Bird & Bird

The new competition regime for distribution in the EU: Opportunities for the decade ahead

Ariane Le Strat, Pauline Kuipers and Jörg Witting - Bird & Bird LLP

Introduction

The Vertical Block Exemption Regulation or VBER provides for a general exemption from competition rules for all types of distribution agreements (see text box below for explanation). Following a comprehensive consultation process on the back of the publication of the draft VBER, in the summer of 2021, the EU Commission published the final version of the VBER and its accompanying Guidelines on 10 May 2022. Both documents are available here. The new rules enter into force on 1 June 2022.

The previous VBER and Guidelines dated from 2010. They were widely considered to be a useful tool for self-assessment of vertical agreements. However, given the exponential growth of online and multichannel sales as well as the tectonic shifts in how consumers buy goods and services across the EU in the past decade, including the development of new players such as online marketplaces, the former regime was in dire need of an upgrade.

This article explores the new regime in depth. It not only highlights where businesses will need to adjust their distribution agreement to comply with the new rules and/or benefit from new exemptions, but also indicates where the Commission provides more room for commercially flexible and tailored approach to the current challenges in omnichannel distribution structures. Notably, the VBER does provide for a one-year transitional period until 31 May 2023 for distribution agreements already in force on 31 May 2022 which meet the existing conditions for exemption. This window gives businesses some time to reflect on the changes and, if necessary, adapt their commercial agreements.

What is the VBER?

Article 101(1) of the Treaty on the Functioning of the European Union (**TFEU**) prohibits agreements which restrict competition. Article 101(3) TFEU sets out the exception to this prohibition for agreements, which 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.

Agreements between entities active at different levels of the supply chain, (a manufacturer and distributor for example) are referred to as **vertical agreements**. Competition law has long established that vertical agreements may be able to benefit from the Article 101(3) exemption.

The Vertical Agreement Block Exemption Regulation (**VBER**) is a regulation which automatically exempts through a **safe harbour** under Article 101(3) TFEU vertical agreements which comply with a set of criteria, namely:

- the parties each have a market share below 30%; and
- the agreement does not contain any hardcore restrictions (eg. fixing resale prices).

The VBER comes with detailed guidance which provides crucial insight into its interpretation in relation to the main types of vertical agreement and distribution structure. These Guidelines also contain the Commission's policy considerations in relation to vertical agreements falling outside the safe harbour of the VBER. This is invaluable guidance for the **self-assessment** businesses and their legal advisors are expected to undertake to ensure distribution agreements comply with competition law. The current regime is applicable across the EU.

Following Brexit, the UK has now developed its own set of rules which are closely aligned with the EU regime. There are however some divergences. You can read about the brand-new UK regime here.

Executive Summary

The new VBER mostly retains the same structure and substance, whilst readjusting certain rules, in particular around the distinction of exclusive, selective and other forms of distribution. The Guidelines address topical issues like dual distribution, dual pricing, retail parity obligations, active sales restrictions and certain indirect measures restricting online sales. They provide extensive guidance on concepts which in practice had become difficult to self-assess and more clarity on the scope of Article 101 TFEU relating to (true) agency agreements and so-called *de minimis* restrictions of competition. The VBER now offers more flexibility for suppliers who wish to combine different types of distribution models, oblige their distributors to pass-on sales restrictions to their customers or want to appoint multiple exclusive distributors.

Summary of the key changes

- ➔ New hardcore restriction of preventing the effective use of the internet as a sales channel
- ➔ Dual distribution remains exempted, with the exception of the provision of online intermediation services by a provider with a hybrid function. It also applies only to exchanges of information directly related and necessary to improve the production or distribution of the contract goods or services
- ➔ Dual pricing and marketplace bans become block exempted
- ➔ Price comparison website restrictions become hardcore restrictions
- ➔ Equivalence principle is no longer applicable within selective distribution
- ➔ Wide Retail parity obligations become an excluded restriction

1. The scope and structure of the new VBER

The heart of the VBER is Article 4. It sets out the so-called hardcore restrictions, which if included in an agreement will automatically remove the benefit of the safe harbour. In the new VBER, the headline restrictions remain unchanged aside from the addition of a new hardcore restriction of preventing the effective use of the internet. Resale price maintenance (**RPM**), namely restricting a distributor's ability to determine its sale price, unsurprisingly remains a hardcore restriction regardless of the distribution structure. Territorial and customer restrictions are also retained as hardcore restrictions.

The VBER now sets out the varying exceptions around territorial and customer restrictions within a clearer structure, looking at i) exclusive distribution, ii) selective distribution and iii) free distribution in turn. It explicitly allows for more flexibility in the design and structure of the distribution models than was previously envisaged. In addition, it introduces new definitions providing more clarity to businesses in particular SMEs who typically have small inhouse legal teams. The aim is to simplify the rules and ultimately reduce compliance costs for businesses.

1.1 Exclusive distribution

Within an exclusive distribution system, a supplier allocates a territory or customer group exclusively to a distributor and can restrict other buyers from actively selling into the exclusive territory or to the exclusive

customer group. The existing permitted restrictions have been carried through in the new VBER.[1] The Commission however has introduced the following new provisions:

- *Up to five exclusive distributors*

The new VBER clarifies that a maximum of five exclusive distributors can be appointed within a particular territory or customer group[2].

- *Active sales restrictions can be passed on*

The VBER will now allow the supplier to demand a 'pass on' of the active sales restriction to the buyer's direct customers[3], if they have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier. This new provision extends the reach of active sales restrictions and provides reinforced protection for the investment incentives of exclusive distributors.

- *Protection of selective distributors in a different territory*

The VBER caters for more flexibility within distribution structures and particularly the co-existence of both selective and exclusive networks. The new provisions explicitly allow a supplier to protect its selective distributors by allowing the restriction of active and passive sales by an exclusive distributor to unauthorised distributors into a territory where the supplier operates a selective distribution system. Again, this restriction (on both active and passive sales) can also be passed on to the exclusive distributor's commercial customers. Different to the protection of exclusive distribution which is limited to "direct" customers, the supplier may pass on active and passive sales restrictions protecting a selective distribution system also further down the distribution chain.

1.2 Selective distribution

Within a selective distribution system, a supplier sells the goods or services only to distributors and (often) retailers selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors or retailers within the territory reserved by the supplier.[4] Again, the Commission has built on the existing permissions and introduced a few more provisions in the new VBER:

- *Protection of exclusive distributors in a different territory*

The VBER now allows the restriction of active sales by selective distributors or their direct customers into an exclusive territory or customer group[5]. This mirrors the new provision in Art 4(b)(ii) VBER and crystallises the Commission's acceptance of combined selective/exclusive distribution systems.

- *Active and passive sales restrictions can be extended to selective distributor's customers*

The VBER will now allow the supplier to restrict a selective distributor's customers from making active or passive sales to unauthorised distributors located within the selective distribution territory[6]. This builds on the existing provision which allows passive and active sales restrictions to non-authorised distributors within a selective network. Such restrictions can now be passed on to the buyer's direct customers as well as further down the distribution chain.

- *Equivalence principle*

The equivalence principle previously required selective suppliers to impose the same or equivalent criteria on their online distributors and brick and mortar distributors. The new Guidelines soften this stance on the basis that online businesses no longer need this protection reflecting that online and offline channels have different characteristics. A selective supplier is no longer required to impose on its authorised distributors identical

[1] See section 6.1.2.3.1 Guidelines.
[2] Art 4(b)(i) VBER.
[3] Art 4(b)(i) VBER and Paragraph 220 Guidelines.
[4] See section 6.1.2.3.2 Guidelines.
[5] Art 4(c)(i)(1) VBER.
[6] Art 4(c)(i)(2) VBER.

criteria for online and physical sales[7], as long as the lack of equivalence does not have as its object the prevention of online sales.

1.3 Free distribution

A free (or rather 'open' as it may contain some protective restrictions) distribution system is defined by the absence of an exclusive or a selective structure.[8] Previously free distribution did not grant distributors the ability to restrict passive or active sales. The new provisions however, in unison with the previously covered provisions, now cater for combined structures.[9] They allow free suppliers to protect their selective or exclusive territories by restricting

(i) **active sales** by the buyer or its direct customers into a territory or customer group reserved to the supplier or allocated to a maximum of five exclusive distributors; and
(ii) **active and passive sales** by the buyer or its customers to unauthorised distributors located within a selective distribution system.

2. Dual Distribution exception now reflects growing horizontal dynamics

Although the VBER is aimed at vertical agreements, the safe harbour remains extended, generally as before, to dual distribution scenarios. Article 2(4) of the previous VBER grants the benefit of the safe harbour to non-reciprocal agreements between competitors, where for instance the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing manufacturer.

The new VBER has retained the dual distribution exception, even extending it to wholesalers and importers and also covering scenarios where the two parties compete on an upstream market level, i.e. not necessarily on the downstream retail level.

Regarding information exchange in dual distribution, the Commission had previously considered a new aggregated market share threshold of 10% at retail level to benefit from the exception. This faced a deluge of criticisms from stakeholders on the basis that it was disproportionately low, unpractical and unreasonable and many of us predicted a Commission U-turn.

The final version of the VBER no longer contains this additional threshold. Instead, the VBER makes it clear that where the exchange of information is unrelated to the implementation of the vertical agreement or is unnecessary to improve the production or distribution of the contract goods or services, it will not benefit from the dual distribution exception[10]. This reflects the fact that the line between competitors and non-competitors is increasingly blurred in multichannel distribution systems. The advent of online sales has only increased this phenomenon with many brand owners selling both through distributors and directly on their websites in parallel. Clearly, suppliers with dual distribution will have to be more cautious in the data requested from their (external) distribution partners and make certain that they avoid using it or exposing it in relation to their direct sales. This is a more measured approach.

It is also noteworthy that the benefit of dual distribution exemption is withdrawn from vertical agreements relating to the provision of online intermediation services when the provider is also a competing undertaking for the sale of the intermediated goods or services[11]. According to the Commission, agreements entered into by providers of online intermediation services with such a hybrid function do not fulfil the rationale of the exception for dual distribution exceptions and the Commission is concerned about self-preferencing and coordination of competition between the users of the online intermediation services.[12] In practical terms this

[7] Para 235 Guidelines.
[8] Para 116 Guidelines.
[9] See section 6.1.2.3.3 Guidelines.
[10] Art 2(5) VBER.
[11] Art 2(6) VBER.
[12] Para 105 Guidelines.

© Bird & Bird LLP

means that such agreements must be assessed on an individual basis, taking guidance also from the Horizontal Guidelines - when it relates to possible collusive effects.[13]

3. Dual pricing is block exempted

The Commission's previous position was to protect online sales at all costs. At the time the previous VBER came into force, online sales were a new sales channels, which needed protecting. However, the commercial landscape has drastically changed in the last 12 years and even more so since the Covid 19 pandemic.

Given this shift, the Commission has fundamentally changed its focus. Requiring a distributor to pay a different price for products intended to be resold online than products to be resold offline (dual pricing) was previously a hardcore restriction. The Guidelines make it clear that this will no longer be the case.[14] Dual pricing will now benefit from the safe harbour as long as the restriction aims to incentivise, or reward appropriate levels of investment respectively made online and offline.

This change will be welcomed by suppliers and physical distributors who have long complained about free-riding and the inability to recoup the marketing and customer support investments as well as the costs of maintaining brick and mortar stores. However, it does mean careful drafting of agreements will be needed to capture the purpose of the dual pricing.

4. A new hardcore restriction of preventing the effective use of the internet

Previously online sales restrictions only featured in the Guidelines as an example of passive or active sales. Their inclusion within the VBER itself is noteworthy particularly through a new 'catch all' hardcore restriction explicitly prohibiting the prevention of the effective use of the internet as a sales channel. This is not a new assessment and was mentioned in the Commission's e-commerce inquiry and in the draft versions of the VBER and its Guidelines. We welcome the inclusion of this assessment within Article 4 as it clarifies the importance of this assessment and underlines the continued significance of the Internet as a sales channel.

4.1 Marketplace bans

Marketplaces were non-existent or at best minor players when the previous VBER was issued in 2010. The Guidelines define marketplaces as online platforms which connect merchants and potential customers with a view to enabling direct purchases. Amazon and eBay (to name only two) have now become behemoth e-commerce platforms. As expected, the Guidelines provide clarity on the permissibility of restrictions on sales via online marketplaces.

Since the 2017 Coty ruling of the EU Court of Justice[15], which established that marketplace bans are acceptable in the context of the selective distribution of luxury goods, there has been an ongoing debate on the permissibility of such restrictions beyond this initial scope. The Commission has ended this debate and clarifies in the Guidelines, that restrictions on sales through online marketplaces are block exempted in vertical agreements if the market share thresholds are met. This exemption applies to all products. According to the Commission, "*suppliers may wish to restrict the use of online marketplaces by their buyers, for instance to protect the image and positioning of their brand, to discourage the sale of counterfeit products, to ensure sufficient pre- and post-sale services, or to ensure that the buyer maintains a direct relationship with customers*[16]".

---

[13] Para 107 Guidelines.
[14] Para 209 Guidelines.
[15] Our article summarising the ECJ's Coty judgement is available here.
[16] Para 334 Guidelines.

© Bird & Bird LLP

The Commission explicitly clarifies that the restrictions on marketplace sales are not hardcore restrictions, since it only limits the manner in which the buyer may sell online and does not restrict sales to a specific territory or customer group. However, a platform ban that prevents the effective use of the internet for online sales will constitute a hardcore restriction[17].

4.2 Restrictions on the use of online advertising channels

The Commission also indicates in the Guidelines that comparison websites are regarded as online advertising channels since they re-direct customers to the website of a retailer. It is of the view that direct or indirect prohibitions on the use of online advertising channels (such as price comparison tools or search engine advertising) have the object of preventing distributors from effectively using the internet as a sales channel and therefore are hardcore restrictions. Similarly, a requirement on a distributor not to use a supplier's trademark or brand name on its website is now a hardcore restriction.

4.3 Geo-blocking

In line with the Geo-blocking regulation,[18] which deals with unilateral geo-blocking, the Guidelines codify in very direct terms the position on bilateral geo-blocking. This is in line with the Commission's decision to fine Valve and a number of game publishers for similar geo-blocking agreements in January 2021[19]. A requirement or contractual clause that a distributor prevents customers located in another territory from viewing its website or automatically re-routing its customers will both be hardcore restrictions[20].

5. The platform economy

Online platforms (aka online intermediation services) such as marketplaces or price comparison tools play an increasingly important role in the distribution of goods and services. Their role however is multifaceted and therefore not always easy to categorise within traditional parameters.

As a matter of principle, the Commission will treat providers of online intermediation services as 'suppliers' within the meaning of the VBER. The definition of 'online intermediation services' has been adapted to include both intermediation services that facilitate the initiation of direct transactions between undertakings, and those that facilitate the initiation of direct transactions between undertakings and final consumers. This also means that online intermediation services providers will generally not qualify as agents for the purposes of Art 101(1) TFEU[21]. The Commission is of the view that they are independent economic operators. The significance of this is that the seller who uses the platform is defined as a 'buyer' of those intermediation services. As such, the supplier is not permitted to set the 'buyer's' price or impose a minimum price, however it can incentivise that the seller lists at a competitive or reduced price, and there is no general duty for the platform to carry a seller's products[22].

6. Sustainability

Sustainability is now a priority objective for the EU. This renewed focus is being felt across the board including in the new VBER. A vertical agreement that does not benefit from the safe harbour may nonetheless still qualify for an exemption under 101(3) TFEU if it fulfils the relevant conditions. The Guidelines make it clear that sustainability objectives are relevant to the Art 101(3) TFEU assessment[23].

---

[17] Para 335 Guidelines and Art 4(e) VBER.
[18] You can find the full text of the Geo-blocking Regulation here.
[19] You can find the full text of the Valve decision here.
[20] Para 206 Guidelines.
[21] Para 46 Guidelines
[22] Para 194 Guidelines
[23] Para 9 Guidelines

© Bird & Bird LLP

In addition, sustainability related criteria such as climate change, protection of the environment or limiting the use of natural resources will qualify as valid qualitative criteria for the purposes of selective distribution systems[24]. For example, a supplier can request that its selective distributors ensure that their goods are delivered in a sustainable manner. Lastly, non-compete restrictions which are longer than five years are more likely to meet the Art 101(3) criteria if they are in place to amortise green investment[25].

7. Wide retail parity obligations are now excluded restrictions

Retail parity obligations (often referred to as Most-Favoured-Nation clauses or MFNs) have long been shrouded in uncertainty. They can take many forms, but typically require a supplier of goods or services to offer them to another party on conditions that are no less favourable than the conditions offered by the supplier to certain other parties or on certain other channel. The conditions could relate to price, inventory, availability or any other terms.

They are very common in the context of online platforms where the case law has drawn an important distinction between 'wide' and 'narrow' retail price parity clauses. 'Wide' retail price parity clauses typically require retailers (e.g. hotels) to publish on a price comparison tool or online marketplace (e.g. online hotel booking site) the same or better price and conditions as those published on any other sales channel. By contrast, 'narrow' retail price parity clauses typically require retailers to publish on a price comparison or online marketplace the same or better price and conditions as those published on its own (direct) website.

A decade's worth of conflicting national enforcement on the rules and many EU Commission investigations ending in commitments have resulted in a confusing picture. The Commission had previously confirmed that it would provide more guidance on how such clauses should be analysed and does deliver on this promise in the new VBER and Guidelines.

The new VBER removes the benefit of the block exemption for 'wide' parity obligations for buyers of online intermediation services, which should now be treated as Excluded Restrictions.[26] This means that, whilst they are not 'hardcore restrictions' and therefore are severable from the rest of the agreement, the pro and anti-competitive effects of 'wide' parity obligations will need to be assessed under Art 101(3) TFEU. Other parity clauses, in particular 'narrow' retail parity obligations and wholesale price parity clauses, remain block exempted. It is interesting to note that the UK has now adopted a stricter approach and bringing wide parity obligations into the list of hardcore restrictions.

8. Withdrawal of the benefit of the Block Exemption

The new VBER clarify the circumstances under which the Commission and national competition authorities can withdraw the benefit of the safe harbour if they consider that a particular agreement is incompatible with Art 101(3) TFEU even though in theory it meets the criteria of the VBER. A similar power has been given to the UK CMA in the new regime it has developed outside of the EU. This is a not a new power but will help future-proof the VBER somewhat. It gives the Commission some flexibility to investigate restrictions it cannot anticipate in 2022. It also adds a layer of uncertainty for stakeholders who will need to keep Art 101(3) TFEU in mind when doing the self-assessment.

[24] Para 144 Guidelines
[25] Para 316 Guidelines
[26] Article 5(1)(d) VBER.

© Bird & Bird LLP

9. Transitional period and Validity

The VBER will enter into force on 1 June 2022 and expire 12 years later on 31 May 2034. The same in principle applies to the accompanying Guidelines. Although this was always the Commission's intention, there has been a lot of feedback that this period seems very long - in view of the changes over the past decade which have inspired the fundamental changes in the Commission's revised policy. But the Commission may perhaps be encouraged to update the Guidelines during this period, if they again appear to be outdated in view of the dynamics and challenges of distribution structures in practice.

A one-year transition period will finish on 31 May 2023 giving companies large and small a short window of opportunity to carry out internal audit and make sure they remain compliant with the rules. This is however an opportunity as the rules do offer more flexibility and room to protect distribution networks and enhance brands in today's e-commerce dominated world.

* * * * *

*Please **get in touch** with your local Bird & Bird Competition & EU lawyer if you have specific questions or would like to explore opportunities that the new regime may open up for your business.*

© Bird & Bird LLP

Ariane Le Strat

Senior Associate

+44 (0)20 7415 6000
ariane.lestrat@twobirds.com

Pauline Kuipers

Partner

+31 (0) 70 353 8810
pauline.kuipers@twobirds.com

Jörg Witting

Partner

+49 (0) 211 2005 6268
joerg.witting@twobirds.com

twobirds.com

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dusseldorf • Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris • Prague • Rome • San Francisco • Shanghai • Singapore • Stockholm • Sydney • Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority (SRA) with SRA ID497264. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.

Admin\52630428.1