

EU COMMISSION PUBLISHES DRAFT REVISED VBER AND VERTICAL GUIDELINES

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Legal Briefings

On 9 July 2021, following a comprehensive consultation process, the EU Commission (Commission) published its proposals for a revised Vertical Block Exemption Regulation ([Draft VBER](#)) and [Draft Vertical Guidelines](#), due to replace the current regime which expires on 31 May 2022. The previous evaluation steps (see [here](#) for more detail) identified a number of areas where the current rules are potentially not functioning well, due to a lack of clarity, the existence of a number of gaps, but in particular because the current rules are not adapted to the strong growth of online sales and the emergence of new market players such as online platforms. We have set out below the key proposed changes in more detail. Of particular note are:

- The revised Article 4 Draft VBER setting out the hardcore restrictions, which is now more clearly structured, listing the permitted territorial/customer restrictions for each type of distribution agreement and allowing greater flexibility in the design of distribution models;
- The approach to online sales restrictions, which recognises that significant developments in e-commerce have taken place since the original VBER and Vertical Guidelines were adopted in 2010,

and no longer treats the majority of online sales restrictions as passive sales restrictions and recognises that online sales and brick-and-mortar shops are inherently different in nature;

- The treatment of dual distribution, which is both more generous (now includes wholesalers and importers in addition to manufacturers) and more restrictive (with the introduction of a 10% aggregate market share level on the relevant market at retail level);
- So called 'wide' MFNs, requiring a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services, are now listed as excluded restrictions in Article 5 Draft VBER, for which the exemption of the VBER will not be available;
- RPM remains a hardcore restriction and the Draft Vertical Guidelines provide little additional guidance on possible efficiency defences.

The Commission is now consulting on its proposals for a revised VBER and revised Vertical Guidelines. The consultation is available through [DG Comp's website](#) and submissions are invited by 17 September 2021. The Commission will then finalise the current drafts with a view to having the new rules in place on 1 June 2022. The main changes proposed for the revised VBER and Vertical Guidelines relate to:

DUAL DISTRIBUTION AGREEMENTS

The block exemption in the VBER does not apply to vertical agreements between competing undertakings, but there is an exception for dual distribution agreements, where a supplier is a manufacturer and also sells its goods or services directly to end customers, therefore competing with its independent distributors at retail level. The Commission notes that originally rather limited scenarios of dual distribution have become increasingly common, due to the growth in online sales which has facilitated direct sales by suppliers, either through their own online stores or via online marketplaces. It has expressed concerns that the current exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible, and is proposing a revised approach to dual distribution agreements under the Draft VBER.

On the one hand the Commission proposes to extend the current exception, by making it applicable not only to manufacturers but also to wholesalers and importers, as well as explicitly clarifying that the exception applies to all aspects of a dual distribution system and any horizontal restrictions by effect, including those resulting from the exchange of information between competing undertakings (Draft Vertical Guidelines paragraph 87).

On the other hand the Commission proposes to introduce a new market share threshold for the dual distribution exception, limiting the exception to agreements where the parties' aggregate market share in the relevant market at retail level does not exceed 10% (Article 2(4)(a) and (b) Draft VBER). If the combined market share exceeds this 10% threshold at retail level but remains below the market share thresholds of Article 3 Draft VBER (i.e. 30% of the relevant market), the block exemption will in general still apply, except for any exchange of information between the parties, which must be assessed under the rules applicable to horizontal agreements (Article 2(5) Draft VBER).

Vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object to restrict competition between the competing supplier and buyer will not benefit from the exception set out in Article 2(4) Draft VBER.

The exception shall also not apply where a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing undertaking (Article 2(7) Draft VBER).

HARDCORE RESTRICTIONS AND PERMITTED TERRITORIAL AND CUSTOMER RESTRICTIONS

Article 4 of the current VBER sets out the list of hardcore restrictions to which the block exemption will not apply. Restrictions on the territory into which or on the customers to whom the buyer may sell the contract goods or services are listed as hardcore restrictions, but with a number of exceptions depending on the type of distribution agreement in question.

Suppliers consider the current rules to be particularly complex, unclear and preventing them from designing their distribution systems according to their business needs. In response to this criticism the Commission has redrafted Article 4 setting out more clearly the permitted territorial and customer restrictions for each type of distribution agreement. The new Article 4 in the Draft VBER proposes a more differentiated approach that allows the supplier to restrict its buyers to a varying degree depending on whether the agreement is one for exclusive distribution, selective distribution, or 'free' distribution (neither exclusive nor selective). It also provides businesses with more flexibility in designing their distribution systems, allowing for shared exclusivity in a territory or for a customer group by allowing the allocation of more than one 'exclusive' distributor and providing greater protection for members of a selective distribution system against sales from outside the territory.

Exclusive distribution

Under an exclusive distribution system the supplier allocates a territory or customer group exclusively to itself or to one or a limited number of buyers and restricts other buyers from actively selling into the exclusive territory or to the exclusive customer group (Article 1(1)(g) Draft VBER).

In contrast to the current rules the Draft VBER introduces the concept of 'shared exclusivity', allowing the supplier to appoint 'a limited number of buyers' in a given territory or for a given customer group as exclusive distributors. However, the Commission highlights that exclusive distribution must not be used to shield a large number of distributors from competition located outside the exclusive territory, as this would lead to a partitioning of the internal market. The number of appointed distributors should therefore be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts (Draft Vertical Guidelines paragraph 102).

In an exclusive distribution system the supplier may restrict:

- Active sales by the exclusive distributor, or the exclusive distributor and its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of other buyers (Article 4(b)(i) Draft VBER).

In contrast to the current regime the supplier is allowed to demand a 'pass on' of the active sales restriction to the buyer's customers (Draft Vertical Guidelines paragraph 206), if they have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier.

- Active or passive sales by the exclusive distributor, or the exclusive distributor and its customers to unauthorised distributors located in another territory where the supplier operates a selective distribution system for the contract goods or services (Article 4(b)(ii) Draft VBER).

This allows the supplier to protect its selective distribution system in a different territory. Again the supplier is allowed to demand a 'pass on' of the active sales restriction to the buyer's customers – in this case even if the buyer's customers have not entered into any distribution agreement with the supplier or other third parties with distribution rights.

The other restrictions the supplier may apply in an exclusive distribution system mirror the current exceptions allowed for under Article 4(b) VBER (location clause), Article 4(b)(ii) VBER (restriction of sales to end users by buyer operating at wholesale level) and Article 4(b)(iv) VBER (restriction on selling components to manufacturers competing with the supplier).

Selective distribution

The definition of selective distribution remains unchanged under the Draft VBER: the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

In a selective distribution system the supplier may restrict

- Active sales by the members of the selective distribution system, or the members of the selective distribution system and their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into another territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of buyers (Article 4(c)(i), first hyphen Draft VBER).

This exemption allows the supplier to protect its exclusive distribution system in another territory against sales from buyers in a selective distribution system, in the same way that under Article 4(b)(i) Draft VBER the supplier may demand to pass on this obligation to customers of its selective distributors (Draft Vertical Guidelines paragraph 206) – if they have entered into a distribution agreement with the supplier or other third parties with distribution rights.

- Active or passive sales by the members of the selective distribution system or their customers to unauthorised distributors located within the territory where the selective distribution system is operated (Article 4(c)(i), second hyphen Draft VBER).

This exemption is similar to the exception currently contained in Article 4(b)(iii) of the current VBER. However, the proposed version now in addition allows the supplier to demand that the buyer's customers are also bound by this restriction.

The other permitted restrictions in Article 4(c)(i) Draft VBER mirror the current permitted restrictions under Article 4(b) VBER (location clause), Article 4(b)(ii) VBER (restriction of sales by wholesalers) and Article 4(b)(iv) VBER (restriction on selling components to manufacturers competing with supplier).

Article 4(c)(ii) Draft VBER mirrors the current restriction on cross-supplies between members of the selective distribution system (Article 4(d) VBER). Article 4(c)(iii) Draft VBER prohibits the restriction of active or passive sales to end users by members of the selective distribution system operating at the retail level of trade, except in the situation set out in the first hyphen of Article 4(c)(i) Draft VBER.

Free distribution

A free distribution system is defined in Article 4(d) Draft VBER as a model in which the supplier operates neither an exclusive nor a selective distribution system.

Under a free distribution system the supplier may impose restrictions on its buyers (and the buyer's customers) in order to protect the territories in which it has set-up an exclusive or a selective distribution system. In particular the supplier may restrict:

- Active sales by the buyer, or the buyer and its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of buyers.
- Active or passive sales by the buyer or its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services.

Again (as for exclusive and selective distribution), the other restrictions the supplier may apply in a free distribution system mirror the current exceptions allowed for under Article 4(b), Article 4(b)(ii) and Article 4(b)(iv) VBER.

ONLINE SALES RESTRICTIONS

Online sales restrictions that qualify as a hardcore restriction are now defined in Article 1(1)(n) of the Draft VBER as a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object to prevent the buyers or their customers from effectively using the internet for the purpose of selling their goods or services online or from effectively using one or more online advertising channels.

The decisive question will therefore be what "effectively using the internet" for selling or advertising exactly means. The Commission provides additional guidance in the Draft Vertical Guidelines (paragraphs 188 - 201). This additional guidance reflects recent case law from the CJEU, in particular the decisions in [Pierre Fabre](#) and [Coty Germany GmbH](#). In line with this case law the Commission clarifies inter alia that

- A direct or indirect **ban on sales on online marketplaces** can in principle be block-exempted (Draft Vertical Guidelines paragraph 194).
- A restriction of the **use of price comparison websites**, or paid referencing in **search engines**, will amount to a hardcore restriction under the VBER (Draft Vertical Guidelines paragraph 192). The Commission holds the view that the ability to advertise allows a distributor to attract potential customers to its website, which is a prerequisite for being able to sell online.

A requirement for the buyer to pay a different price for products intended to be resold online than for products to be resold offline, so-called '**dual pricing**', is currently considered to be a hardcore restriction (current Vertical Guidelines, paragraph 52). The Commission now looks set to relax its strict approach to dual pricing, provided the dual pricing is intended to incentivise or reward an appropriate level of investment and relates to the costs incurred for each sales channel (Draft Vertical Guidelines paragraph 195). This change in approach is motivated by the Commission's view that online sales have by now developed into a well-functioning sales channel and therefore no longer require special protection by qualifying certain indirect measures restricting online sales as hardcore restrictions.

In the context of a selective distribution system suppliers will no longer be required to impose the same qualitative criteria on online sales that they impose on brick-and-mortar shops. The Commission recognises that both channels are inherently different in nature.

The Draft VBER now defines active and passive sales in Article 1(1)(l) and Article 1(1)(m). In respect of online sales, the concept of active sales is construed more widely than under the current regime, which treats almost any online selling as a form of passive selling. In particular:

- Offering **language options on websites** other than those used in the territory for which the distributor is established, amounts to active sales under the Draft VBER and can therefore be prohibited in the context an exclusive distribution agreement. Under the current regime the Commission takes the view that offering different language options on the website does not, of itself, change the passive nature of online sales (Current Vertical Guidelines, paragraph 52).
- Offering a **website with a domain name corresponding to a territory** other than the one in which the distributor is established also constitutes active selling, and can therefore be prevented where active sales restrictions are permitted.

TREATMENT OF ONLINE INTERMEDIATION SERVICES

The online platform economy plays an increasingly important role for the distribution of goods and services, and the Commission proposes to treat providers of online intermediation services as 'suppliers' within the meaning of the VBER, irrespective of whether the provider is a party to the transaction it facilitates (Article 1(1)(d) Draft VBER). Online intermediation services are defined as:

Services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded, and that constitute information society services within the meaning of EU Directive 2015/1535.

The Commission points out that undertakings active in the online platform economy enable new ways of doing business, some of which are not easy to categorise under the concepts traditionally associated with vertical relationships between suppliers and distributors in the brick-and-mortar environment (Draft Vertical Guidelines paragraph 60). In order to clarify the rights or obligations of online intermediation service providers the Draft VBER proposes to treat them as suppliers. This means that online intermediation services must comply with Article 4(a) of the Draft VBER to avoid a hardcore restriction with regard to intermediated goods or services. In particular, any imposition of fixed or minimum sales prices by a such a service provider for transactions that it facilitates will be regarded as a hard-core restriction under Article 4(a) draft VBER (Draft Vertical Guidelines paragraph 179).

PARITY OBLIGATIONS (MOST-FAVOURIED NATION/CUSTOMER ('MFN') CLAUSES

MFN clauses, that require a business to offer the same or better conditions to its contracting party as those offered on any other sales channel, are block exempted under the current rules. The Commission evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. At the same time, several national competition authorities have held that MFN clauses can have negative effects on competition.

In light of these developments the Commission now proposes to remove the benefit of the block exemption for such **across-platform retail parity obligations** imposed by providers of online intermediation services. A new type of excluded restriction has been added under Article 5 of the Draft VBER which provides 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 using competing online intermediation services (Article 5(1)(d) Draft VBER). Instead, these types of restriction will now require an individual assessment under Article 101 TFEU.

Other narrow retail parity obligations, as well as wholesale parity obligations, will continue to benefit from the safe harbour provided by the Draft VBER.

TACITLY RENEWABLE NON-COMPETE OBLIGATIONS

Non-compete obligations the duration of which is indefinite or exceeds a period of five years are currently listed as excluded restrictions under Article 5 of the VBER and will therefore not benefit from the block exemption. In addition, Article 5(1) of the current VBER provides that a non-compete obligation that is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

In an effort to reduce costs and administrative burden on the parties, the Commission suggests allowing tacitly renewable non-compete obligations to benefit from the block exemption. In its Draft Vertical Guidance the Commission clarifies that non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption and do not count as indefinite, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, allowing the buyer to effectively switch its supplier after the expiry of the five-year period (Draft Vertical Guidelines paragraph 234).

RPM EFFICIENCIES

The evaluation process has shown that market participants consider that the current rules governing a potential justification of RPM measures lack a sufficient degree of legal certainty. RPM remains a hardcore restriction under Article 4 of the Draft VBER, but the Commission has (slightly) expanded its guidance regarding potential efficiencies of RPM (Draft Vertical Guidelines paragraph 182).

However, in terms of substance the Draft Guidelines cover the same three examples of efficiency defences as listed in the current guidance, namely, using RPM to:

- Induce distributors to increase promotion efforts in the introductory period of a new product
- Coordinate a short-term low price campaign
- Avoid free-riding with regard to pre-sale services for complex products

The Draft Vertical Guidelines are therefore disappointing in this regard and the Commission can be expected to receive a further plea for greater clarity on the possible RPM efficiencies during the public consultation.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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