

Preparing for the new Block Exemption Regulation on vertical agreements

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2021 IDI Conference

17 June 2021

Outline

1. Review process: where do we stand?
2. Proposals concerning the organization of distribution networks
3. Issues linked to specific behaviours/clauses
4. Other issues at stake

1. Review process: where do we stand?

Timeline

- Commission Regulation 330/2010 (VBER) expires on 31 May 2022 => review process launched in 2018, for VBER and VGL
- Evaluation phase (2018-September 2020) => staff working document (2020) 172 final
- Impact Assessment (ongoing): the Commission launched consultations on specific issues and regulatory options (Oct-Nov 2020 and Dec 2020- March 2021) => proposal for new VBER and VGL expected soon

Regulatory challenges

- Times have changed and so have distribution systems: the regulatory framework should be updated to meet the challenges of the digital transformation
- Constraints on the organization of distribution networks and on specific behaviours/clauses that are not necessary and proportionate should be removed

Commission's approach

VBER and VGL will be maintained, with targeted improvements:

- ❖ softening/removal of some constraints (some options would entail a hardening of specific constraints)
- ❖ clearer rules and more complete guidance to avoid differences between Member States
- ❖ update in light of ECJ case-law (Coty etc.)
- ❖ proper rules for omnichannel environment and new market players

2. Proposals concerning the organization of distribution networks

Dual distribution

Dual distribution is the situation in which a supplier sells directly to end customers, hence competes with its own distributors at retail level – currently covered by VBER

- increasing practical importance: are horizontal concerns still negligible or should we introduce a lower market share threshold e.g. 20%?
- should the exemption of dual distribution be extended to wholesalers and/or importers?

Dual distribution: related issues

- **exchange of information** between supplier and distributors

e.g. DK Competition Authority in *Hugo Boss* considers exchange of info concerning future prices, discounts and quantities within dual distribution system as a horizontal agreement

- **hybrid platforms** acting as intermediaries and distributors should be excluded from the Art. 2(4)(b) exemption?

Hardcore treatment of sales restrictions

Art. 4 VBER contains strict rules on sales restrictions with limited exceptions: should the exceptions be broadened? Hardcore treatment may be removed for:

- restrictions of active sales if **shared exclusivity** between two or more distributors in the same territory
- combination of **exclusive and selective** distribution
- restrictions of **sales from outside the territory** allocated to selective distribution system to unauthorized distributors within such territory

Indirect restrictions of online sales

Currently hardcore. Should the approach become more flexible?

e.g. no hardcore treatment of **dual (wholesale) pricing** and case by case approach so as to allow covering the costs of physical stores (so far, rigid approach by some competition authorities e.g. *Lego cases*)

Is the **equivalence principle** in the application of criteria for online versus brick and mortar sales in selective distribution too uncertain to justify a hardcore treatment?

3. Issues relating to specific behaviours or clauses

Parity obligations/MFN clauses

- Currently block exempted. Increasing use of parity obligations, either with respect to any other sales channel or just the company's direct sales channel. Outside the VBER, different approaches in Member States. Usually wide parity clauses are a greater concern
- Proposal to remove the benefit of block exemption for a subset of parity obligations or for all parity obligations and inclusion in the list of excluded restrictions, thus requiring an individual effects-based assessment

Comments

- Removal of the benefit for all parity clauses apparently unjustified
- For excluded parity clauses, VGL should provide indications on how to assess the impact on competition pursuant to Art. 101, paragraphs 1 and 3, taking into account the economic context and the counterfactual scenario in terms of free riding on the platform's investments

Efficiencies of RPM

DG Comp not willing to change Art. 4(a) VBER but available to consider case by case application of Art. 101(3) and discuss the standard of proof

Strict attitude by NCA e.g. in *Casio* (UK, 2019)

MAP considered restrictive by object

- Do 'recommended prices + monitoring' always amount to RPM? What about price ranges or prohibition of discounts?
- Can uniform pricing be justified in franchising?
- What about assessment of fulfilment contracts pursuant to Art. 101(1) or 101(3)?

Duration of non compete obligations

Currently non compete obligations the duration of which is indefinite or exceeds five years are excluded from the benefit of the block exemption (Art. 5) and same treatment for **tacitly renewable non compete obligations**

=>the option is being considered to include tacitly renewable non compete obligations with duration not exceeding 5 years in the block exemption provided the buyer is free to periodically terminate or renegotiate the agreement

4. Other issues at stake

Boundaries of the agency notion

In case of agency agreements, the selling or purchasing function of the agent (e.g. setting resale prices) forms part of the principal's activities. Notion based on risk allocation

- When is a risk not significant?
- Can platforms be considered agents?
- What about fulfilment contracts? (no influence on resale prices but the distributor bears the risk of not selling the product)

Dual role as agents and distributors

Preliminary position in a Commission's staff working document. When a distributor acts also as agent for certain products of the same supplier, it can be considered a 'true' agent pursuant to Art. 101 for such products under strict conditions:

- if clearly differentiated products with distinct characteristics and other activities within the same product market required by the principal are fully reimbursed; or
- if distributor free to enter into agency agreement and all relevant risks are borne by the principal

Rights of supplier in selective distribution network

Selective distribution networks wish a more effective protection against resellers outside the network

Online sales

As to restrictions of **online sales**, still different approaches in the different Member States

How should the *Coty* case-law on restrictions on the **use of third party platforms** be included in the VBER/VGL (e.g. also non luxury goods)?

What about restrictions on the use of **price comparison tools** and on the **use of the supplier's trademark on online search engines**?

Case by case assessment of the impact on the possibility to sell online or form-based approach?

Room for justifications?