

Strelia Competition Newsflash

May 2022

New Vertical Block Exemption Regulation – What are the main changes?

1. Introduction

On 10 May 2022, the EU Commission adopted new [Vertical Block Exemption Regulation \(“VBER”\)](#) and [Vertical Guidelines](#) following a thorough evaluation and review which started in 2018. The objective of the Commission was twofold. The first objective was to readjust the safe harbour to ensure that the latter is neither too generous nor too narrow. The second objective was to provide stakeholders with up-to-date rules and guidance in a business environment which has been reshaped by the growth of e-commerce and online sales.

The revised VBER and Vertical Guidelines will enter into force on 1 June 2022.

In this Newsflash, we set out the background on the VBER before commenting on the main changes related to the readjustment of the safe harbour (first objective of the reform) and the provision of up-to-date rules given the new “online” business environment (second objective of the reform).

2. Background on the VBER

Vertical agreements are agreements (or concerted practices) between two or more undertakings, each of which operates, for the purposes of the agreement (or the concerted practice), at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”) prohibits agreements between undertakings that restrict competition. Moreover, a vertical restraint is a restriction of competition in a vertical agreement falling within the scope of Article 101(1) TFEU.

However, under Article 101(3) TFEU, such agreements are compatible with the Single Market, provided they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and without eliminating competition.

Articles 2(1) of the new VBER provides that pursuant to Article 101(3) TFEU and subject to the provisions of the VBER, Article 101(1) TFEU does not apply to vertical agreements to the extent that such agreements contain vertical restraints. This exemption applies on condition that (i) the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and (ii) the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

3. Most important changes

a. Readjustment of the safe harbour

i. The scope of the safe harbour has been narrowed for dual distribution and parity obligations

Dual distribution

Dual distribution is a situation where a supplier not only sells its goods or services through independent distributors but also directly to end customers in direct competition with its independent distributors.

Under Article 2(4) of the old VBER, the exemption of the VBER did not apply to vertical agreements entered into between competitors, except in case of dual distribution. In this respect, Article 2(4) of the new VBER has extended the “dual distribution exemption” to wholesalers and importers.

However, the review of the VBER has shown that the old VBER might have exempted (vertical) dual distribution agreements where horizontal concerns (between competitors) were no longer negligible, in particular concerning (i) information exchange between suppliers and distributors and (ii) so-called hybrid platforms.

As regards information exchange between suppliers and distributors in the context of dual distribution, Article 2(5) of the new VBER excludes from the exemption information exchange that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of those two conditions.

As regards hybrid platforms, Article 2(6) of the new VBER excludes from the block exemption vertical agreements relating to the provision of online intermediation services (**‘OIS’**) where the OIS provider (namely the platform) also sells goods or services in competition with the firms to which it provides intermediation services (namely where it has a hybrid function).

This means that these two aspects of dual distribution will no longer be exempted under the new VBER but must instead be assessed individually under Article 101 TFEU.

Parity obligations

Parity obligations (sometimes also referred to as Most Favoured Nation clauses (**“MFNs”**)) are obligations which require a seller to offer the same or better conditions to its counter-party as those offered on third-party sales channels, such as other platforms, and/or on the seller's direct sales channels, like its website.

Under the old VBER, all types of parity clauses were block exempted. However, the use of “wide retail parity clauses” (requiring the contract party to offer the same or better prices and conditions as those offered on any other sales channel), also called “across-platform retail parity clauses”, has been subject to intensive enforcement under competition law in the recent years.

Therefore, the “wide retail parity clause” (“across-platform retail parity clause”) has been added to the list of excluded restrictions under Article 5(d) of the new VBER. This means that this type of clause will no longer be exempted under the new VBER but must instead be assessed individually under Article 101 TFEU.

On the other hand, the new VBER still block exempts all other types of retail parity clauses, including retail parity obligations relating to direct sales channels (the so-called “narrow retail parity clause”). That being said,

the new VBER and the new Vertical Guidelines include a warning relating to the use of narrow retail parity obligations in concentrated platform markets.

ii. The scope of the safe harbour has been enlarged for certain active sales restrictions and certain indirect measures restricting online sales (dual pricing and the equivalence principle)

Active sales restrictions

Restrictions of a buyer's ability to actively approach individual customers (i.e., active sales) are generally considered to be hardcore restrictions (*per se* prohibited) which prevent the block exemption of agreements containing such restrictions. The old VBER contained a list of exceptions to this rule. The new VBER has extended this list of exceptions.

In Article 4(b) of the new VBER, the possibility of shared exclusivity is introduced, allowing a supplier to appoint up to a maximum of 5 distributors per exclusive territory or customer group. Moreover, under the same Article 4(b), it is also possible for the supplier to oblige its distributors to pass on restrictions of active sales to their customers.

In addition, under Article 4(c) of the new VBER, it is now possible for a supplier (having set up a selective distribution system) to prohibit buyers and their customers from selling to unauthorized distributors located in a territory where the supplier operates a selective distribution system, regardless of whether those buyers and customers are themselves located inside or outside that territory.

Certain indirect measures restricting online sales (dual pricing and the equivalence principle)

Under the old Vertical Guidelines, dual pricing (i.e., charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline) was considered to constitute a hardcore restriction.

Under the new Vertical Guidelines, dual pricing is block exempted subject to certain safeguards: (i) the difference in the wholesale price for online and offline sales should not have the object of restricting cross-border sales or of preventing the effective use of the internet by the buyer; and (ii) any implementation system (such as a monitoring system for the purpose of billing) should not limit the amount of products the buyer can sell online.

Under the old Vertical Guidelines, not respecting the equivalence principle (i.e., imposing criteria for online sales that are not overall equivalent to the criteria imposed for sales in brick-and-mortar shops) was also considered to constitute a hardcore restriction.

Under the new Vertical Guidelines, in the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, to take account of the fact that the two channels are inherently different in nature. That being said, these criteria should not have the object of preventing the effective use of the internet by the buyer or its customers to sell the contract goods or services.

b. The provision of up-to-date rules given the new “online” business environment

As the business environment has been reshaped by the growth of online sales and by new market players such

as online platforms, it was necessary for the Commission to provide stakeholders with up-to-date rules and guidance. In particular, the new VBER and the new Vertical Guidelines incorporated the guiding principles for the assessment of online restrictions drawn from the case law of the Court of Justice of the EU, namely in *Pierre Fabre* (Case C-439/09) and *Coty* (Case C-230/16).

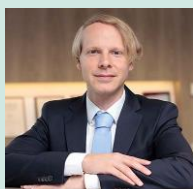
In this respect, Article 4(e) of the new VBER provides that restrictions on online sales are hardcore when they, directly or indirectly, in isolation or combination with other factors, have the object of preventing buyers or their customers from effectively using the Internet to sell the contract goods or services, including restrictions that have the object of preventing the use of one or more entire online advertising channels (for example, search engine advertising or price comparison services). On the other hand, online advertising restrictions that do not exclude the use of entire online advertising channels are block exempted, for example, if such restrictions are linked to the content of online advertising or set certain quality standards.

The new VBER and the new Vertical Guidelines also provide specific rules and guidance relating to the platform economy. Article 1(1)(d) of the new VBER clarifies that providers of online intermediation services qualify as suppliers under the VBER. Moreover, Article 1(1)(e) of the new VBER defines online intermediation services, taking inspiration from a definition in the (P2B) Regulation 2019/1150 (i.e., information society services which allow undertakings to offer goods or services (i) to other undertakings, with a view to facilitating the initiating of direct transactions between those undertakings, or (ii) to final consumers, with a view to facilitating the initiating of direct transactions between those undertakings and final consumers, irrespective of whether and where the transactions are ultimately concluded).

It is important to note that the new Vertical Guidelines (section 3.2.3) explain why undertakings active in the online platform economy generally do not qualify as genuine agents (whose agreements fall outside Article 101(1) of the Treaty). In particular, the following specific situation of some platforms is pointed by the new Vertical Guidelines: a situation where the conditions under which goods or services are sold and the commercial strategy are determined by the undertaking active in the online platform economy rather than by the sellers of the goods or services.

As regards resale price maintenance (“RPM”), the new Vertical Guidelines clarify among others that the imposition of minimum advertised prices (“MAPs”), which prohibit the distributor from advertising prices below a level set by the supplier, will be treated as an indirect form of RPM (which constitutes a hardcore restriction). Although in principle MAPs leave the distributor free to sell at a price that is lower than the advertised price, the Commission consider that they disincentivise the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts.

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