022 and in effect until 31 May 2034. There will be a transitional period for companies to adapt their vertical agreements to the new regime, which will run from 1 June 2022 to 31 May 2023. [10] However, vertical agreements entering into force as of 1 June 2022 need to comply with the new rules immediately.

Unilateral conduct

It is nothing new that unilateral conduct is not block-exempted by the VBER and, in case of dominance, has to be assessed under article 102 TFEU. However, the Vertical Guidelines highlight in paragraphs 52 to 55, as an important reminder, that the adoption of a unilateral policy or the imposition of sales terms and conditions by one party may well constitute an agreement where the other party tacitly accepts them. [11]

Dual distribution

Dual distribution encompasses situations where a supplier sells its goods or services at several levels of trade through independent resellers (such as retailers), but also directly to end-customers in competition with those resellers either through their own online shops or through marketplaces. [12] Dual distribution has become a common occurrence and been accelerated as a result of digitilisation and more recently by the pandemic. In response to consumer demand, omnichannel retailing is further expanding this concept and is becoming the predominant way to approach markets.

Initially, the Commission proposed the introduction of a new market share threshold of 10 per cent for the dual distribution, which limited the exception to agreements where the parties' aggregate market share in the relevant market at retail level did not exceed 10 per cent. [13] Following significant push-back from stakeholders and an additional consultation relating to specific guidance on information exchange in the context of dual distribution, this threshold was not included in the final law. Further details on related changes in the Vertical Guidelines are set out below. Despite this concession, the Commission can be expected to rigorously enforce any concerns of horizontal coordination in the context of dual distribution and the burden will be on companies to show that their set-up benefits from the block exemption.

Dual distribution under the VBER 2010 and the changes

The VBER 2010 and the Vertical Guidelines 2010 were light on any substance and guidance on dual distribution. The VBER 2010 specifically provided that dual distribution was covered by the safe harbour for vertical agreements under the two exceptions provided in article 2(4) VBER 2010. These exceptions concerned non-reciprocal agreements, namely, agreements in which the buyer of the contract goods or services does not also supply the contract goods or services or competing goods or services to the supplier. The first exception in article 2(4)(a) VBER 2010 covered situations of dual distribution, in which the manufacturer of particular goods also acts as a distributor in competition with independent distributors. The second exception covered similar situations of dual distribution but for services.

The new VBER retains the dual distribution exception in article 2(4)(a) and (b) but extends it to wholesalers and importers. The upstream level comprises a supplier who is a manufacturer, importer or wholesaler and also sells goods or services as an importer, wholesaler or retailer at the downstream market, whereas the buyer sells goods or services at the downstream level as an importer, wholesaler or retailer. As long as the buyer does not compete with the supplier on the upstream market where it buys the contract goods or services, dual distribution may be exempted.

Pursuant to article 2(6), online intermediation services such as online platforms no longer benefit from the safe harbour if those providers supply their goods and services in competition with businesses to which they also provided intermediation services and, hence, have a hybrid function. The stated reason is that providers of online intermediation services with a hybrid function may have an incentive to favour their own sales and the ability to influence the outcome of competition between firms that use their online intermediation services. The Vertical Guidelines provide that anticompetitive effects might be unlikely if the provider of intermediation services has only recently entered the market and, therefore, has no market power. This reflects a recent case in Italy where restrictions in the context of dual distribution and hybrid online intermediation services were among others subject to a total fine of €203 million imposed by the Italian Competition Authority on Amazon and Apple. Among other findings, the Italian Competition Authority held that providers of online intermediation services with a hybrid function cannot benefit from the VBER and that the VBER did not apply to restrictions relating to the conditions for the provision of online intermediation services to third parties. [14]

Vertical Guidelines and exempted information exchange

In response to the negative feedback and demand for further guidance on the draft VBER regarding the 10 per cent threshold, the Commission published and consulted on a draft new section on information exchange (the Draft Guidance) in dual distribution. [15] This Draft Guidance included a non-exhaustive list of examples of permissible and prohibited information exchange.

The Draft Guidance has been included – albeit with some changes – into the final version of the VBER and the Vertical Guidelines. Whether the exchange of information between a supplier and a buyer in a dual distribution context would be covered by the VBER depends, pursuant to article 2(5) VBER, on two alternative conditions, namely, whether the exchange is either directly related to the implementation of the vertical agreement or whether it is necessary to improve the production or distribution of the contract goods or services by the parties. [16] Information exchange outside this scope is not block exempted. The Commission gives examples of types of information exchange in the Vertical Guidelines to facilitate the assessment. [17] While the examples below give some insight into the Commission's approach, in all types of information exchange cases there remains a considerable amount of uncertainty and the overall context will be important for the assessment:

- technical information relating to registration, certification, handling, use, maintenance, repair, upgrading or recycling of the goods (notably for compliance with regulatory measures), and information that enables the supplier or buyer to adapt the contract goods or services to the requirements of the customer;
- logistical information relating to the production and distribution of the contract goods or services, including information relating to production processes, inventory, stocks, sales volumes and returns;
- information relating to the prices 'at which products or services are sold by the supplier to the buyer';
- supplier's recommended resale prices (RRPs) or maximum resale prices, 'provided that the exchange of such information is not used to restrict the buyer's ability to determine its sale price or to enforce a fixed or minimum sale price', without prejudice to what is stated below on actual prices;
- marketing information including on 'promotional campaigns and information on new products to be supplied under the vertical agreement'; and
- performance-related information, 'including aggregated information communicated by the supplier to the buyer relating to marketing and sales activities of other buyers of the contract goods/services (provided that this does not enable the buyer to identify the activities of particular competing buyers) and information relating to the volume or value of the buyer's sales of the contract goods or services relative to the buyer's sales of competing goods or services'.

In referencing the Horizontal Guidelines, [18] the Vertical Guidelines also provide a list of examples of information the exchange that generally do not fall within the scope of the block exemption and are considered problematic: [19]

- information relating to future prices 'at which the supplier or buyer intend to sell the contract goods or services downstream' (except in the context of a coordinated short-term low price campaign);
- information relating to identified end-users of the contract goods or services, 'unless the exchange of such information is necessary to enable the supplier or buyer […] to adapt the contract goods or services to the end-user's requirements, to

grant the end-user special conditions, including under a customer loyalty scheme, or to provide pre- or after-sales services, including guarantee services or to allocate customers under an exclusive distribution agreement'; and
- information relating to goods sold by a buyer under its own brand name 'exchanged between the buyer and a manufacturer of competing branded goods, unless the manufacturer is also the producer of the own-brand goods'.

While the types of information exchanges detailed above do not benefit from the block exemption, they do not necessarily infringe article 101 TFEU. The burden of proof rests on the parties that intend to benefit from the VBER. It is, therefore, essential that, if information is exchanged that does not benefit from the VBER, companies take precautions and implement steps to minimise the risk of horizontal coordination. The Commission provides the following examples:

- exchange of information in aggregated form only;
- delay between generation of the information and the exchange; and
- technical and administrative measures such as firewalls to ensure that information is kept separate between teams dealing with up and downstream activity.

The Commission makes clear, however, that the use of such precautions will not bring within the scope of the exemption of the VBER information exchanges that would otherwise fall outside the scope of that exemption. [20]

Exclusive, selective and free distribution

Article 4(b) to (d) of the VBER provide a list of hardcore restrictions and exemptions in the context of exclusive selective and free distribution systems. The revised rules provide more clarity on the interplay between these distribution systems by enabling their more effective coexistence. The revised definition of active and passive sales is crucial for territorial or customer restrictions in all of these systems, and which will be discussed first.

Active and passive sales

A welcome and notable change introduced by the VBER brings the definition of active and passive sales more in line with market realities. This reflects the fact that the internet is no longer a nascent rather an established sales channel. The VBER now defines active sales in article 1(l) as actively targeting customers, either offline or online, by any means of direct communication or through targeted advertising and promotion including 'price comparison services or advertising on search engines targeting customers in specific particular territories or customer groups'. Such active sales also include operating a website with a top-level domain corresponding to particular territories, or offering on a website language options that are commonly used in particular territories, where such languages are different to the one commonly used in the distributor's trading area. Passive sales are defined as sales in response to unsolicited requests from individual customers (article 1(m)).

The key change is that online shops with a domain name or language options that vary from those commonly used in the distributor's territory are now considered a form of active selling within another territory. However, as clarified in the Vertical Guidelines, offering an English language option on a website or online shop is not considered to indicate that the distributor's activities are directed at English-speaking territories, as the English language is used throughout all EU member states. [21] It is worth noting in this context that the legal assessment necessarily has to take into account rules set out in the Geoblocking Regulation (EU) 2018/302, which prohibits discrimination against consumers based on their nationality, place of residence or place of establishment when they buy goods or services. [22]

Under the previous regime, a supplier was only able to prohibit certain active sales by its direct buyers when those active sales restrictions were block exempted in the context of an exclusive, selective and free distribution system. This now also applies to obligations that pass on this requirement to the buyer's customers or sub-distributors, if they have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier. [23] This has the aim of protecting investment incentives of exclusive distributors, allowing for a more flexible approach towards the co-existence of multiple distribution structures and giving the supplier more control over its distribution system.

Permissible active and passive sales restrictions are considered in the following paragraphs and relate to exclusive distribution systems (article 4(b) VBER), selective distributions systems (article 4(c) VBER) and distribution systems that are neither exclusive nor selective (article 4(d) VBER).

('Shared') exclusive distribution

Exclusive distribution remains block-exempted under the conditions set out in article 4(b) of the VBER. The concept of 'shared exclusivity' is introduced and allows a supplier to appoint up to five other exclusive distributors in a particular territory or for a specific customer group. Above that number, the Commission sees an increased risk that the exclusive distributors may freeride on each other's investments. [24] Under the VBER 2010, exclusive distribution was only permitted to one distributor per exclusive territory. The VBER's specific limit of five distributors was probably prompted by criticism during the consultation about the lack of legal certainty of the then-proposed rules. Some flexibility on the basis of a proportionality test would have been a more suitable approach for suppliers to organise their distribution system. While suppliers are, on the one hand, able to define the scope of the territory at their discretion, [25] the five-distributor limit is fixed. Five distributors may well be little in one of the bigger EU member states, or even in a large territory, and the risk of freeriding on each other's investments seems less apparent when compared to a smaller member state or territory. Cross-supplies between more than one exclusive distributor within an exclusive territory for a specific customer group cannot be restricted. These distributors can, however, be protected from active sales from other buyers of the manufacturer. If the supplier has reserved the territory or customer group for itself, the Vertical Guidelines provide that the supplier must inform all its distributors. This does not mean, however, that the supplier needs to be commercially active in the reserved territory or in relation to the reserved customer group. Rather, it is sufficient if the supplier wishes to allocate other distributors for those territories or customer groups in the future. [26]

A new exemption applies to restrictions on active or passive sales by exclusive distributors to unauthorised distributors in territories where the manufacturer operates a selective distribution system. This brings additional legal certainty to operating selective and exclusive systems in tandem, without one affecting the effectiveness of the other.

The VBER also allows the restriction of the exclusive distributor's ability to actively and passively sell components to customers that would manufacture competing goods to those of the supplier.

Selective distribution

Within a selective distribution system, a supplier sells the goods or services only to authorised distributors selected on the basis of specified criteria, and these authorised distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier. Under the VBER, selective distribution systems are granted enhanced protection. The following clarifications have been introduced.

Under a new exception from the hardcore list, article 4(c)(i)(1) VBER allows suppliers to restrict active sales by selective distributors or their customers to an exclusive territory or customer group. This exemption allows the supplier to protect its exclusive distribution system operated in another territory against sales from buyers in a selective distribution system.

Pursuant to a new rule in article 4(c)(i)(2) VBER, suppliers are allowed to restrict a selective distributor's customers from making active or passive sales to unauthorised distributors located within the selective distribution territory. This exemption is similar to the exception previously contained in article 4(b)(iii) VBER 2010. However, the new rules now also allow the suppliers to pass the restrictions on to the buyer's customers.

A new article 4 (c)(i)(5) allows for restrictions on component sales to customers that would use them to manufacture the same type of products that are produced by the manufacturer.

A noteworthy example of a possible additional exemption from the prohibition of restriction of cross-supplies between authorised distributors relates to restrictions of active sales of cross-supplies by wholesalers in the territories of other authorised wholesalers. The Vertical Guidelines list an example where a restriction might, under certain circumstances, fulfil the conditions of article 101(3) TFEU, where that restriction is required to prevent freeriding and protect investment by the wholesaler in its territory, and it is not practical to specify the required promotional activities as a contractual obligation in the agreement. [27] While freeriding is a real concern, parties should consider carefully whether outright active sales restriction is the only solution and less restrictive means are unavailable.

The Vertical Guidelines also provide further clarifications on the *Metro* criteria, [28] which, once they are fulfilled, generally cause the (qualitative) selective distribution system to be considered as falling outside of article 101(1) TFEU. The Vertical Guidelines clarify that such qualitative criteria may also refer to the achievement of sustainability objectives (eg, climate change or protection of the environment). Particularly with regard to the first *Metro* criterium, which relates to the necessity of a selective distribution system due to the nature of the goods or services, it is highlighted that a selective distribution system might be necessary, for instance, for high-quality or high-technology products. The Vertical Guidelines also state, with reference to the *Coty* judgment, [29] that operating a selective distribution system may also be necessary for luxury goods. [30] The quality of such goods may also result from the aura of luxury surrounding them.

Importantly, the Vertical Guidelines continue to state that the VBER exempts qualitative and quantitative selective distribution agreements that do not satisfy the *Metro* criteria if the 30 per cent market share threshold is not exceeded and the agreement does not contain hardcore restrictions, even where combined with other non-hardcore vertical restraints. This is not new, but with the wording in paragraph 152, the Commission no longer refers to the characteristics of the product themselves as reason for a possible withdrawal of the block exemption (which requires an active step by the Commission or a national competition authority). [31] Rather, the focus is on whether the selection criteria can sufficiently be linked to the characteristics of the product or whether they are not necessary to improve the distribution of the product, which simplifies the assessment easier.

Free distribution

The VBER also introduces a new section in article 4(d) on free distribution in which the supplier operates neither exclusive nor selective distribution models. Under this model, the supplier can impose restrictions on its distributors, again including the latter's customers, to protect territories in which it has set-up an exclusive or selective system.

Online sales restrictions

The VBER and Vertical Guidelines include guiding principles for the assessment of online restrictions drawn from recent case law of the Court of Justice of the European Union (CJEU). [32] A new article 4(e) VBER provides that restrictions that prevent the effective use of the internet by the buyer or its customers to sell the contract goods or services are hardcore restrictions. The Vertical Guidelines clarify that one or more restrictions of online sales or online advertising in a vertical agreement that de facto prohibit the buyer from using the internet to sell the products has, at the very least, the object of restricting passive sales to end-users. [33]

The Vertical Guidelines provide examples of obligations that (indirectly) have the object of preventing the effective use of the internet. These include requiring the buyer to prevent customers located in another territory from viewing its website or online store; a requirement that the buyer shall only sell in a physical space or in the physical presence of specialised personnel; a requirement that the distributor shall seek the supplier's prior authorisation for selling online; or prohibiting the buyer from using an entire online advertising channel, such as search engines or price comparison services. [34] On the other hand, the Vertical Guidelines also clarify that the supplier may impose requirements on the buyer relating to the manner in which the products are to be sold online, including (1) the requirement to ensure the quality or particular appearance of the buyer's online store; (2) requirements of the display of the products; (3) the direct or indirect ban on the use of online marketplaces; (4) a requirement that the buyer operates one or more brick and mortar shops; and (5) a requirement that the buyer sells a minimum absolute amount of the contract goods or services. [35]

The criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on bricks-and-mortar shops. [36] Suppliers operating a selective distribution system are now able to differentiate between online and offline channels on the basis of the different characteristics of both channels as long as the lack of equivalence in the selection criteria does not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers. This flexibility is also applied to dual pricing cases, which are discussed in more detail below. The abandonment of the strict equivalence between offline and online sales will enable physical distributors and bricks-and-mortar shops to reduce the risk of freeriding and increase the chances to recoup their marketing expenditure. This is also an important step towards protecting city centres' high street shops and towards a rebalancing of the importance of both online and offline channels.

As regards marketplace bans, the Vertical Guidelines define market places as online platforms that connect merchants and potential customers with a view to enabling direct purchases. [37] The Vertical Guidelines clarify that suppliers may prohibit buyers from selling products or services via online marketplaces, regardless of the type of product or service. [38] This is because such restrictions generally do not prevent distributors from effectively selling via the internet given that sales over online marketplaces represent only one method of selling online. Only a platform ban that directly or indirectly prevents the actual or effective use of the internet for online sales will constitute a hardcore restriction. [39] On the other hand, a ban on price comparison tools such as price comparison websites or apps is not exempted as such restrictions are considered to prevent the buyer from using an entire online advertising channel, which is considered a hardcore restriction within the meaning of article 4(e) VBER. [40] The ability to advertise allows a distributor to attract potential customers to its website, which increases price transparency and intensifies intra-brand – and potentially inter-brand – price competition between retailers.

RPM

RPM remains a hardcore restriction, whether implemented directly or through indirect means. The Commission provides some examples where certain arrangements may outweigh possible anticompetitive effects, but these remain exceptions and a case-by-case analysis is required.

Article 101(1)(a) TFEU prohibits agreements that 'directly or indirectly fix purchase or selling prices or any other trading conditions'. RPM is specifically referred to in article 4(a) of the VBER, which qualifies as a hardcore restriction a 'restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.'

In the past, decisions regarding RPM were mainly adopted by national competition authorities. [41] On 24 July 2018, the Commission also adopted four decisions regarding RPM and fined consumer electronics manufacturers for imposing fixed or minimum resale prices on their online retailers in breach of EU competition rules. [42] The Commission found that the infringing parties intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking their supplies. Many, including the biggest online retailers, used pricing algorithms that automatically adapt retail prices to those of competitors.

The Vertical Guidelines also emphasise that agreements that amount to RPM are not per se infringements, albeit an infringement by object of article 101 TFEU, and that undertakings may bring forward efficiency justifications under article 101(3) TFEU. [43] The VBER provides examples of such efficiency justifications as an enumerated list allowing for other justifications to be argued. Examples include when a manufacturer introduces a new product; RPM may be an efficient means to induce distributors to better take into account the manufacturer's interest to promote this product and to increase sales efforts. Also, fixed resale prices may be necessary to organise a coordinated short-term low price campaign. Efficiencies could also be claimed if RPM is used to avoid freeriding between retailers on pre-sales services, in particular in the case of complex products. [44] However, a shift towards a more effects-based approach in the VBER and the Vertical Guidelines has not occurred, [45] and the VBER does not provide significantly new guidance on when RPM can meet the efficiency defence under article 101(3) TFEU. Therefore, this remains an area of legal uncertainty and continues to require a facts-based analysis of the individual case.

The Vertical Guidelines highlight that RPM can be applied by indirect means, in particular referring to minimum advertised prices (MAPs), which prohibit the distributor from advertising prices below a level set by the supplier.' [46] The Vertical Guidelines state that although, in principle, MAPs leave the distributor free to sell at a price that is lower than the advertised price, they disincentivise the distributor from setting a lower sale price. [47] The VBER and the Vertical Guidelines therefore treat MAP as a form of RPM. In contrast, in the United States, MAP and RPM are considered to be different issues as, unlike an RPM agreement, a MAP policy is considered not to stop a retailer from actually selling below any minimum price. The Vertical Guidelines also clarify that RPM could lead to efficiencies under article 101(3) TFEU, in particular when a minimum resale price or MAP can be used to prevent a particular distributor from using the product of a supplier as a loss leader. [48]

Price monitoring, including through price monitoring software, does not, on its own, constitute RPM, but the Vertical Guidelines note that it increases price transparency in the market, which allows manufacturers and resellers to effectively track resale prices in their distribution network. The Vertical Guidelines recognise that these measures may enhance efficiency. [49] While this statement is helpful, price monitoring has featured in various recent cases [50] in which the monitoring tool was found to be used to identify and sanction deviations from RRPs by resellers. Thus, the context in which price monitoring occurs remains crucial for the assessment.

Dual pricing

Dual pricing is defined as a practice through which 'the buyer pays a different price for products sold online than for products sold offline.' [51] An agreement containing a dual pricing policy has so far been considered a hardcore restriction, [52] although it has been recognised that in some specific circumstances such an agreement might fulfil the conditions of article 101(3) TFEU. In particular, national competition authorities have investigated dual pricing cases affecting online sales. [53]

However, with the internet being an established sales channel no longer worthy of particular protection, the Commission changed its approach in the Vertical Guidelines. Paying a different price for products intended to be resold online than products to be resold offline is no longer regarded as a hardcore restriction. This safe harbour exception is justified 'as [dual pricing] may incentivise or reward an appropriate level of investments in online or offline sales channels, provided that it does not have the object of restricting sales to particular territories or customers.' [54] Importantly the difference in price should be related to the differences in the costs incurred in each channel by the distributors at the retail level.

Parity clauses

Price parity clauses (also known as MFNs) have been particularly used by online platforms to ensure that business users do not offer their products or services at lower prices or under better terms on other platforms or their own websites. These clauses have so far been block-exempted, but there has been inconsistent treatment of MFNs across the EU, which was predominantly the result of insufficient guidance at the EU level and lack of consistent case law (also due to the fact that many cases were settled by article 9 commitment decisions, eg, *Amazon e-books* [55] and *Apple e-books* [56]). The inconsistency stems from the different treatment of wide and narrow MFNs. Wide MFNs do not allow the supplier to offer, sell or resell the goods on competing platforms or competing intermediary services at more favourable prices. Narrow MFNs restrict the supplier from selling products or services directly to customers at lower prices (eg, through their own platform).

The VBER now explicitly deals with parity clauses and imposes stricter rules for online intermediary services. The list of expanded restrictions in article 5 VBER states that the block-exemption will not apply to 'any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end-users under more favourable conditions via competing online intermediation services' (article 5(1)(d) VBER). The VBER therefore excludes

MFN clauses that aim at limiting business users of a platform from selling goods or services under more favourable conditions via competing intermediation platforms (wide MFNs). The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. As a result, wide MFNs will now require an individual assessment under article 101 TFEU. [57]

All other types of parity obligations, including narrow MFNs, continue to be exempted under the VBER, provided that the platform and the supplier concerned each have a market share of less than 30 per cent. This includes, for example, MFNs at the retail level relating to the direct sales or marketing channels of suppliers of goods or services. [58] In practice, this also means that a buyer of online intermediation services could agree not to offer, sell or resell goods or services to end-users under more favourable conditions through its own sales channels.

Non-compete clauses

The VBER also contains new rules on non-compete clauses, in other words, obligations imposed on a buyer to purchase more than 80 per cent of its total demand for a specific product and its substitutes from one supplier. Under the VBER 2010, non-compete clauses with a duration of more than five years with an indefinite term were excluded from the safe harbour. This also covered the scenario in which a non-compete obligation was tacitly extended beyond a period of five years.

In contrast, the VBER and the Vertical Guidelines provide that non-compete clauses that are tacitly renewable beyond a five-year period would benefit from the VBER if the buyer can effectively switch to another buyer at the end of the five-year period. This would be the case if the buyer can terminate or renegotiate the agreement with the supplier with a reasonable notice period and at reasonable cost. [59]

UK Competition and Markets Authority's approach

As the Commission reviewed its approach to vertical agreements, so did the UK Competition and Markets Authority (CMA). In the aftermath of the Brexit, the UK retained the VBER under UK law, which remained in force until the end of May 2022. In parallel to the EU consultation, the CMA and the Department for Business Energy and Industrial Strategy (BEIS) launched their own consultation of the UK Vertical Agreements Block Exemption Order (VABEO). On 13 May 2022, the BEIS published [60] its response to the final consultation and a link to the final Order, which will come into force on 1 June 2022 and be in effect for six years, until 31 May 2028. The CMA also consulted on the VABEO Guidance, which will be adopted at a later stage. [61] As global companies will necessarily include the UK in their European sales strategy despite Brexit, some of the areas of divergences between the EU and UK vertical regimes are briefly highlighted.

A number of areas that in previous drafts suggested divergence between EU and UK law have now been brought in line with the VBER. These include the ability of exclusive and selective distribution restrictions to be passed on to customers of the buyer (article 8(3)(a), (4)(a), (5)(a) VABEO) and shared exclusivity (without a limitation to five buyers). Two noteworthy areas of divergence remain: with regard to dual distribution, the VABEO is more permissible than the VBER and does not identify information exchange as potentially limiting the exemption of dual distribution, nor does it exclude online intermediation services from the scope of the exemption.

Another area in which the VABEO does not follow the VBER concerns MFN clauses, where the VABEO takes a stricter approach. The VBER excludes wide MFNs from the scope of the block exemption. The VABEO lists wide parity obligations as hardcore restrictions in article 8(2)(f). In addition, the VABEO diverges from the EU position in relation to automatically renewable non-compete obligations beyond five years. The VABEO continues to exclude those non-compete obligations from the scope of the safe harbour.

It remains to be seen how the CMA will address some of those divergences in its Vertical Guidance. If they remain, they will be early signs of divergence between EU and UK law – albeit only slightly – and the fact that the EU and UK are not aligned could prove to create some new practical challenges to multinational companies, who will now need to consider two regimes where one existed previously.

Another area that should not be forgotten is the divergent approach in relation to the exhaustion of IPRs, which are an important factor in assessing restrictions on parallel trade between the EEA and the UK. The UK government has consulted [62] on this issue and decided to keep the regime that has been in place since 1 January 2021: the UK government considers UK IP rights to be exhausted if a product is placed onto the market of the EEA by the IP right owner or with their consent.

Products placed on the UK market do not, however, exhaust IP rights in the EEA. Absolute territorial restrictions, which are prohibited under European law within the EEA, will have to be reconsidered in the post-Brexit world in the context of parallel trade between the EEA and the UK.

Conclusions

The new VBER and Vertical Guidelines retain the structure and substance of the previous VBER, which provides for legal certainty. Certain rules have been clarified and readjusted, in particular with regard to the distinction of exclusive, selective and free distribution. In this regard, the new rules offer more flexibility for suppliers who intend to combine different types of distribution models and wish to oblige their distributors to pass-on sales restrictions to their customers. The VBER and the Vertical Guidelines also address hotly debated issues like dual distribution, dual pricing, MFN clauses and online sales restrictions. The next years will show how useful the clarifications and amended rules prove to be in practice. Companies have been given a more effective tool, but while the legal assessment of their vertical agreements will be facilitated, the assessment remains a complex exercise. The expected increase in EU and national enforcement cases will likely provide further guidance and, hopefully, more legal certainty. Markets will continue to develop over the next 12 years, which will show whether the Commission has crafted a flexible enough framework.

Notes

[1] Regulation No. 19/65/EEC of 2 March 1965 on application of article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 1965 533/36, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ 1999 L 148/1.

[2] Commission Regulation 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

[3] See further in the section 'Non-compete clauses', below.

[4] Guidelines on Vertical Restraints, OJ 2010 C 130/1.

[5] https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en#view-the-consultation-document.

[6] https://ec.europa.eu/competition-policy/antitrust/legislation/vertical-block-exemptions_en.

[7] Vertical Guidelines, para. 112: Regulation (EU) No. 316/2014 of 21 March 2014 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ 2014 L 93/17; Regulation (EU) No. 1217/2010 of 14 December 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ 2010 L 335/36; Regulation (EU) No. 1218/2010 of 14 December 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, OJ 2010 L 335/43.

[8] Commission Regulation (EU) No. 461/2010 of 27 May 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ, 2010 L 129/52. In this regard, the Commission has started the policymaking stage of the review, to decide by 31 May 2023 whether to renew the current Motor Vehicle Block Exemption regime, revise it or let it lapse.

[9] Vertical Guidelines, para. 114.

[10] Article 10 VBER.

[11] Commission decision of 17 December 2018, AT.40428 – *Guess*; see also CMA Decision under 50565, Bundeskartellamt B11-31/19; B11-33/19.

[12] Already recognised by the Commission in the final report on the e-commerce sector inquiry, 1 Commission, 10 May 2017, Final report on the E-commerce sector inquiry, SWD(2017) 154 final, COM 2017 (229) final.

[13] Commission, Draft revised Vertical Block Exemption Regulation, C(2021) 5026 final of 9 July 2021.

[14] Italian Competition Authority, Case No. 1842 (*Amazon/Apple*).

[15] Commission, Guidance on information exchange in the context of dual distribution of 4 February 2022.

[16] Article 2(5) VBER; Vertical Guidelines, paras. 96 and 98; Draft Guidance, paras. 9 and 12.

[17] Vertical Guidelines, para. 99.

[18] Vertical Guidelines, para. 103.

[19] Vertical Guidelines, para. 100.

[20] Vertical Guidelines, para. 103.

[21] Vertical Guidelines, para. 213.

[22] On passive sales and geo-blocking practices, cf. also Commission decisions AT.40413, AT.40414, AT.40420, AT.40422, AT.40424 (*Video Games*).

[23] Vertical Guidelines, para. 223.

[24] Vertical Guidelines, para. 121.

[25] Vertical Guidelines, para. 123.

[26] Vertical Guidelines, para. 124.

[27] Vertical Guidelines, para. 183.

[28] Case C-26/76 – *Metro I, Metro SB-Großmärkte v Commission*, EU:C:1977:167.

[29] Case C-230/16 – *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941.

[30] Vertical Guidelines, para. 149.

[31] Vertical Guidelines, paras. 256 to 268 with further clarifications on parallel networks of similar vertical agreements.

[32] Case C-439/09 – *Pierre Fabre Dermo-Cosmétique SAS*, EU:C:2011:649; Case C-230/16 – *Coty Germany GmbH v Parfümerie Akzente GmbH*, EU:C:2017:941.

[33] Vertical Guidelines, para. 203.

[34] Vertical Guidelines, para. 206.

[35] Vertical Guidelines, para. 208.

[36] Vertical Guidelines, para. 235.

[37] Vertical Guidelines, para. 332.

[38] Vertical Guidelines, para. 208.

[39] VBER, para. 15.

[40] Vertical Guidelines, para. 347.

[41] Czech Office for the Protection of Competition, decision of 4 January 2022 (*Garland*); German Federal Cartel Office, decision of 2 December 2021 (*Bose*); cf. also CMA, decision of 23 March 2022 (*Dar Lighting*).

[42] AT.40465 (Asus), AT.40469 (*Denon & Marantz*), AT.40181 (*Philips*), AT.40182 (*Pioneer*).

[43] Vertical Guidelines, para. 195.

[44] Vertical Guidelines, para. 197.

[45] Cf. Pini/Cammalleri in GCR, European Union: Modernising the Law on Vertical Agreements, p. 76.

[46] Vertical Guidelines, para. 187.

[47] Vertical Guidelines, para. 189.

[48] Vertical Guidelines, para. 197.

[49] Vertical Guidelines, para. 190.

[50] AT.40465 (*Asus*), AT.40469 (*Denon & Marantz*), AT.40181 (*Philips*), AT.40182 (*Pioneer*); see also CMA, decision of 1 August 2019, Case 50565-2.

[51] Vertical Guidelines, para. 209.

[52] Vertical Guidelines 2010, para. 62.

[53] German Federal Cartel Office, decision of 2013 (*Gardena*) and (*Bosch Siemens Hausgeräte*); French Competition Authority, decision of 27 January 2021 (*Lego*).

[54] Vertical Guidelines, para. 209.

[55] AT.40153 *E-book MFNs and related matters* (*Amazon*), Decision dated 4 May 2017.

[56] AT.39847 *E-books*, Decision dated 12 December 2012.

[57] Vertical Guidelines, paras 356 to 378.

[58] Vertical Guidelines, para. 254.

[59] Vertical Guidelines, para. 248.

[60] www.gov.uk/government/consultations/draft-vertical-agreements-block-exemption-order#full-publication-update-history.

[61] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1065260/CMA_VBER_Review_-_draft_CMA_Vertical_Guidance_.pdf.

[62] www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime.

Oliver Heinisch

Author | Partner

oheinisch@sheppardmullin.com

Sheppard Mullin Richter & Hampton LLP

Michael Hofmann

Author | Associate

mhofmann@sheppardmullin.com

Sheppard Mullin Richter & Hampton LLP