

THE PROPOSED REFORMS OF THE EU COMPETITION REGIME FOR DISTRIBUTION ARRANGEMENTS

The European Commission (the **Commission**) has launched a consultation which sets out its plans to update the Vertical Block Exemption Regulation (**VBER**), which provides a widely-applicable safe harbour for distribution arrangements from the EU prohibition on anticompetitive agreements.

The proposed changes reflect the significant changes in market dynamics since the VBER was last updated in 2010. For example, the growth of online sales in recent years has resulted in proposals to give suppliers more freedom to support physical sales channels, and the increased use of "dual distribution" models - where suppliers compete with their distributors in certain sales channels - has also prompted plans to change the treatment of such arrangements. Various other changes would allow suppliers more flexibility to restrict their distributors from selling to certain territories or customer groups.

THE PROPOSED CHANGES

The VBER exempts a broad range of distribution arrangements from the EU prohibition on anticompetitive agreements, provided the parties have market shares of less than 30% on their respective markets (for the buyer, the relevant market is the purchasing market) and the agreement does not contain any "hardcore" restrictions of competition law.

The Vertical Guidelines (the **Guidelines**) explain how the VBER applies, and also set out how the Commission assesses various types of vertical arrangements that fall outside the scope of the VBER.

The main proposed changes to the VBER and Guidelines are as follows.

Updated definitions of active and passive sales

A fundamental principle of the EU competition regime for distribution agreements is that suppliers can, in certain circumstances, prevent their distributors from making "active" sales (e.g. through targeted advertising) to customers in territories or groups allocated to other distributors, but cannot, as a rule, prevent passive (i.e. unsolicited) sales. The draft VBER and Guidelines now contain more detail on what these terms mean in an online context. A restriction will be considered to restrict passive online sales if it

Key issues

- Why is the Commission amending the competition regime for distribution arrangements?
- What new freedoms will suppliers have to restrict distributors' sales to certain territories or customers, and to support physical sales channels?
- What are the new rules and guidance in relation to online platforms?
- How can parties respond to the consultation?

has the object of preventing a distributor from effectively using the internet to make sales, or from effectively using one or more online advertising channels.

One significant change is that offering a website in the language that is not commonly used in the distributor's home country is now accepted as being a form of active selling, although the Commission takes the view that English is commonly used in all EU countries. The Guidelines also clarify that responding to a tender (public or private) is a form of passive selling.

Dual pricing and criteria for online sales

At present, a supplier will usually be committing a hardcore antitrust infringement if it charges a higher wholesale price for products that a distributor resells online, and a lower price for products that are resold in physical stores. Under the draft VBER this would be permissible, provided the difference in the wholesale price takes into account the different investments and costs incurred by the distributor in the two channels.

Similarly, suppliers operating a selective distribution system would no longer be required to impose on their authorised distributors criteria for online sales that are "overall equivalent" to those applicable for offline sales.

Exclusive distribution

The current VBER allows a supplier to restrict active sales by a buyer into a territory or customer group for which it has appointed a single exclusive distributor (see box to the right), but not if two or more distributors are appointed. This somewhat counterintuitive rule (more distributors should mean more competition) is set to be scrapped under the draft VBER. Instead, suppliers would be able to appoint a number of exclusive distributors for a given territory or customer group, provided that number is determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves the investment efforts of the distributors.

In addition, suppliers would, in certain circumstances, be able to require distributors to impose active sales restrictions on their own customers; something which is not at present permitted.

Selective distribution

Suppliers operating a selective distribution system (see box to the right) would, under the draft VBER, be able to prevent all distributors from making sales to unauthorised distributors located within the selective distribution territories, not just (as is the case at present) distributors that are also located in that territory. There would also be an unqualified right to require such restrictions to flow down to any customer of its distributors.

However, contrary to the wishes of many suppliers, the Commission is not proposing to soften the rule that prevents suppliers from operating exclusive distribution at the wholesale level combined with selective distribution at the retail level.

Dual distribution

Dual distribution (see box to the right) has become increasingly common since the current VBER was enacted, as suppliers often maintain a presence in certain online sales channels, e.g. selling through their own website. The current VBER exempts dual distribution – despite it involving a horizontal

Distribution models

- **Exclusive distribution** means a system where the supplier allocates a territory or customer group exclusively to itself or to one or a limited number of buyers and restricts other buyers from actively selling into the exclusive territory or to the exclusive customer group.
- **Selective distribution** means a system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the selective distribution territory.
- **Dual distribution** means a system in which the supplier competes with its distributor(s) on the downstream (e.g. retail) market. Can be combined with exclusive or selective distribution.

agreement between competitors at the retail level rather than a purely vertical agreement – but only if the supplier is a manufacturer (and the distributor is not). The draft VBER would extend the benefit of the exemption to suppliers that are wholesalers or importers too.

However, the scope of the exemption will also be partially reduced, as exchanges of information between the competing distributors will only be covered by the exemption if their combined market share of the downstream market is less than 10%. Above this level, parties will need to consider carefully the sales information that can be shared between them and the need for the supplier to put in place information barriers.

Evergreen clauses

Exclusivity (or "single branding") requirements preventing the distributor from selling goods or services that compete with those of the supplier are not block exempted if their duration exceeds five years or is indefinite. While this would not change under the draft VBER, the rule that treats tacitly renewable restrictions as being indefinite would be eliminated. This would allow parties to implement distribution arrangements with single branding requirements that do not need to be renegotiated every five years.

Online platforms

Recognising the growth of sales through online platforms (or "online intermediation services" in the jargon of the draft VBER), there are new provisions in the draft VBER and Guidelines that are expressly aimed at such platforms. In particular:

- online platforms that sell on their own behalf, as well as hosting the sales of third party sellers, would not benefit from the dual distribution exception described above and therefore could not benefit from the VBER to the extent that they sell products or services that compete with those of their third party sellers;
- "wide" parity clauses – requiring a party that sells through an online platform not to sell its products on better terms on any competing platform – are excluded from the scope of the draft VBER and would therefore need to be assessed for compliance separately. Narrow parity clauses – requiring a party not to sell on favourable terms through a specific sales channel (such as its own website) - would continue to be block exempted, and the draft Guidelines contain new guidance on how the Commission will assess both wide and narrow parity clauses that fall outside the scope of the VBER;
- the draft Guidelines now seek to reflect the Commission's interpretation of the Coty judgment, stating that a ban on distributors using online platforms is acceptable under the VBER, and explaining the circumstances in which such a ban will not be acceptable if the VBER is not applicable; and
- the Guidelines also contain a new section explaining when restrictions on the use of price comparison tools fall within the VBER, and how the Commission will assess the compliance of those that do not.

Other areas

In other areas, the Commission has resisted calls to relax its approach. In particular:

- there is no appreciable difference in the attitude towards resale price maintenance (**RPM**) between the current Guidelines and the draft version, although the latter does helpfully clarify that there is no RPM if a supplier imposes, in a fulfilment contract, the prices that a distributor will charge to specific customers that have prior agreements with the supplier. The draft Guidelines also now clarify that the use of price monitoring software does not, in itself, constitute RPM and indeed may increase supply-chain efficiencies; and
- the criteria for a genuine agent (the prices of which can be determined by the principal) remain difficult to satisfy, and certain new clarifications in the draft Guidelines may exacerbate this in cases where a supplier uses a reseller as an agent for some products and independent distributor for others. Moreover, the draft VBER and Guidelines now take the position that online platforms cannot, in principle, be considered to be genuine agents for the purposes of EU competition law.

NEXT STEPS

The Commission invites all interested parties to submit comments on the draft VBER and Guidelines by 17 September 2021. The Commission will then assess the evidence gathered from the impact assessment and the stakeholder comments. It expects the final revised VBER and Guidelines to be published in time to enter into force on the day after the current VBER expires on 31 May 2022.

Convenience comparison versions prepared by Clifford Chance, showing the proposed changes to the VBER and Guidelines, are available here ([VBER](#)) and here ([Guidelines](#)).

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