



The new EU rules on vertical restraints: a general overview

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Speaking in a personal capacity. The views expressed are not necessarily those of DG Competition or the European Commission.

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Competition

Objectives of the VBER review (quick recap)

- 1. Readjust the safe harbour provided by the VBER**
 - Eliminating false positives under the VBER
 - Dual distribution
 - Parity obligations
 - Reducing false negatives under the VBER
 - Actives sales restrictions
 - Specific online restrictions
- 2. Provide stakeholders with up-to-date guidance for a business environment reshaped by the growth of e-commerce and online platforms**
- 3. Ensure a more harmonised application of the vertical rules across the EU**

Dual distribution

- Where a supplier sells directly to end customers, as well as using independent distributors
- Evaluation indicated dual distribution now more prevalent and may raise horizontal concerns
- Dual distribution exception maintained
 - Extension of the exemption to cover more levels of the supply chain (importers, wholesalers)
- Information exchange in dual distribution block-exempted where the exchange is (i) directly related to implementation of vertical agreement and (ii) necessary to improve production or distribution of contract goods or services
 - Guidelines provide examples of information exchanges that are or are not likely to meet the test
 - Information exchange that falls outside VBER requires individual assessment, no presumption of a (horizontal) infringement, rest of agreement remains block-exempted

Parity obligations

- Enforcement experience indicates that not all parity obligations can be assumed to generally meet the conditions of Article 101(3)
- Across-platform ('wide') retail parity obligations excluded from VBER (Art. 5)
 - Where a platform prevents a seller from offering the same products to end users at lower prices or better conditions via competing platforms
 - Exclusion covers all conditions (price, content, availability)
 - Includes incentives that cause equivalent effects
- All other parity obligations, including narrow retail parity clauses and non-retail parity clauses remain block-exempted
- VBER Article 6 and the Guidelines warn that benefit of the VBER may be withdrawn in concentrated platform markets with cumulative use of narrow retail parity obligations

Active sales restrictions (1/2)

- Evaluation showed need for greater flexibility for suppliers to design their distribution systems and scope to exempt active sales restrictions in additional circumstances
- Active and passive sales now defined in VBER
 - **Active sales:** actively targeting customers, including using search engine advertising and price comparison websites targeting particular territories and using in a website country-specific top-level domains or languages commonly used in countries other than those where the buyer is established (except EN)
 - **Passive sales:** sales made in response to unsolicited requests from individual customers (no targeting), including participation in public procurement and responding to private invitations to tender
- Updated guidance on when online sales practices amount to active or passive selling
- Art. 4 VBER – hardcore on territorial/customer restrictions now organised by distribution model (ED, SDS, free distribution). Exclusive distribution and selective distribution now defined in VBER

Active sales restrictions (2/2)

Exclusive distribution

- Shared exclusivity block-exempted, up to maximum of 5 distributors per exclusive territory/customer group (no restriction of active/passive sales within the exclusive territory/customer group)
- Supplier may require buyers to oblige their *direct* customers not to make active sales into exclusive territories/customer groups ('pass-on')
- Combination of exclusive and selective distribution in same territory (e.g. exclusive wholesaler, selected retailers) still not block-exempted

Selective distribution

- Supplier may restrict buyers from selling to unauthorized distributors located in an SDS territory, irrespective of where the buyer is located. Supplier may require buyers to impose the same restriction on their direct and indirect customers ('pass-on')
- Guidelines clarify that SDS is block-exempted irrespective of: (i) nature of product, (ii) nature of selection criteria (qualitative and/or quantitative) and (iii) whether the selection criteria are published

Specific online sales restrictions

- Evaluation showed that online sales have developed into a well-functioning sales channel that no longer needs special protection relative to offline sales channels

Dual pricing

- Supplier may charge different wholesale prices to the same buyer depending on whether goods are to be sold online/offline
- Limiting principles:
 - Must not have object of preventing the effective use of the internet or restricting cross-border sales
 - Implementation must not cap the amount of products that may be sold online
 - Supplier may not require that retail prices are higher/lower depending on the sales channel
- No requirement for cost calculations; principle applies irrespective of distribution model

Relaxation of equivalence rule

- Criteria imposed by supplier for online/offline sales in selective distribution don't need to be equivalent, provided the online sales criteria don't have the object of preventing the effective use of the internet

Framework for assessing online sales restrictions

VBER Article 4(e):

[VBER] shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(e) the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer:

- (i) other restrictions of online sales; or*
- (ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel*

VBER Recital 15:

- Contains guidance for applying Article 4(e) (e.g. hardcore if object is to significantly diminish the aggregate volume of online sales of the contract goods/services or the possibility for consumers to buy the contract goods/services online)
- Specifies there is no need for an effects analysis

Platforms (1/2)

VBER Article 1(1)(e) – definition of online intermediation services:

‘online intermediation services’ means 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

VBER Article 1(1)(d) - providers of OIS categorised as suppliers in respect of the OIS

Platforms that don't meet the OIS definition may be categorised as suppliers or buyers (as previously)

Platforms (2/2)

Consequences of being an OIS provider (without prejudice to the treatment of platforms outside VBER)

- Cannot be categorised as a buyer in respect of the intermediated goods/services
- Market share calculated on relevant market for provision of OIS
- Article 4 hardcore list applies to restrictions imposed by the OIS provider but does not apply to restrictions imposed on the OIS provider by sellers

Hybrid platforms

- VBER Article 2(6): agreements relating to the provision of OIS fall outside the VBER where the OIS provider has a hybrid function (it competes as a reseller on the relevant market)
- Individual assessment outside VBER: vertical restraints assessed using Vertical Guidelines, possible collusive effects assessed using Horizontal Guidelines
- Comfort for smaller hybrid platforms: their agreements “not an enforcement priority” if no market power and no by object restrictions

Additional points (overview)

- Agency agreements, including new guidance on agents that also act as independent distributors for the same supplier ('dual role')
- RPM remains a hardcore restriction but expanded guidance (MAPs, fulfilment contracts)
- Guidelines contain examples of vertical agreements pursuing sustainability objectives that can benefit from the VBER/fulfil Article 101(3) in individual cases
- Non-compete (exclusivity) obligations block-exempted if less than 5 years or tacitly renewable and distributor can effectively give notice and terminate
- Guidelines clarify the conditions for national competition authorities to withdraw the benefit of the VBER in individual cases

Any questions?