



ANTITRUST CLIENT BRIEFING

EU Distribution Rules Under Review

Review of the European Commission's Staff Working Document

14 September 2020

At a Glance

The Development

- The European Commission (EC) has published a 232-page Staff Working Document that summarises the findings of its evaluation of the EU Vertical Block Exemption Regulation (VBER) and accompanying Vertical Guidelines to confirm whether they are still fit for purpose.
- This Staff Working Document is an important milestone in the EC's current review, closing the evaluation phase and launching a new phase in which concrete proposals for revision will be put forward. Whilst not radical, the changes are likely to be important and focus mainly on reflecting the digital economy.
- Within the next weeks, the EC will launch an impact assessment to look into the policy options for a revision of the rules in order to address the issues identified during the evaluation. Stakeholders will have the opportunity to provide their views.
- In 2021, the EC will issue a draft of the revised rules for public consultation. The EC intends for the new rules to be in force by 31 May 2022.

Hot Topic at EU Level

- The adoption of the EC's final report on the e-commerce sector inquiry in May 2017 marked a turning point for the EC's enforcement action against vertical restrictions. Previously, there was very limited enforcement at EU level.
 - Since May 2017, the EC has adopted nine infringement decisions and two commitment decisions (to address preliminary competition concerns) concerning vertical restrictions.
 - Between 1 June 2010 and 1 January 2020, there were 391 reported national competition authority (NCA) cases involving vertical restrictions.

What Is the VBER?

- The VBER is designed to give parties to vertical agreements (entered into between businesses operating at different levels of the production or distribution chain) increased certainty about the compatibility of their agreements with Article 101 (1) under the Treaty on the Functioning of the European Union (TFEU) by creating a safe harbor.
- Vertical agreements containing no "hardcore restriction" (e.g., resale price maintenance or territorial and customer restrictions) can be presumed to benefit from an exemption if neither party's market share exceeds 30%.
- Agreements not satisfying the VBER criteria may still be compatible with Article 101 TFEU, but such agreements require individual assessment.
- The VBER is accompanied by a set of guidelines (Guidelines on Vertical Restraints) that are designed to help companies to self-assess.
- The VBER entered into force in 2010 and will expire on 31 May 2022.

Key Milestones of the Vertical Review

6 May 2015

- Launch of EC e-commerce sector inquiry (final report published on 10 May 2017)

4 February 2019 – 27 May 2019

- Public consultation regarding the VBER and Guidelines on Vertical Restraints

14 and 15 November 2019

- Stakeholder workshop

13 December 2019

- Publication of a summary report of a targeted consultation of NCAs

5 February 2020

- Publication of a summary report of the stakeholder workshop

25 May 2020

- Publication of an external evaluation support study, including:
 - Four stakeholder surveys aimed to collect evidence on specific restrictions in Germany, France, Italy, Sweden, Poland, and Hungary
 - A consumer survey aimed to collect evidence on the purchasing behavior of European consumers, notably with regard to the interaction between online and offline channels

Key Conclusions

- The evaluation states that the VBER and the Guidelines on Vertical Restraints remain “useful tools” that facilitate the self-assessment of vertical agreements and help reduce compliance costs for businesses entering into such agreements.
- However, the EC notes that markets have changed significantly since the adoption of the current version of the VBER and the Guidelines on Vertical Restraints in 2010.
 - Changes include the growth of online sales, new market players (such as online platforms), and changes in distribution models (such as increased direct sales by suppliers and a greater use of selective distribution systems). New types of vertical restriction have also emerged, such as restrictions regarding sales through online marketplaces and restrictions on online advertising, as well as retail parity clauses.
- The report identifies the following key issues with the current rules. A precise understanding of how the EC intends to address the issues identified is pending the next phase of the EC’s review.
 - Some provisions lack clarity, are difficult to apply, or fail to reflect the digital economy.
 - For example, there is a lack of guidance on how to assess retail parity clauses or restrictions on the use of price comparison websites.
 - Recent case law needs to be reflected.
 - NCAs and national courts interpret the rules inconsistently.
 - For example, there is inconsistent practice on the application of agency rules in an online context, and the treatment of online platform bans.
 - The list of practices that do not benefit from the VBER (hardcore restrictions) are broadly appropriate, but it could be worth considering whether amendments are necessary to the conditions for exemption set out in the VBER, which may create some exceptions to hardcore restrictions.

Snapshot - Certain Identified Issues (1)



Online Sales

- Current guidelines provide a generally low level of legal certainty.
- Guidance is lacking on the treatment of some online sales restrictions in the context of selective distribution.
- There is a large variety of views among stakeholders on the effects of the brick-and-mortar requirement, and a lack of clarity regarding the limits of the possibility for suppliers to require their distributors to operate a brick-and-mortar shop.
- Guidance is lacking on the assessment of certain restrictions on sales through third-party online marketplaces and the need to update the rules in light of recent case law, such as Coty.
- Guidance is lacking on the assessment of restrictions on the use of price comparison websites.
- The current distinction between active and passive sales, in particular in the context of online sales, is unclear.
- There is a need for more guidance as regards the treatment of restrictions on online advertising. There is no guidance currently on using trademarks and brands names in the context of online advertising.



Market Share Thresholds

- Rules currently used to define the relevant market are not well-suited to determine relevant product and geographic markets in emerging online markets or when online intermediaries (e.g., platforms) are involved.
- Assessing market shares of online platforms is difficult.
- Market share thresholds may be too low for the introduction of a novel product.
- Granting the benefit of the block exemption during a non-transitory period to businesses with significant market power, especially in tipping markets, could undermine the objective of the VBER.



Hardcore Restrictions

- There is no issue with the use of the concept of hardcore restriction.
- There is a wide interpretation of concepts by NCAs.
- Guidance is lacking on the circumstances under which hardcore restrictions may satisfy the Article 101 (3) TFEU exemption conditions.

Snapshot – Certain Identified Issues (2)



Selective Distribution

- The significant increase in the use of selective distribution was highlighted.
- There are divergent opinions about the effects of selective distribution on competition.
- There are questions surrounding the appropriateness of the level of the market share thresholds in the context of selective distribution systems.
- Insufficient legal certainty



Exclusive Distribution

- There is a lack of clarity regarding the possibility to combine selective and exclusive distribution.



Dual Distribution

- There is insufficient clarity as to how information exchange in dual-distribution scenarios are to be treated.
- There is a lack of clarity regarding the relationship between hybrid platforms, which act as both suppliers of online platform/intermediation services and retailers, and the sellers present on such platforms.



Data Sharing

- The rules on data collection as well as information exchange in distribution agreements, including for dual distribution, need to be clarified.



Resale Price Maintenance

- There is limited guidance on the circumstances under which recommended or maximum resale prices could amount to resale price maintenance (RPM), including:
 - Practices prohibiting discounts applied by retailers
 - Practices compelling retailers to apply a price within a specific range defined by the supplier
- There is a lack of clarity as regards the conditions under which RPM may benefit from an exemption under Article 101 (3).
- There is a lack of clarity in relation to the circumstances under which efficiencies resulting from RPM in the context of product launches and short-term price campaigns are accepted.
- There is a lack of coherence in the treatment of RPM across the EU since NCAs seem to pursue divergent approaches.

Snapshot – Certain Identified Issues (3)



Agency

- There is a lack of clarity concerning the level and type of risks that are relevant to determine whether a vertical agreement can be considered a genuine agency agreement.
- The criteria for defining an agent are difficult to apply to online platforms.
- There are divergent approaches among NCAs and national courts.



Non-Compete Obligations

- Limiting the application of the VBER to non-compete obligations with maximum duration of 5 years is not economically justified (as businesses often enter into longer commercial relationships, coupled with long-term investments).
- Excluding tacitly renewable non-compete obligations from the VBER is legally unjustified to the extent that the buyer can terminate or renegotiate the agreement (including the non-compete obligation) at any time with a reasonable notice period and at reasonable costs.
- There is a lack of guidance on the assessment of non-compete obligations that cannot benefit from the block exemption, but can be considered as nonetheless satisfying the conditions of Article 101 (3).



Parity Clauses

- There is insufficient guidance on how to assess the compatibility of retail parity clauses.
- There are divergent approaches among Member States.



Franchising

- Questions surround the appropriateness of current market share thresholds in the context of franchising.
- Legal certainty with regard to the combination of franchising with exclusive distribution is insufficient.
- Questions surround the market share threshold in the analysis of non-compete obligations in franchise agreements.

Source Material

A copy of the EC's Staff Working Document is available [here](#).

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