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# Kluwer Competition Law Blog

## New EU Antitrust Rules for Distribution – European Commission’s Inception Impact Assessment

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On 23 October 2020, the European Commission (EC) published its inception impact assessment of policy options for a potential revision of the EU Vertical Block Exemption Regulation (VBER) and accompanying Vertical Guidelines for consultation.

This inception impact assessment will be followed by a more detailed impact assessment that the EC will publish for public consultation at the end of 2020.

The EC is contemplating important changes to the current regime in relation to dual distribution, active sales restrictions, indirect measures restricting online sales (including dual pricing), and parity (most-favoured-nation) obligations.

### Next Steps – Timeline

**20 November 2020:** Deadline for feedback on the inception impact assessment

**Towards the end of 2020:** Open public consultation and a targeted consultation of consumer organizations to gather feedback on the policy options proposed, and their ability to tackle issues identified

**2021:** Draft of the revised rules for public consultation

**Q4 of 2021:** Finalization of impact assessment and submission to the EC Regulatory Scrutiny Board

**31 May 2022:** New rules to be in force

### What is the VBER?

The VBER is designed to give parties to vertical agreements (entered into between businesses operating at different levels of the production or distribution chain) increased certainty about the

compatibility of their agreements with Article 101(1) under the Treaty on the Functioning of the European Union (TFEU) by creating a safe harbour.

Vertical agreements containing no “hardcore restriction” (e.g., resale price maintenance or territorial and customer restrictions) can be presumed to benefit from an exemption if neither party’s market share exceeds 30%.

Agreements not satisfying the VBER criteria may still be compatible with Article 101(1) TFEU, but such agreements require individual assessment.

The VBER is accompanied by a set of guidelines (Guidelines on Vertical Restraints) that are designed to help companies self-assess.

The VBER entered into force in 2010 and will expire on 31 May 2022.

### **Inception Impact Assessment**

The EC states that it is considering the following actions.

1. Clarifying, simplifying, and filling in **gaps as a result of the new digital world**. This includes:

- Incorporating recent case law on the substantive conditions of Article 101(3) TFEU (which allows agreements that are found to be restrictive of competition to be exempted from the application of competition law subject to four cumulative conditions (i) efficiency gains; (ii) fair share for consumers; (iii) indispensability of the restrictions; and (iv) no elimination of competition).
- Filling in gaps in the rules that would otherwise create scope for divergent interpretations concerning:
  - “Restrictions that have emerged or that have become more prevalent since the adoption of the current rules”, e.g., restrictions on the use of price comparison websites and online advertising restrictions
  - The treatment of new market players, such as online platforms, in certain areas of the rules (e.g., agency, dual distribution)

The EC emphasizes that any issues related to agreements pursuing sustainability objectives will be taken into account in this context. The EC is likely to consider whether the assessment of sustainability gains merits a specific treatment in the framework of the balancing exercise under Article 101(3) TFEU. More broadly, the EC is looking to determine whether there are circumstances in which the pursuit of Green Deal objectives would warrant a specific treatment of restrictive agreements.

2. Improving clarity in relation to the treatment of **possible efficiencies resulting from resale price maintenance (RPM)**.

The EC states that “it will explore the possibility to engage with businesses in discussions on concrete instances regarding the conditions under which efficiencies for RPM can be claimed and the evidence that is required to satisfy the conditions of Article 101(3) TFEU”. It is not clear whether this engagement with business will extend just to the public consultation so that relevant changes are made to the new VBER and accompanying guidelines, or whether it will extend beyond their adoption so that the EC becomes more open to providing informal advice on when efficiencies for RPM can be claimed.

3. Reducing costs and administrative burden by allowing **tacitly renewable non-compete obligations**, to the extent that the buyer can periodically terminate or renegotiate the agreement. Until now, non-compete obligations that are tacitly renewable beyond a period of five years are not covered by the safe harbour of the VBER and require self-assessment. The EC’s proposal constitutes an important change of policy in this regard. This is a pragmatic solution as the impact on competition will be remote if the clause can be terminated on short notice.

4. Exploring a possible revision of the current rules in the areas of **dual distribution, active sales restrictions, indirect measures restricting online sales (including dual pricing)**, and **parity obligations** (see below for details).

### **Dual Distribution**

The EC considers that with the growth of online sales, dual distribution (where a supplier sells its goods/services directly to end customers, competing with its distributors at the retail level) has increased significantly.

Dual distribution is generally covered by the VBER (constituting an exception to the general rule that agreements between competitors are not covered by the VBER).

The EC considers that the current rules give rise to the following potential issues:

- There is a risk of exempting vertical agreements if horizontal concerns are no longer negligible and the conditions of Article 101(3) of the TFEU are not satisfied.
- There may be a gap in the rules since market participants that are perceived as being in a comparable dual distribution situation to that of manufacturers or service providers (such as wholesalers and importers) do not benefit from the VBER.

### **Policy options include:**

- Limiting the scope of the exception to scenarios that are unlikely to raise horizontal concerns by, for example, introducing a threshold based on the parties’ market shares in the retail market or other metrics and aligning the coverage of the exception with what is considered exemptible under the horizontal rules.
- Extending the exception to dual distribution by wholesalers and/or importers.
- Removing the exception from the VBER, thereby requiring an individual assessment under

Article 101 TFEU in all dual distribution cases.

- The first and second of these options may be introduced cumulatively.

### **Active Sales Restrictions**

Suppliers consider the current rules complex and unclear and an obstacle to designing their distribution systems according to their business needs.

Stakeholders expressed their objective to establish “shared exclusivity” between two or more distributors in a particular territory, and to effectively combine exclusive and selective distribution in the same or different territories.

Stakeholders consider that the current rules prevent the effective protection of the territory in which a selective distribution system is operated against sales from outside that territory to unauthorized distributors located inside the selective distribution territory.

#### **Policy options include:**

- Expanding the exceptions for active sales restrictions to give suppliers more flexibility to design their distribution systems according to their needs, in line with Article 101 TFEU.
- Ensuring more effective protection of selective distribution systems by allowing restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorized distributors inside that territory.

### **Indirect Measures Restricting Online Sales (Including Dual Pricing)**

Suppliers and hybrid retailers consider that the current rules, which do not allow them to differentiate wholesale prices based on the costs of each channel, prevent them from incentivizing associated investments, notably in physical stores.

Stakeholders consider that there is a lack of legal certainty in the application of the equivalence principle, as online and offline sales channels are inherently different and it is difficult to assess when a divergence in the criteria used for each channel amounts to a hardcore restriction under the VBER.

#### **Policy options include:**

- No longer regarding dual pricing as a hardcore restriction, with safeguards to be defined in line with case law.
- For online sales, no longer regarding the imposition of criteria that are not overall equivalent to the criteria imposed in brick and mortar shops in a selective distribution system as a hardcore restriction, with safeguards to be defined in line with the case law.

### **Parity Obligations (Most-Favoured-Nation Clauses)**

The evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms.

National competition authorities and courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g., other platforms or other online or offline intermediaries).

**Policy options include:**

- Removing the benefit of the VBER and including in the list of excluded restrictions (Article 5 of the VBER) obligations that require parity relative to specific types of sales channels, thus requiring an individual effects-based assessment under Article 101 TFEU for such obligations: parity obligations relating to other types of sales channels would continue to benefit from the block exemption, on the basis that they are more likely to create efficiencies that satisfy the conditions of Article 101(3) TFEU
- Removing the benefit of the block exemption for all types of parity obligations by including them in the list of excluded restrictions, thus requiring an individual effects-based assessment in all cases

Key Milestones of the Vertical Review

**6 May 2015**

Launch of EC e-commerce sector inquiry (final report published on 10 May 2017)

**4 February 2019 – 27 May 2019**

Public consultation regarding the VBER and Guidelines on Vertical Restraints

**14 and 15 November 2019**

Stakeholder workshop

**13 December 2019**

Publication of a summary report of a targeted consultation of National Competent Authorities

**5 February 2020**

Publication of a summary report of the stakeholder workshop

**25 May 2020**

Publication of an external evaluation support study, including:

- Four stakeholder surveys aimed at collecting evidence on specific restrictions in Germany, France, Italy, Sweden, Poland, and Hungary
- A consumer survey aimed at collecting evidence on the purchasing behavior of European consumers, notably with regard to the interaction between online and offline channels

**8 September 2020**

EC published the results of its evaluation in a 232-page Staff Working Document

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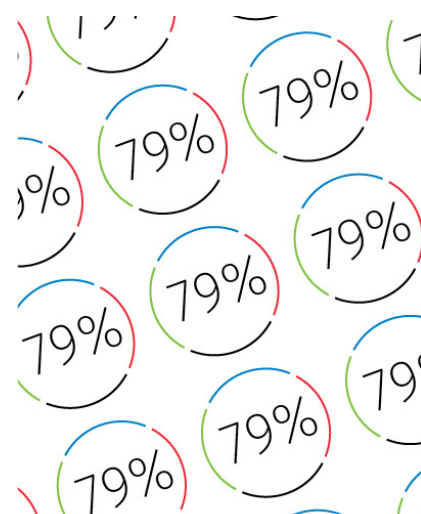
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