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The Commission's Draft VBER and Vertical Guidelines - Key Changes

Dual distribution systems – stricter rules would increase costs and competition law risks for suppliers: Information sharing in dual distribution systems would no longer be block exempted and would be subject to case-by-case self-assessment if retail market shares exceed 10%. Information sharing, or other aspects of dual distribution, resulting in a 'by object' restriction would preclude the application of the VBER regardless of market share.

Online sales restrictions – greater flexibility for suppliers, although restrictions preventing the effective use of the internet would still be considered hardcore: The Draft VGL confirm that marketplace bans would be block exempted. Conversely, total bans on any online advertising channel (including the use of price comparison sites) would be considered hardcore, although bans on individual providers as well as quality criteria could be used as long as they do not prevent effective online sales. Within certain limits, dual pricing would be permissible under the VBER, and sales-related criteria for online and offline retailers would not have to be equivalent.

Greater scope to impose active sales restrictions: The Draft VBER's list of hardcore restrictions distinguishes between different types of distribution systems and, generally, provides greater scope for active sales restrictions. In addition, territories/customer groups can be allocated "exclusively" to several distributors and protected against active sales from outside the exclusively allocated territory/customer group. Suppliers can require that active sales restrictions be passed on from the buyer to the buyer's (distributor) customers. Selective distribution systems can be protected against sales to unauthorised retailers from non-SDS territories.

Most MFNs would remain block exempted: All MFN (parity) clauses would continue to benefit from the VBER, with the exception of so-called "wide MFNs" in favour of platform providers of online intermediation services.

Scope for RPM could slightly increase: The Draft VGL do not provide materially new guidance on when RPM can meet the Article 101(3) exemption conditions. On the other hand, they clarify that RPM in fulfilment contracts would, under certain conditions, be block exempted, and somewhat surprisingly appear to indicate that certain minimum advertised price ("MAP") policies could benefit from the VBER.

Consecutive non-compete periods: Tacitly renewable non-competes for consecutive five-year periods would be block exempted if the buyer can realistically terminate the non-compete after five years.

Agency contracts: The Draft VGL provide new guidance on cost reimbursement methods for "genuine agents", and apparently reflect a modest softening of approach with respect to the conditions under which "dual role" agents (i.e., those that also act as risk-taking distributors for the principal) can qualify as genuine agents. Providers of online intermediation services cannot in principle qualify as genuine agents.

Online platforms: The Draft VBER and Draft VGL specifically address agreements with online platforms in a number of respects, reflecting their increased role in the distribution of products and provision of services: (i) platforms cannot be considered **genuine agents,** (ii) platforms cannot benefit from the VBER's **dual distribution** exception, (iii) suppliers can **ban sales over third-party platforms** (although price comparison platforms would enjoy greater protection as their use cannot be totally banned), and (iv) wide **MFNs** in favour of platforms would not be block exempted.

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VBB Insights

The Commission's Draft VBER and Vertical Guidelines - Detailed Analysis

On 9 July 2021, the European Commission ("Commission") published the draft revised Vertical Block Exemption Regulation ("Draft VBER") and draft revised guidelines on vertical restraints ("Draft VGL"), a key step in the context of the revision of the current regime governing vertical agreements, set to expire on 31 May 2022. Comments on the drafts may be submitted to the Commission by 17 September 2021.

The Draft VBER and Draft VGL would bring about a number of important changes to the application of the EU competition rules to a wide range of vertical agreements. These changes would impact not only distribution systems for branded products, but vertical agreements in all industry sectors across the entire economy. In these VBB Insights, we provide a first detailed analysis of the most important changes and their potential impact on market participants.

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STRICTER RULES AND INCREASED RISKS FOR SUPPLIERS OPERATING A DUAL DISTRIBUTION SYSTEM

Information sharing in dual distribution systems would no longer be block exempted and would be subject to case-by-case self-assessment if retail market shares exceed 10%.

Information sharing, or other aspects of dual distribution, resulting in a "by object" restriction would preclude the application of the VBER regardless of market share.

Dual distribution systems – where for example the supplier sells through its own on- and/or offline store(s) as well as through third-party retailers – are ubiquitous. They have grown in scale with the rapid development of direct-to-consumer online sales, but they are in no way a recent phenomenon. Given their prevalence, very many brands would be materially affected by the significant limits to the availability of the VBER for dual distribution systems proposed by the Commission. Whereas (non-reciprocal) vertical agreements in dual distribution systems are exempted under the current VBER without any specific limitations, the new rules proposed by the Commission would:

- Exempt (non-reciprocal) vertical agreements in dual distribution systems in their entirety, including information exchange between the parties, only if the parties' combined retail market share does not exceed 10% (a threshold that appears to still be under consideration) (Draft VBER, Article 2(4));

- Provide for a more limited exemption where the parties' aggregate market share at retail level exceeds 10% but their individual shares do not exceed 30% in the relevant sale and purchase markets,[1] in which case the block exemption would apply to (non-reciprocal) vertical agreements, but not to exchanges of information between the parties which would have to be self-assessed under Article 101 TFEU (Draft VBER, Article 2(5));

- Preclude the availability of the VBER for vertical agreements in dual distribution systems (regardless of the parties' retail market share) if the agreement, including the information exchange between the parties, is considered to restrict competition by object (Draft VBER, Article 2(6)); and

- Clarify that the exception for dual distribution does not apply to the situation of a provider of online intermediation services that also sells goods and services in direct competition with a buyer of such online intermediation services (Draft VBER, Article 2(7)).

The reasons for these proposed changes, which are particularly restrictive towards information exchange, remain unclear. The Commission has stated that stricter rules are justified because dual distribution may give rise to "horizontal concerns". Unfortunately, however, the Commission has failed to explain its horizontal concerns in any detail and has pointed to no empirical evidence that would support such a significant tightening of the existing rules. It therefore also remains unclear why the proposed changes would address any concerns more effectively than the existing regime.

Although less radical than certain options previously considered by the Commission during the current review process – when the Commission contemplated excluding dual distribution systems from the VBER entirely – the proposed changes would materially affect suppliers operating a dual distribution system. A successful and effective – vertical – relationship between the supplier and its retailers will almost invariably require the sharing of information about sales, products, marketing campaigns, market trends, and consumer preferences on a continuous basis. As soon as

1 As a generally applicable change to the application of the 30% market share threshold of the current VBER (i.e., one not limited to dual distribution scenarios), where the market share of the supplier or the buyer is initially not more than 30% but subsequently exceeds 30%, the block exemption will continue to apply for a period of two consecutive years regardless of the level of the market share achieved in either of those two years.

the parties' share on the retail market exceeds 10%, under the current draft all sharing of information would no longer benefit from the block exemption. And, if the exchange of information is considered to result in a restriction by object – an assessment that comes with considerable uncertainty – the entire agreement would lose the benefit of the block exemption. As a key purpose of a block exemption is to provide legal certainty by specifying the precise restrictions by object which prevent an agreement from benefiting from its safe harbour, this blanket exclusion is particularly unsatisfactory.

The Draft VGL would not provide any guidance on the type of information exchanges that routinely occur between a supplier and a retailer. This is unfortunate, in particular as the Commission has missed the opportunity to address the one key issue for which the business community had urged the Commission to provide more guidance – how a supplier can use retailer information in a competition law compliant way. Instead, the Commission envisages guidance on information exchanges in the forthcoming revision of the Horizontal Guidelines. This is a peculiar choice. The Horizontal Guidelines, which are also being reviewed, currently do not address information exchanges in dual distribution systems for a very good reason: the relationship between a supplier and a retailer remains fundamentally vertical, even in a dual distribution context, and this typically also applies when they exchange information.

To what extent the revised Horizontal Guidelines will recognise the fundamentally vertical relationship between a supplier and a retailer, and will provide practical and business-oriented guidance on the circumstances when information exchanges between them raise competition law concerns, remains to be seen. The suspicious attitude that the Commission has shown towards dual distribution system during the VBER reform does raise concerns about the further guidance the Commission has promised to develop.

Considering the widespread use of dual distribution systems by brands, the proposed changes would undoubtedly affect a large number of market participants. If the proposal on dual distribution is adopted without further changes, suppliers with dual distribution systems will face a high degree of incremental legal uncertainty. Even if guidance is eventually provided, it will not be binding on the courts or national competition authorities. Brands and retailers alike will have to carefully arrange and monitor their information exchanges with each other, and will face higher costs in trying as best they can to limit the risk of their distribution activities being deemed to amount to illegal horizontal restraints of competition. But the fundamental question remains why the creation of such uncertainty would be justified in the first place.

ONLINE SALES CONDITIONS - GREATER FLEXIBILITY FOR BRANDS TO SUPPORT OFFLINE SALES OF THEIR PRODUCTS

Marketplace bans would be block exempted. Conversely, total bans on any online advertising channel (including the use of price comparison sites) would be considered hardcore, although bans on individual providers as well as quality criteria could be used as long as they do not prevent effective online sales.

Within certain limits, dual pricing would be permissible under the VBER, and sales-related criteria for online and offline retailers would not have to be equivalent. However, suppliers wishing to benefit from this more lenient approach will do so at their own risk, as the dividing line remains vague between what is permissible and what would be considered a serious competition law violation.

Taking its cue from the analytical approach of the Court of Justice in Coty, the Commission takes the view that restrictions on certain methods of selling or advertising online are block exempted as long as they do not rise to the level of preventing the distributor from effectively selling over the internet. Relying on this approach, the Commission proposes to widen the range of practices that would benefit from the block exemption, including some that are currently considered hardcore restrictions.

At the same time, the Commission mainly – though not entirely – embraces what amounts to an effects test in determining whether restrictions related to online selling falling short of an outright prohibition should be considered to be hardcore restrictions preventing the application of the block exemption: as a general rule, restrictions which prevent distributors from effectively selling over the internet will be treated as hardcore restrictions. A specific example would be restrictions which prevent distributors from effectively using one or more online advertising channels.

Based on the approach of the Draft VGL, the determination of whether a specific internet-related restriction is block exempted or enters hardcore territory will in practice depend both on the nature and intensity of the restriction. Thus, although the Commission would grant suppliers greater flexibility to organise their distribution systems, using this flexibility will not be without risks since there is no objective, bright-line distinction between permissible and hardcore restrictions.

Online marketplace bans would comply with the VBER. Importantly, the Draft VGL confirm that bans on sales through online marketplaces would benefit from the block exemption as they do not prevent distributors from effectively selling over the internet given that sales over online marketplaces represent only one method of selling online. This would apply not only to selective distribution, but all distribution systems (Draft VGL, para. 194). This confirms the Commission's view that the Court of Justice's analysis of the VBER in its Coty judgment applies not only to luxury products but to all types of products.

Significantly, the Commission notes that the application of the block exemption cannot depend on market-specific or customer-specific circumstances (Draft VGL, para. 188), apparently rebutting the Bundeskartellamt's suggestion that the specificities of the German market (where a higher proportion of online sales by retailers have been made over platforms than in other Member States) could justify treating online marketplace bans on German retailers as hardcore restrictions despite Coty. Presumably, therefore, any doubts raised by the use of certain apparently less definitive language elsewhere in the Draft VGL (e.g., where statements that platform bans are not hardcore restrictions are prefaced or qualified by wording such as "generally" or "to the extent that they do not have the indirect object of preventing the effective use of the internet for the purposes of online selling…") would be misplaced.

The Commission's assessment of online marketplace bans outside of the safe harbour of the block exemption suggests that, in the context of selective distribution, such restrictions may often not infringe Article 101(1) TFEU, especially where the supplier does not enter into an agreement with a platform and therefore cannot ensure that the online marketplace meets the selection criteria (Draft VGL, para. 319). This reasoning was used by the Court of Justice in Coty, but it is highly significant that the Commission does not suggest that it should be limited to the type of luxury products which were at issue in Coty but rather implies that a platform ban may be justified for any products that justify the use of selective distribution. As the Commission recognises, suppliers use such bans in order, among other reasons, to protect the image and positioning of a brand, which is not a goal whose legitimacy should be limited to suppliers of luxury products (however such products should be defined). Importantly, although the Draft VGL repeatedly refer to online marketplace bans in the context of selective distribution systems, the discussion appears to be potentially relevant also for online marketplace bans in other distribution systems.

Total bans on the use of price comparison sites and other specific advertising channels would be considered hardcore restrictions. Conversely, the Commission proposes strict rules for restrictions on the use of specific advertising channels, including the use of price comparison sites as well as the use of the supplier's trademark for bidding to be referenced in online search advertising services. Total bans on the use of specific advertising channels would be considered hardcore restrictions, as the Commission believes that they could prevent retailers from effectively selling over the internet (Draft VGL, para. 192).

In contrast, less than complete bans could escape the characterisation as hardcore restrictions. With respect to price comparison sites, for example, the Draft VGL suggest that the supplier would be allowed to impose certain quality requirements and even prohibit the use of a specific price comparison tool. Likewise, the supplier might be able to prohibit the use of a certain search engine without losing the benefit of the block exemption (Draft VGL, para. 325). But according to the Draft VGL, advertising restrictions must not go too far. If an online seller can claim that a prohibition extending to the use of "all most widely used" price comparison websites or search engines prevent it from attracting customers in practice, such restrictions would be considered hardcore restrictions (Draft VGL, para. 192). [2]

As different retailers may have preferences for different advertising channels, it could be challenging for the supplier to anticipate when its attempts to control how its products appear in different advertising channels, including price comparison sites, would be considered block exempted and when, conversely, they could be considered a serious competition law infringement. The language in the Draft VGL might suggest that even if most online retailers can successfully operate while complying with a supplier's rules on advertising channels, it may be sufficient for the finding of a hardcore restriction if one or a few online retailers claim that they are no longer able to effectively reach customers online (Draft VGL, para. 192). This degree of specificity would, however, sit very uneasily with the Commission's contention in paragraph 188 of the Draft VGL that the determination of whether an obligation amounts to a hardcore restriction cannot depend on customer-specific circumstances.

Not surprisingly, where the block exemption does not apply (for example, because the market share thresholds are exceeded), the Commission's rather severe assessment of significant price comparison restrictions in the Draft VGL suggests that they are likely to be difficult to defend on an individual assessment. Even quality criteria are viewed as a potentially significant limitation. As for attempts to invoke brand protection to try to justify a restriction, these will not be accepted where, for example, a tool provides reviews or comparisons linked to factors such as the quality of the goods, the level of customer service and the trustworthiness of the distributors using its services. Furthermore, the fact that the sale does not take place on the price comparison site, but instead on the distributor's website that must meet the supplier's quality criteria, is liable to be a major obstacle to justifying extensive restrictions.

Dual pricing strategies would in principle comply with the VBER. The Commission proposes to relax the currently strict rules that consider dual pricing strategies – where a supplier charges a higher wholesale price for products intended to be sold online than for products to be sold offline – to be hardcore restrictions under the VBER and likely competition law infringements. According to the Draft VGL, dual pricing strategies would, at least under certain conditions, no longer be considered a hardcore restriction and would benefit from the Draft VBER (Draft VGL, para. 195).

The changes proposed by the Commission, particularly in respect of dual pricing, would be a very significant development in the application of EU competition law. These changes also would be based on a solid justification, considering the dramatic increase in online sales and the recognised difficulties for suppliers to effectively incentivise offline retailers to carry and promote their brands under the current regime. Greater pricing flexibility, together with more tailored online criteria, should enable suppliers to better balance online and offline sales in such a way as to maximise their ability to reach customers interested in their brands through these complementary sales channels.

Nevertheless, the Draft VGL also highlight that suppliers wishing to benefit from the more flexible framework for dual pricing strategies will have to accept material competition law risks. Specific conduct that could be considered to indirectly prevent online sales in practice would still be considered hardcore restrictions, and the dividing line remains vague between permissible wholesale price differentiation and wholesale price differentiation that would be considered a serious competition law violation.

2 The use of a specific site or search engine can be considered a form of active selling into an exclusively allocated or reserved territory or customer group, where the site or search engine is specifically targeted at customers in such territory or customer group. In these circumstances, active selling through the use of such a site or search engine can be prevented (see, the discussion of active sales restrictions below).

The Draft VGL attempt to clarify, for example, that (permissible) dual pricing must have as its object to incentivise or reward "appropriate" levels of investment in online and offline environments, and that wholesale price differences should "take into account" different investments and costs incurred by a hybrid distributor's online and offline sales efforts. Conversely, wholesale price differences that are found to be "entirely unrelated" to differences in online and offline costs would not be considered to benefit from the Draft VBER. The Draft VGL also state that price differences must not make online sales "unprofitable or financially not sustainable".

The above appears to suggest that, for the block exemption to apply, the prices charged to a distributor for on- and offline resale respectively should be at least broadly equivalent when allowance is made for any cost differences between the two channels – in other words, broadly speaking, the price difference requires an objective cost-based justification, otherwise it risks being considered to have the object of preventing a distributor from effectively selling over the internet.

This is arguably a different, and stricter, approach to determining whether a restriction prevents a distributor from effectively selling over the internet than is applied under the Draft VGL to platform and online advertising restrictions, where the determination appears to depend on the extent of the effect of the type of restriction concerned and not on whether it is justified. Indeed, whether or not platform and advertising restrictions are objectively justified is only relevant when such restrictions fall outside the safe harbour of the block exemption and need to be individually assessed under Article 101(1) TFEU. The reason for this apparent dichotomy may lie in the case law of the Court of Justice. Whereas the approach to platform and at least some advertising restrictions largely follows the Court of Justice's ruling in Coty, the case law on – at least territorial – dual pricing is arguably stricter, which the Commission may consider affords it less scope for a narrower effects-based approach.

In any event, suppliers would likely find it challenging to anticipate how these criteria could be applied in practice. For example, a supplier will typically not have good insight into the different costs incurred by retailers in online and offline sales of the supplier's products. And, in a dual distribution system, given the Commission's view that information exchange may be a horizontal concern, any attempt by the supplier to gain insight into retailers' cost structures could itself be considered to raise competition law issues. Thus, dual pricing strategies would have to be carefully designed so that a supplier, if challenged, would be able to demonstrate that it sought to establish a reasonable correlation with expected cost differences and that online sales remain viable. The criteria proposed by the Draft VGL may also not be sufficient to prevent divergent interpretations by competition authorities in the EU, thus undermining efforts to ensure a uniform application of EU competition law to dual pricing strategies across all Member States.

Online sales criteria do not need to be equivalent to criteria applicable to offline sales. As a further example of an apparent softening of the current, strict approach to treating distributors differently when they sell on- and offline, the Draft VGL do not repeat the much criticised broad requirement suggested by the current VGL that – for the block exemption to apply – the (sales-related) criteria which a supplier requires retailers to meet when they sell online, particularly in a selective distribution system, should be equivalent to the criteria they must meet when selling offline. This is not surprising as the concept of equivalence was not referred to by the Court of Justice in Coty in upholding the applicability of the VBER to a specific sales criterion (i.e., a platform ban).

This said, the Draft VGL are somewhat tentative in addressing this point and it is unclear how much flexibility suppliers will have: the criteria applicable to online sales do not need to be "identical" to the offline sales criteria (which anyway is not a requirement under the current rules), and specific quality criteria applicable to online sales (a few examples of which are provided, including an obligation to cover the cost of product returns by customers) are not considered hardcore restrictions, subject to the general proviso that they do not prevent distributors from effectively selling over the internet. No guidance is provided on which types of sales and service-related criteria might overstep this mark.

GREATER SCOPE TO IMPOSE (ACTIVE) SALES RESTRICTIONS AND TO PROTECT SELECTIVE DISTRIBUTION

The Draft VBER's list of hardcore restrictions distinguishes between different types of distribution systems and, generally, provides greater scope for active sales restrictions. Suppliers can require that active sales restrictions be passed on from the buyer to the buyer's (distributor) customers. Selective distribution systems can be protected against sales to unauthorised retailers from non-SDS territories.

Territories/customer groups can be allocated "exclusively" to several distributors and protected against active sales from outside the exclusively allocated territory/customer group.

The application of the VBER to active sales restrictions into an exclusive territory/customer group would no longer be conditional on all buyers in the EU being subject to the same restrictions.

Reorganisation of the list of hardcore restrictions. The Draft VBER reorganises the list of hardcore restrictions in order to clearly distinguish exclusive distribution systems (Draft VBER, Article 4(b)), selective distribution systems (Draft VBER, Article 4(c)), and distribution systems that are neither exclusive nor selective (Draft VBER, Article 4(d)). For all three types of distribution systems, the Draft VBER increases the scope of the restrictions that are, by way of exception, not considered hardcore. These provide greater scope for, in particular, imposing active sales restrictions – in contrast, passive sales restrictions continue to be treated as hardcore (except in the case of sales to unauthorised resellers where selective distribution is used).

Guidance on circumstances in which online promotion is active selling. Perhaps in recognition of the erosion of the value of the protection (provided by the VBER to active sales restrictions) resulting from the treatment of online selling as a form of passive selling, more extensive guidance is provided on the circumstances in which online promotion will qualify as active selling. In a significant change compared to the current rules, a distributor would be considered to engage in active selling where it offers its website in a language different to a language commonly used in the distributor's territory, other than English (Draft VBER, Art. 1.1(d)). Thus, for example, a supplier could prevent its French distributor from offering Finnish as a language option on its website if it had appointed an exclusive distributor in Finland. However, given the effectiveness of online translation tools, it is doubtful that this change will have a significant effect.

Shared exclusivity may be protected from active sales under the VBER. Contrary to the current rules, the Draft VBER envisions the possibility of shared exclusivity, i.e., territories or customer groups that are exclusively allocated to more than one distributor. As a result, the Draft VBER permits a supplier to prohibit active sales into territories or customer groups that are allocated to either one or to a limited number of buyers. Although the block exemption will apparently apply where exclusivity is shared even among a large number of buyers, and regardless of how that number is determined, the benefit of the exemption risks being withdrawn where that number of buyers is too large to generate the efficiency-enhancing incentives needed to justify a protection from active sales and avoid market partitioning (Draft VGL, para. 107).[3] Although the exact delineation between what constitutes a legitimately "limited" and an unduly "large" number of exclusive distributors may be unclear in practice, it is appropriate that this uncertainty does not prevent reliance on the block exemption unless and until it is withdrawn (for the future) in a proceeding where the authority would bear the burden of proof.

3 This requirement that the number of distributors among which exclusivity is shared should be determined in an efficiency-enhancing manner is also reflected in the new definition of 'exclusive distribution system' in Art. 1.1(g) of the Draft VBER (which refers to a system where territories or customer groups are allocated exclusively "to one or a limited number of buyers, 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…"). But this definition does not seem relevant to determining the applicability of the exemption to active sales restrictions under Art. 4(b) - (d), which exempt restrictions into territories "allocated by the supplier exclusively to one or a limited number of buyers" rather than to buyers in an *exclusive distribution system*.

Application of VBER to active sales restrictions into an exclusive territory/customer group would no longer be conditional on all buyers in the EU being subject to the same restrictions. While para. 51 of the current VGL suggests that a restriction of active sales into the territory or customer group allocated to an exclusive distributor is only block exempted where "the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union", the Commission has apparently determined that it is no longer appropriate to impose this – from a practical perspective – highly challenging and arguably disproportionate condition as a requirement for the applicability of the block exemption. Instead, insufficient protection from active sales by other buyers will be a factor that may lead to the withdrawal of the block exemption, for the future, in an individual proceeding. Consistent with the approach described above with respect to shared exclusivity, withdrawal is likely where the degree of protection from other buyers is judged insufficient to generate the efficiency-enhancing incentive to invest that justifies protection from active sales (Draft VGL, para. 205).

Pass on: suppliers may require active sales restrictions to be passed on to sub-distributors. Under the current VBER, a supplier may only prohibit active sales (that otherwise meet the conditions for exemption) by its direct buyers, and the supplier may not limit sales by the customers of those buyers. In contrast, under the Draft VBER, a supplier may impose active sales restrictions on a distributor and also on those of the distributor's customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier (Draft VBER, Art. 4(b)(i), 4(c)(i) and 4(d)(i)). Thus, the active sales restriction may be passed on to customers granted distribution rights by either the supplier, by the distributor or by a third party authorised by the supplier. The ability to pass on the restriction apparently does not extend to customers of the distributor which are not formally appointed as resellers, for which there would appear to be no clear reason.

Selective distribution: prohibitions on sales to unauthorised resellers from outside areas where selective distribution is used would be block exempted. Contrary to the current rules, where selective distribution is used in part of the EU and exclusive or open distribution is used elsewhere, the Draft VBER exempts a prohibition on sales to unauthorised distributors located in the area where selective distribution is used by distributors and their customers located elsewhere (Draft VBER, Article 4(b)(ii)). This change should put an end to a source of free riding created by the current VBER where a supplier chooses to use different distribution systems in different parts of the EU.

PLATFORM "WIDE MFNS" WOULD BE EXCLUDED FROM THE VBER - ALL OTHER MFNS WOULD CONTINUE TO BE BLOCK EXEMPTED

Only so-called "wide MFNs" in favour of platform providers of online intermediation services would be excluded from the block exemption.

MFNs (or parity provisions) have been used for many years across all sectors of the economy without attracting significant attention by competition law enforcers. In recent years, however, they have become the subject of an intense debate and of enforcement actions in the context of MFNs used by online intermediation services (such as hotel booking sites or platforms such as Amazon).

The proposed revisions to the VBER reflect these specific developments and insights gained from them. After considering more wide-ranging changes concerning MFNs, the Commission proposes in Article 5(1)(d) of the Draft VBER to exclude from the safe harbour only so-called wide MFNs in favour of online intermediation services. These are MFNs requiring a buyer of online intermediation services – such as a hotel – not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services. As a result, these MFNs would be subject to self-assessment under Article 101 TFEU in light of the (extensive) guidance provided by the Draft VGL.

All other MFNs would continue to benefit from the VBER. This would include so-called 'narrow MFNs' in favour of online intermediation services, whereby a buyer of online intermediation services would agree not to offer, sell or resell goods or services to end users under more favourable conditions through its own sales channels, as well as all MFNs used outside the context of online intermediation services.

The Draft VGL feature a new section on the assessment of MFNs which – again – focuses on their use by online intermediation services (Draft VGL, paras. 333 to 353). Very little is said about the assessment of MFNs in other contexts, which may be an indication that these MFNs will remain outside the focus of competition enforcers.

RPM WOULD REMAIN A HARDCORE RESTRICTION

The Draft VGL provide largely unchanged guidance on when efficiencies could in principle justify RPM despite its hardcore status. But they provide that RPM in fulfilment contracts would, under certain conditions, be block exempted, and somewhat surprisingly appear to indicate that certain minimum advertised price ("MAP") policies could benefit from the VBER. Price monitoring does not constitute RPM.

Hardcore restriction but no per se infringement. Resale price maintenance ("RPM") remains a hardcore restriction (Draft VBER, Article 4(a)). However, the Draft VGL emphasise that its characterisation as a hardcore restriction does not mean that RPM would be considered a per se infringement and efficiency justifications would have to be considered under Article 101(3) TFEU. Guidance is provided on circumstances in which RPM may create efficiencies and could therefore be justified under Article 101(3) TFEU. This could be the case, in particular, if RPM is used (i) to facilitate the launch of a new product on the market; (ii) in the context of a short-term (two to six weeks) low price campaign; or (iii) to avoid free-riding between retailers on pre-sales services in the context of experience or complex products (Draft VGL, para. 182). These closely follow the justifications already included in the current VGL, although they are described as examples in the Draft VGL thereby, in principle at least, leaving open the door for the possibility of others.

The Draft VGL's discussion of RPM does not signal any concrete change of position on the part of the Commission despite the arguments made in many submissions that the rules and enforcement practices related to RPM have been too strict and could prevent the use of RPM in circumstances where the practice could be efficiency enhancing. Whether there will be an increased willingness to consider the possible pro-competitive effects of RPM is not clear. As under the current framework, few businesses may be willing to test the effects of the guidance in practice, considering in particular the market perception that competition enforcers are quick to dismiss efficiency justifications without serious consideration of their merits.

RPM in fulfilment contracts can be lawful under certain conditions. A potentially very helpful clarification on the scope and limits of RPM in the Draft VGL concerns so-called "fulfilment contracts". This refers to situations where a supplier and an end user have entered into a contract, and the supplier then uses a third-party buyer (a third party that does not act as the supplier's agent) to fulfil the contract, i.e., supply the products to the end user.

The Draft VGL clarify that, in these circumstances, fixing the retail price at which the third-party buyer will deliver the products to the end user does not constitute RPM, but only if the end user has waived the right to choose the firm that delivers the products. It appears that, in order to meet this condition, the contract between the supplier and the end user must either already identify the third-party buyer that will fulfil the contract on the supplier's behalf, or grant the supplier discretion to unilaterally determine the third-party buyer at a later stage. If this condition is not met, the supplier could still impose maximum prices on the buyer(s) delivering to the end user, but not fix a particular price.

MAP policies might not be characterised as RPM under certain circumstances. Unexpectedly (this issue has not been discussed during the review process), the Draft VGL appear to suggest that minimum advertised price ("MAP") policies – policies that require retailers to use a minimum price in advertising, although they remain free to charge an actual price that is lower – might not be considered RPM if the retailer's freedom to deviate from the MAP is not restricted.

The Draft VGL identify circumstances in which MAP policies would be considered RPM (Draft VGL, para. 174). This would be the case if the supplier sanctions retailers for charging an actual price below the MAP, or prohibits them from offering a discount or from communicating that the final price could differ from the MAP. But this, as well as the context in which the Draft VGL discuss MAP policies, suggests that MAP policies that do not interfere with the retailer's right to charge a lower actual price would not be considered RPM.

This would signal a significant development in EU competition law. Although the Commission has not addressed MAPs in detail in its enforcement practice, the perception in Europe generally has been that all MAP policies would be considered RPM as they can be seen as interfering with the retailers' ability to effectively compete on price. This perception was also reinforced by the CMA's recent (pre-Brexit) enforcement practice, which fined suppliers for the use of MAPs.

The Draft VGL's apparent endorsement of the use of MAPs is rather short and only indirect, and the Draft VGL also make it clear that MAPs can be considered RPM in certain circumstances. Nevertheless, the Draft VGL do suggest that a carefully implemented MAP policy could escape the characterisation as a hardcore restriction and therefore could benefit from the block exemption. This would undoubtedly be significant for many suppliers of branded products, as it would strengthen their ability to encourage a greater focus on non-price aspects when retailers advertise their products. On the other hand, the consistency of a potentially new softer approach to MAPs with the hardline approach to restrictions on the use of price comparison tools described above may be questioned.

Price monitoring is not viewed as an inherently suspicious practice. The monitoring by suppliers of the prices charged by their retailers, including through the use of price monitoring software, is not considered to constitute RPM, and neither is an obligation on retailers to report other retailers that deviate from the "standard price level". The Draft VGL recognise that these measures, including the latter, may be efficiency-enhancing. If a supplier does engage in RPM, monitoring may make it more effective but it does not constitute proof that RPM has occurred.

NON-COMPETE OBLIGATIONS WITH RENEWABLE FIVE-YEAR TERMS WOULD BENEFIT FROM THE VBER

Tacitly renewable non-competes for consecutive five-year periods would be block exempted if the buyer can realistically terminate the non-compete after five years.

Non-compete obligations – obligations imposed on a buyer to purchase more than 80% of its total demand for a specific product and its substitutes from one supplier – that do not exceed five years in duration would continue to benefit from the VBER. If their term exceeds five years or is indefinite, they would continue to be excluded from the safe harbour and subject to a case-by-case assessment under Article 101 (Article 5(1)(a) Draft VBER).

The revised language of Article 5 of the Draft VBER as well as the Draft VGL clarify that non-competes that are tacitly renewable beyond a five-year period would benefit from the VBER – i.e., they would be considered not to exceed five years – 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 effectively terminate the agreement with the supplier with a reasonable notice period and at reasonable cost (Draft VGL, para. 234).

AGENCY: FOCUS ON DUAL ROLE AGENTS AND PLATFORMS

The Draft VGL provide new guidance on cost reimbursement methods for "genuine agents".

The Draft VGL suggest a modest softening of approach with respect to the conditions under which "dual role" agents (i.e., those that also act as risk-taking distributors for the principal) can qualify as genuine agents.

Platforms offering online intermediation services cannot in principle qualify as genuine agents.

The Draft VGL introduce a number of new elements into the assessment of agency agreements under Article 101 TFEU compared to the existing VGL. The current VGL clarify the circumstances in which (the selling function of) an agent is considered to be part of the same economic unit/undertaking as its principal and, thus, restrictions on the sale of the principal's products by the agent will be considered to fall outside the scope of Article 101 TFEU (so-called "genuine agency").

Cost reimbursement methods for "genuine agents". The Commission provides new guidance on the method of reimbursement of an agent's costs necessary to ensure that the agent qualifies as "genuine", which will assist principals in calculating and covering relevant risks borne by their agents. But whatever method is chosen, the principal will ultimately have to cover all the costs actually incurred by the agent, including by making top-up payments where the initial methodology proved insufficient to cover all costs.

"Dual role" agents. The Commission takes a somewhat more nuanced approach to "dual role" agents, i.e., companies that act as both agent and reseller for the same principal/supplier in relation to products belonging to the same product market. The existing VGL make clear that the principal/supplier must also cover the risks and costs associated with the agent/reseller's resale activities in these circumstances to preserve the "genuine" character of the agency relationship. In practice, this has made dual role agency a commercially unattractive proposition except where the reseller activities are marginal. Furthermore, the case law of the Court of Justice can be interpreted as supporting a strict approach to such relationships.

The Draft VGL appear to signal a (very) cautious relaxation in the Commission's approach. In articulating an arguably more specific theory of harm than can be discerned from the case law, the Draft VGL suggest that such relationships risk adversely affecting the dual role agent's incentives, and decision-making freedom, to independently and effectively compete on price when it acts as an independent distributor. In principle, such concerns may be at least abated in circumstances where:

1. the risk-taking reseller is not forced to take on the additional agency role (that is, it must be able to choose to remain only as a risk-taking reseller); and

2. the agency relationship relates to differentiated products (with additional functionalities or features compared to the products sold under the risk-taking reseller relationship).

If these conditions are fulfilled, a dual role agent may be able to qualify as a genuine agent where all costs directly or indirectly relevant to the agency relationship (defined broadly so as to include certain costs also benefiting the reseller activity, even if previously incurred) are paid by the principal. Whether in practice this will result in a principal having to reimburse much less than under the approach of the current VGL is liable to be very fact specific. Determining these costs in practice will be a complex and uncertain exercise. This in itself may have a chilling effect given the risks of failing to implement the guidance correctly: the Draft VGL make clear that the dual role exception should be interpreted strictly as a dual role provides "an easy way to control retail prices for those products that allow high resale margins" (para. 43).

Online intermediation services cannot be considered "genuine agents". The Commission clarifies that providers of online intermediation services are categorised as suppliers under the Draft VBER and therefore in principle cannot be considered "genuine agents" for the purposes of Article 101 TFEU. This clarification dispels any doubts as to the competition law assessment of the role of online intermediaries in vertical relationships, which have arisen since the explosion of e-commerce and the growth of online marketplaces and platforms. In support of this conclusion, the Draft VGL note that (i) such platforms act for a very large number of other sellers preventing them from being an effective part of the same undertaking as any of them (which constitutes an apparent significant analytical change as the current VGL expressly state, as a general matter without specific reference to platforms, that acting for several principals does not prevent the conditions of genuine agency being met); and (ii) these platforms make significant market-specific investments.

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