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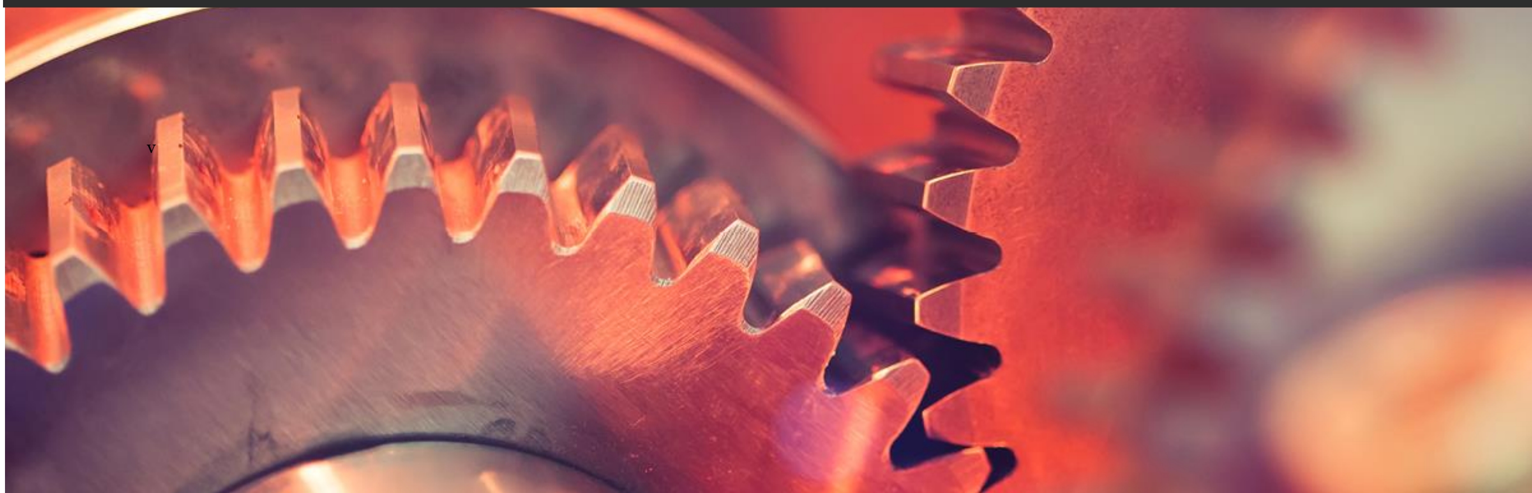

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The New VBER and Vertical Guidelines Explained: Key Takeaways

On 10 May 2022, the European Commission adopted the long-awaited new Vertical Block Exemption Regulation (VBER) and the new accompanying Vertical Guidelines (Guidelines). The VBER entered into force on 1 June 2022 and is valid for 12 years. It allows for a one-year transitional period for existing agreements to align with the VBER and Guidelines.

The VBER and Guidelines were revised to reflect the growth of online sales and (digital) market developments (*see* our prior GT Alert, "Distribution Agreements in the EU: Changes After VBER and Accompanying Guidelines are Revised"). With regard to the 'offline' world, the VBER largely remains unchanged and codifies current case law of the European Court of Justice (ECJ). For the 'online' world, however, the VBER provides new rules.

The following key changes, modernizations and amendments of the VBER and Guidelines are discussed in this GT Alert:

- narrower interpretation of existing exemption for agency agreements and clarification as regards temporary transfer of ownership and dual role agents;
- non-competes during the term of an agreement may be tacitly renewable, provided the distributor has the choice to terminate or renegotiate the agreement at the end of the five-year period;

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- definition of exclusive distribution now extends to more than one distributor;
- suppliers who impose restrictions on their direct distributors for active sales may now also require them to 'pass on' this prohibition to their own direct customers;
- different distribution systems in different areas within the European Economic Area (EEA) may now be protected against each other;
- rules on resale price maintenance are clarified and specific exemptions are broadened;
- definitions of active sales and passive sales are clarified and included in the VBER;
- online sales restrictions are permitted as long as the effect does not 'significantly diminish' sales through this channel; and
- rules relating to (information exchange in) dual distribution systems are adapted to online sales.

1. Agency Agreements

- Integration required

In line with case law, the VBER now provides for a narrower interpretation of the existing exemption for agency agreements. Only genuine agents who are truly integrated in a principal's distribution model and do not have any independent (economic) risk are not subject to the restrictions of 101(1) of the Treaty on the Functioning of the European Union (TFEU).

This risk criterion of the agency test remains the same; however, a new test is added in order to measure the risks involved: the commission the principal pays to the agent is now relevant as opposed to the revenues generated by the transactions the agent is involved in. The agent should be compensated for investments related to the sale of goods or services, which should be interpreted broadly. Furthermore, in cases where the agent enters into transactions on behalf of a large number of principals, this may not qualify as 'genuine agency'. Prior to the VBER, without having to take a real economic risk, any distribution was possible via distributors who function as an undisclosed agent of the principal, without the end-user being aware. It should be noted that in the *CEPSA* case the ECJ requalified petrol distributors as agents because the very small margin that was allowed made independent economic conduct by the agent impossible without considering the integration. It is therefore not clear where the 'safe harbour' ends if there is no margin for the agent's independent economic operation, but a certain level of integration is absent with multiprincipal agents.

- Temporary transfer of ownership

The Guidelines clarify that an agent may temporarily, for a very brief period of time, acquire ownership of the contract goods while selling them on behalf of the principal. In such cases, an agency agreement remains outside the scope of 101(1) TFEU, if the agent does not incur any (significant) costs or risks in relation to this transfer of ownership *(see par. 33 (a) Guidelines)*.

- Dual role agents

The concept of dual role agents refers to the commercial strategy under which both agency and distribution models are combined with the same partner (but for different products). Under the VBER, such an independent distributor may also qualify as a genuine agent if the following conditions are met: (i) the activities and risks covered by the agency agreement can be effectively delineated; (ii) the

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independent distributor is genuinely free to enter into the agency agreement; and (iii) all relevant commercial and financial risks (including all investments related to the agency agreement) linked to the sale of the goods and services in relation to the agency agreement are borne by the principal-supplier (*see par. 36 Guidelines*).

2. Non-compete obligations

With regard to non-competes, there are no significant changes. Non-competes during the contract term that (i) are for an indefinite period, (ii) exceed a five-year period, or (iii) are tacitly renewable and exceed this five-year period remain prohibited. Furthermore, post-term non-competes are only allowed if they are (i) executed in relation to the relevant contracted products, (ii) restricted to the contracted facility, and (iii) indispensable to protect the know-how transferred to the counterparty for its work under the agreement.

The only addition worth mentioning is that the VBER now allows for non-compete obligations to be tacitly renewable (beyond the five-year period) provided a distributor can effectively renegotiate or terminate the agreement at reasonable notice and at reasonable cost. The distributor should, therefore, be allowed to effectively switch supplier at the end of the five-year period (*see par. 248 Guidelines*).

3. Exclusive and Selective Distribution Systems

The VBER does not materially change the principles relating to exclusive or selective distribution, but there are some modernizations.

- Shared exclusivity

Under the old VBER, it was not possible to have more than one exclusive distributor in a relevant territory or for an allocated customer group in the market. The VBER now provides suppliers with the possibility to select up to five distributors for one territory or a particular group of consumers within the exclusive distribution system (*see article 4(b)(i) VBER and par. 219 Guidelines*).

- Pass on or roll over of active sales restrictions

The old VBER limited the possibility of active sales restrictions to be imposed on the (direct) distributor of the supplier only and prohibited imposing an obligation on distributors to roll over this restriction to its own customers (the so-called "rolling over prohibition"). Under the new VBER, suppliers may not only impose an active sales restriction on their direct distributors but also require them to prohibit their own customers from actively selling into territories or customer groups that the supplier has allocated exclusively to other distributors or reserved for itself (*see article 4(b)(i) VBER and par. 220 Guidelines*).

- Reverse protection system (exclusive and selective distribution systems)

The VBER allows principals to set up different distribution systems in different areas within the EEA and to protect them against each other. The following protections are possible:

  – Exclusively allocated systems may now be protected against active sales by distributors from selective distribution territories (*see article 4(c)(i) VBER*) and from free territories; *see article 4(d)(i) VBE*R).

– Selective distribution systems may be protected against active and passive sales by distributors from exclusive distribution territories (*see article 4(b)(ii) VBER*) or by distributors from free territories; *see article 4(d)(ii) VBER*).

In addition, the VBER allows principals to pass on a restriction imposed on the distributor (as explained above).

4. Resale Price Maintenance

The rules on resale price maintenance (RPM) remain largely unchanged, but specific exemptions have been broadened in the Guidelines: a supplier may not force or incentivize its buyer to (re)sell products or services at certain minimum or fixed prices. This constitutes a hardcore or black-listed restriction of Article 101(1) TFEU. However, in exceptional cases a distributor may still be prohibited from selling below the wholesale price (by imposing a minimum resale price) in order to prevent that distributor from using a supplier's product as a loss leader (the 'free rider prohibition').

The Guidelines also provide some clarifications and additions:

- The prohibition on the distributor advertising prices below a level fixed by the supplier (minimum advertised price policies) may be an indirect means of applying RPM (*see par. 187 Guidelines*).
- Price monitoring used in e-commerce does not in itself constitute RPM, as it increases price transparency (*see par. 191 Guidelines*).
- Fulfilment exception: where the supplier negotiates the commercial terms with an end user and then selects the company that will implement the commercial terms, the imposition of those commercial terms – including a resale price by the supplier – does not constitute RPM if the end-user waived the right to choose the fulfilling company itself (*see par. 193 Guidelines*).
- Parties providing online platform economy services are fully subject to RPM restrictions and may not impose a fixed or minimum resale price for the facilitated transactions via the platform. Platforms fall within the definition of supplier (*see par. 194 Guidelines*).

5. Clarifications of Active and Passive Sales

The new VBER now clearly defines the notions of active and passive sales and provides some valuable context to online promotions and situations.

- Active sales (Article 1(1)(l) VBER)

The new definition confirms that when actively and specifically targeting certain territories or customer groups, online promotion will constitute active sales. Active sales means "*actively targeting of customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established*".

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- Passive sales (Article 1(1)(m) VBER)

The new definition clarifies that when responding to unsolicited requests without actively and specifically targeting territories or customer groups, this will amount to passive sales, as the sale was not initiated. Passive sales means "*sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory are determined to be passive sales. In line with the rationale of the system of public procurement in the EEA (and codifying some national case law) the sales resulting from a participating in public procurement or responding to private invitations to tender are also deemed passive sales*".

6. Online Sales

As stated, the VBER intends to modernize the rules regarding e-commerce and online sales. Restrictions on the effective use of the internet are modernized and clarified as follows:

- Preventing the effective use of internet is now a hardcore restriction

The VBER provides the first explicit hardcore restriction specifically related to online sales. Under Article 4(e) VBER, the prevention of – or having as their object the prevention – the effective use of the internet by the distributor or its customers to sell the contract goods or services is blacklisted and prohibited. The same holds true for preventing the use of one or more entire online advertising channels (such as search engines or price comparison services). However, not all restrictions qualify as preventing the effective (*i.e.*, de facto) use of internet. The VBER allows certain other restrictions of online sales or restrictions of online advertising that do not purport to prevent the use of an entire online advertising channel.

When assessing whether a restriction on the use of internet is (capable of) preventing the effective use of internet, one must take into account the content and context of the restriction, which may not depend on market-specific circumstances or individual characteristics of the contracting parties (*see recital 15 VBER and par. 203 Guidelines*). The VBER may exempt other restrictions on online sales or advertising, *e.g.*, where restrictions on online advertising relate to the content of the online advertising or set certain quality standards (*see par. 210 Guidelines*).

In general, restrictions on online sales and online advertising are not considered hardcore if the distributor remains free to operate its own online shop and to advertise online, as in such cases the use of the internet will not be effectively prevented (*see par. 208 Guidelines*).

- (More) flexibility regarding dual pricing and equivalence

Under the VBER, dual pricing (*i.e.*, charging different prices for online and offline sales) may be exempted and thus allowed, provided that the supplier (i) does not have the object of preventing the effective use of the internet to sell the products or services to certain territories or customers and (ii) aims to reward the investments made online or offline.

The general test should be whether the difference in the wholesale price is in reasonable proportion to the differences in investment and costs incurred by the buyer to sell in each channel.

The European Commission also has abandoned the principle of equality between online and offline conditions. According to the Guidelines, different criteria may be imposed on suppliers within a selective

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distribution system with regard to online sales and offline sales if they do not have the object to prevent the buyers or their customers from effectively using the internet.

7. Dual Distribution

Dual distribution relates to a situation where a supplier sells goods or services through independent distributors but also competes with those distributors and sells directly to the relevant market. As online sales have significantly increased over the last decade, the VBER provides for an adaptation of the rules relating to dual distribution.

- Extension of safe harbour to wholesalers and importers

The VBER in principle allows for the vertical element to prevail in this type of channel conflict. Non-reciprocal vertical agreements concluded between competitors may benefit from VBER on the condition that the distributor does not compete with the supplier at the upstream level where the distributor buys the contract goods. The upstream level may be the level where the supplier is active as manufacturer, importer, or wholesaler (*see article 2(4)(a) VBER*).

The inevitable exchange of information in such permitted dual distribution systems remains largely exempted, as it is assumed that it should be possible for a supplier to compete with its distributor for its customers as long as the distributor does not itself compete with the supplier on the upstream market (*see article 2(4) VBER and par. 95 Guidelines*).

However, this exchange of information between a (multi-channel) supplier and its distributors – on the condition that the collective market share threshold of 30% is not exceeded, as per article 2(5) VBER and par. 96 Guidelines – is only exempted from article 101(1) TFEU if it is (i) directly related to the execution of the distribution agreement and (ii) necessary for efficiencies in connection with the production or distribution of the relevant products or services.

This limitation, which recites the parameters of what is known as the ancillary restraint, is reminiscent of a time before the first VBER, when the European Commission provided exemptions for franchise agreements and restrictions outside the scope of 101(1) TFEU because they already qualified as ancillary restraint as per the *Pronuptia* landmark case.

Key Takeaways

The VBER modernizes vertical competition law in line with digital market developments and ECJ caselaw. The VBER and the Guidelines will impact both the EU and national application of vertical competition law and also bind the European Commission at the EU level. Furthermore, it will play an important role in contracting and private enforcement within the EU.

New vertical rules regarding digital platforms also are to be considered in combination with the various other initiatives that seek to regulate market power in the digital markets.

As the VBER brings about these changes, parties should consider adjusting their existing distribution agreements in the EU to comply with and benefit from the new regime in any event before 1 July 2023 (the end of the transitional period).

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