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The European Commission adopts the new Vertical Block Exemption Regulation (VBER) alongside new Guidelines on Vertical Restraints (VGL)

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At a glance

Dual distribution systems, including related information exchange, benefit broadly from the VBER: The VBER retains and moderately expands the block exemption for restraints imposed between parties that are considered to compete only because the supplier engages in dual distribution. In addition, information exchange in dual distribution is block exempted provided the exchange is (i) directly related to the implementation of the vertical agreement, and (ii) necessary to improve the production or distribution of the contract goods or services. The VGL provide practical examples of numerous types of information the exchange of which generally meets this test, and of some types of information that generally does not (e.g., future prices).

Providers of online intermediation services can draw limited comfort from the VBER and VGL: Platforms acting as intermediaries are classified as suppliers for the purposes of the VBER, which entails various potentially adverse consequences for them: (i) the market share threshold in Article 3(1) VBER must be calculated on the market for the supply of online intermediation services, rather than the market(s) for the intermediated goods and services, (ii) restrictions imposed by providers of online intermediation services on the buyers of those services (e.g., buyers selling over a service provider's marketplace) may constitute hardcore restrictions within the meaning of Article 4 VBER, (iii) across-platform retail parity obligations imposed by providers of online intermediation services on buyers of those services are excluded from the benefit of the VBER and (iv) providers of online intermediation services that have a hybrid function cannot benefit from the dual distribution exception in Article 2(4) VBER with respect to the agreements they conclude as a supplier of such services. Furthermore, online intermediation platforms cannot generally qualify as "genuine agents" in respect of the distribution of goods and services.

Resale price maintenance (RPM) including minimum advertised prices (MAPs) remain a hardcore restriction: The VBER and VGL confirm the long-standing hostile approach to RPM, and retreat from the unintended softer approach regarding MAPs. As before, the VGL emphasise that RPM can nevertheless be justified under Article 101(3) TFEU and include examples of possible justifications. Notably, the VGL now include among those examples a prohibition on a distributor from using its supplier's product as a loss leader. In addition, the VGL confirm the circumstances in which pricing restrictions in fulfilment contracts can avoid qualifying as RPM.

Greater scope for active sales restrictions – shared exclusivity: The VBER provides greater scope for suppliers to impose active sales restrictions on buyers. A territory or customer group can now be allocated exclusively to a maximum of 5 distributors and those distributors can be protected against active sales from distributors appointed outside of that territory or not appointed to supply that customer group. A supplier may also now oblige its distributors to pass on the restriction on active sales to their immediate buyers (although not further down the distribution chain).

Greater scope for using selective distribution in only part of the EU: Selective distribution systems ("SDS") can now be protected against sales to unauthorised resellers from territories where selective distribution is not used: unlike under the former VBER, a supplier can prevent a distributor in an area where either exclusive or free distribution is used, as well as that distributor's customers, from selling to unauthorised resellers in SDS territories.

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Some evolution in what qualifies as active and passive selling: Departing from the position under the former VGL, the VGL now consider that offering a language option in an online store differing from the languages commonly used in the seller's territory is a form of active selling into the territories where those other languages are used (with the exception of English). The VGL also characterize participation in public procurement as being a form of passive selling.

Online sales restrictions – greater flexibility for suppliers, although restrictions preventing the effective use of the internet are considered hardcore: In a departure from the previously strict rules, a supplier can benefit from the block exemption where it applies online sales criteria that are not equivalent to / are stricter than those imposed on brick-and-mortar distributors. The VGL also confirm that marketplace bans are block exempt. Conversely, a total ban on a distributor from using an online advertising channel (including the use of price comparison websites or of search engine advertising) is considered a hardcore restriction, although bans on the use of individual providers or the imposition of quality criteria are block exempted. The treatment of dual pricing is significantly more liberal under the new VGL, at least provided the price difference does not make online sales "unprofitable" or "financially unsustainable".

Modest extension of the VBERs exemption of non-compete obligations: Tacitly renewable non-compete obligations for consecutive five-year periods are now block exempted if the buyer can realistically terminate the non-compete after five years.

Most parity / most favoured nation (MFN) obligations benefit from the VBER: All MFN clauses continue to benefit from the block exemption, with the exception of so-called retail "wide MFNs" in favour of platform providers of online intermediation services.

More extensive analysis of agency agreements: The new VGL provide guidance on the method of reimbursement for an agent's costs to ensure that the agent does not bear risk. Furthermore, the VGL contain important new guidance on "dual role" agents: such distributor-agents can qualify as "genuine" where (i) the activities and risks covered by the agency and distributor relationships respectively can be effectively delineated to ensure that all risks relevant to the agency relationship are in practice borne by the principal and (ii) the agency or distribution relationship is not forced upon the agent. The VGL also suggest it may now be more difficult for agents representing multiple principals to qualify as genuine agents.

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Background

On 10 May 2022, the European Commission ("Commission") adopted and published the new Vertical Block Exemption Regulation (Regulation 2022/720) (the "new VBER" or "VBER") and the accompanying Guidelines on Vertical Restraints ("the new VGL" or "VGL"). The new VBER replaces the former Vertical Block Exemption Regulation (Regulation 330/2010: the "former VBER"), which expired on 31 May 2022, along with the former version of the Vertical Guidelines.

The VBER concerns the application of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") to vertical agreements, namely agreements that relate to the supply and distribution of goods and services. The VBER provides a legal safe harbour as agreements which meet the requirements of the VBER are exempt from the application of Article 101(1). The VGL provide guidance on how to interpret and apply the VBER, as well as on the assessment under Article 101(1) and Article 101(3) TFEU of vertical agreements that fall outside the VBER.

The new VBER is the result of an evaluation and consultation process started in 2018. Following a public consultation on policy options, the Commission published a draft proposal for a new VBER and VGL in July 2021, inviting comments from interested parties. In February 2022, the Commission published a draft new section of the VGL dealing with information exchange in dual distribution systems. The versions of the VBER and VGL eventually adopted largely follow the previous drafts, but with some significant modifications in response to industry and other feedback.

The new VBER largely retains the structure of the former VBER.

- Article 2(1) VBER declares that Article 101(1) TFEU shall not apply to vertical agreements to the extent that such agreements contain vertical restraints. The scope of this exemption is limited in the case of vertical agreements containing IP provisions, as well as in relation to vertical agreements concluded between competitors and, by virtue of a new provision, concluded by hybrid platforms.

- Article 3(1) subjects the application of the exemption to a 30% market share threshold: for the exemption to apply, the respective market shares of the supplier (on the market for the sale of the goods or services) and of the buyer (on the market for the purchase of the goods or services) should not exceed 30%.

- Article 4 provides a list of hardcore restrictions, i.e., vertical restraints which are normally considered sufficiently injurious to competition to prevent the benefit of the block exemption from applying to a vertical agreement in which they are included.

- Article 5 excludes certain obligations contained in vertical agreements from the benefit of the block exemption, without, however, removing the benefit of the exemption for the remainder of the vertical agreement (as such excluded obligations are considered less harmful than hardcore restrictions).

- Articles 6 and 7 provide for the possibility of the withdrawal, or disapplication, of the benefit of the block exemption by the Commission or, in certain circumstances, by the national competition authorities.

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Pursuant to the transitional provision contained in Article 10 VBER, vertical agreements in force on 31 May 2022 which benefited from the exemption under the former VBER – but do not meet the conditions for the application of the new VBER – shall continue to enjoy the benefit of the exemption until 31 May 2023. The new VBER will remain in force until 31 May 2034.

The remainder of this article will focus on the main areas where the new VBER and VGL introduce significant changes to the assessment of vertical restraints. In general, the changes create certain new opportunities for suppliers of goods in terms of the restrictions they may impose on their distributors and other customers, whilst on the other hand severely restricting the ability of online platforms to benefit from the VBER.

1. Dual distribution systems/information exchange

Dual distribution refers to a scenario where a supplier sells goods or services to independent distributors but also itself operates downstream at the same level of trade as the independent distributors, thereby competing with the independent distributors. This would be the case where, for example, a supplier sells its products to independent retailers but also operates its own online or physical retail stores. Although the VBER does not apply to agreements between competing undertakings, Article 2(4) of the new VBER makes a now broader exception to this rule in the case of vertical agreements concluded between undertakings which are only considered to compete because the supplier engages in dual distribution. Under this exception, which applies whether the supplier is a manufacturer, an importer or a wholesaler, non-reciprocal agreements concluded in the context of dual distribution can benefit from the VBER provided that the distributor does not compete with the supplier at the upstream level at which it buys the goods or services. This means that the VBER applies not only where, a *manufacturer* supplies goods to, and competes downstream with, an independent distributor (provided the distributor does not also manufacture competing goods), as under the former VBER, but also where an *importer or wholesaler* supplies goods to, and competes downstream with, as the case may be, an independent wholesaler or retailer (provided that the independent wholesaler or retailer does not manufacture, or as the case may be, import or wholesale competing goods).

A topic that was the subject of intense debate in the review of the former VBER was the treatment of information exchange in dual distribution, and the extent to which it should – or should not – be subjected to the normal strict approach to information exchange in a horizontal context. The previous rules provided for no limitation on the application of the VBER to information exchange in the context of dual distribution. Pursuant to Article 2(5) new VBER, exchanges of information between the parties to a vertical agreement concluded in the context of dual distribution system are now block exempted provided two conditions are met: such exchanges must be (i) directly related to the implementation of the vertical agreement, and (ii) necessary to improve production or distribution of the contract goods or services. Contrary to the much stricter position advocated in the Commission's 2021 drafts, the exemption of information exchange does not depend on the parties' market share in the retail market respecting a low 10% threshold; instead, the only relevant market share threshold remains the 30% threshold applicable to the parties' individual positions in the relevant sale and purchase markets (Article 3 VBER).

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The new VGL provide a non-exhaustive list of examples of information the exchange of which, "depending on the particular circumstances", may be considered to be directly related to the implementation of the agreement and necessary to improve production and distribution (thus meeting the conditions of Article 2(5) VBER). The scope of the information that may usually be exchanged is to some extent broader than was provided for under the draft published earlier this year. In general, the same approach is taken whether the information is provided by the supplier or by the buyer. In brief, this list includes (subject to certain specific limitations, including not to use the information to impose hardcore restrictions such as RPM and territorial restrictions):

- technical information;
- logistical information, including inventory, stocks, sales volumes and returns (excluding, subject to exceptions, in relation to identified end users);
- information on customer purchases, preferences and feedback (excluding, subject to exceptions, in relation to identified end users);
- pricing information, including:
    - the supplier's supply price to the buyer;
- the supplier's recommended or maximum resale prices;
    - the current or past resale prices of the buyer;
    - information on promotional campaigns and marketing information;
- performance-related (benchmarking) information, including:
    - aggregated and anonymised information provided to a buyer relating to the marketing and sales activities of other buyers;
    - information relating to the buyer's sales of the contract goods or services relative to its sales of competing goods or services.

In contrast, the three categories of information that are said generally to not meet the dual requirements of Article 2(5) are the following:

- future downstream sales prices of the supplier or buyer;

- information related to identified end users unless such information is necessary to
  - enable the supplier or buyer to satisfy the requirement of a particular end user (e.g., grant it special conditions under a loyalty scheme); and
  - enable otherwise valid customer restrictions to be implemented/monitored.
- information relating to a buyer's sales of own-brand goods provided to a manufacturer of competing branded goods, unless the manufacturer is also the producer of those own-brand goods.

The new VGL outline several precautions the parties can take to minimise the risk that the information exchanged will raise horizontal concerns where their vertical agreement does not benefit from the block exemption. These include limiting the exchange to aggregated sales information or using an appropriate delay between the generation of the information and its exchange. A further precaution would be the use of administrative or technical measures, such as firewalls, that ensure that information provided by the buyer is only available to the personnel of the supplier responsible for its upstream activities (e.g., its relations with independent distributors) and not personnel responsible for the supplier's downstream direct sales activity (e.g., its own retail business). Otherwise, an assessment should be made under the Horizontal Guidelines as to whether information exchanged outside of the safe harbour of the VBER raises material concerns. Unfortunately, the Commission's draft new Horizontal Guidelines, at least for now, contain no guidance on how to assess information exchange in a vertical relationship.

2. Providers of online intermediation services

In general, the new VBER and VGL provide little comfort for providers of online intermediation services, in particular marketplace platforms, which were not the object of specific treatment under the former VGL and VBER. Within the analytical framework of the VBER and VGL, these platforms are categorised as suppliers, whereas undertakings offering and selling goods and services over such platforms are classified as buyers in respect of the online intermediation services provided to them (Article 1(1)(e) VBER and para. 67 VGL). Therefore, for the purposes of the VBER, a provider of online intermediation services cannot be considered as a buyer in respect of sales of goods and services which it intermediates.

This categorisation has several consequences for agreements concluded by providers of online intermediation services.

- First, the market share threshold set out in Article 3(1) VBER must be calculated on the market for the supply (and purchase) of online intermediation services, rather than the market(s) for the intermediated goods and services, making it less likely that leading platforms will benefit from the VBER.

- Second, restrictions imposed by providers of online intermediation services on the buyers of those services may constitute hardcore restrictions within the meaning of Article 4 VBER, for example a requirement to charge a fixed or minimum price for the goods sold over the platform or not to sell the goods in certain territories or to certain customers. In contrast, restrictions on suppliers are, with one rather limited exception, not treated as hardcore restrictions under Article 4, with the consequence that companies selling their products over a platform can prevent the platform from lowering the effective price of the products sold there, even at the platform's own expense (even in a way that would not reduce the amount received by the seller).

- Third, across-platform retail parity obligations imposed by providers of online intermediation services on buyers of those services are excluded from the benefit of the VBER under Article 5(1)(d), whereas all other parity clauses benefit from the block exemption.

- Fourth, providers of online intermediation services that have a hybrid function (i.e., where the provider of intermediation services is also a competing undertaking downstream on the market for the sale of the intermediated goods or services where it sells on its own account) cannot benefit from the dual distribution exception in Article 2(4) VBER with respect to the agreements they conclude as a supplier of such services. These agreements instead fall outside of the VBER altogether and have to be assessed under the Commission's Horizontal Guidelines as regards possible collusive effects and by reference to the VGL as regards any vertical restraints, creating significant legal uncertainty.

- Finally, online intermediation platforms cannot qualify as genuine agents in respect of the distribution of goods and services. In support of this conclusion, the VGL note that these platforms (i) act for a very large number of other sellers preventing them from being an effective part of the same undertaking as any of them, (ii) may benefit from a significant imbalance in their favour in the commercial relationship with buyers of their services owing to strong network effects and (iii) make significant market-specific investments. However, the significance of this conclusion in the VGL, in practice, is not clear because, as noted above, the buyer of intermediation services can in any event prevent the provider from discounting the sale of the buyer's products or otherwise determine where and to whom sales take place over the platform.

The above seems to underscore an underlying concern that vertical restraints imposed by marketplace platforms are generally liable to be harmful to competition, to a large extent regardless of whether market power can be proven. The VGL suggest that restraints (other than object restrictions) imposed by hybrid platforms may not be an enforcement priority for the Commission absent market power, but this does not compensate for the considerable legal uncertainty created by the cumulative limitations on the ability of such platforms to benefit from the conventional regime applicable to vertical restraints.

3. Resale price maintenance

The long-standing hostile approach to resale price maintenance ("RPM") remains rather firmly in place under the new VBER and VGL. As a result, agreements restricting a buyer's ability to set resale prices below a certain level, whether directly or indirectly, remain hardcore restrictions (Article 4(a) VBER). Nonetheless, a number of points in the guidance merit closer attention, including the following.

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Minimum Advertised Prices. The VGL do not adopt the unintended softening of approach seemingly suggested by the 2021 draft of the VGL in respect of minimum advertised prices ("MAPs"), indicating instead that the practice will indeed be treated as an indirect means of enforcing RPM. Although MAPs leave the distributor free, in principle, to sell at a lower price than that advertised, they are treated as hardcore restrictions on the grounds that they disincentivize the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts (VGL para. 189).

Fulfilment contracts. The VGL confirm the circumstances in which pricing restrictions in fulfilment contracts can avoid qualifying as RPM, somewhat broadening the scope of the arrangements that are able to benefit from this exception by comparison to the 2021 draft of the VGL. A fulfilment contract is defined as an arrangement whereby a supplier uses a third-party buyer to fulfil a supply agreement previously concluded by the supplier with a customer (by, e.g., delivering the product, taking care of invoicing, receiving payment, etc). Where the supplier selects the third-party buyer providing the fulfilment service, the imposition of a resale price by the supplier does not constitute RPM. By contrast, where the undertaking that will provide the fulfilment services is selected by the supplier's customer, the imposition of a resale price by the supplier on the buyer providing that service may restrict competition for the provision of the fulfilment services. In that case, the imposition of a resale price may amount to RPM (VGL para. 193).

This approach suggests that the supplier can dictate the price paid by the ultimate customer even where the provider of fulfilment services takes title to the goods and does not fulfil the conditions to qualify as a genuine agent, provided that the supplier has previously reached agreement with the ultimate customer. If, on the other hand, the service provider does not *buy* the goods from the supplier but instead only provides services to the supplier, the VGL would not apply (although a pricing restriction imposed by the supplier of goods on the fulfilment services provider would, in these circumstances, not be a hardcore restriction as only restrictions on the pricing of buyers qualify as hardcore restrictions).

Efficiency justifications. As before, the VGL emphasise that the characterisation of RPM as a hardcore and by-object restriction of competition does not render the practice a per se infringement, and efficiency justifications must be considered under Article 101(3) TFEU (with the supplier bearing the burden of proof). In this respect, the VGL provide examples of justifications, closely following those provided in the former VGL. As previously, these include (subject to demanding conditions): (i) facilitating the launch of new products, (ii) conducting short-term (two to six weeks) price campaigns, and (iii) avoiding free-riding between retailers on pre-sale services in the case of complex products. Notably, the new VGL give an additional example of possible justification, not included in the 2021 Draft VGL: a minimum resale price or MAP can be used to prevent a particular distributor from using the product of the supplier as a loss leader (VGL para. 197(c)). The Commission signals that it is willing to accept that a distributor regularly selling a product below the wholesale price can have damaging effects on the brand image of a product and can reduce demand and investment incentives over time. Therefore, it can be, on balance, pro-competitive for a supplier to prevent a distributor from selling below the wholesale price.

All in all, it seems unlikely that the new rules will give suppliers sufficient confidence to risk imposing restrictions on discounting, though the opportunity to prevent loss leading and control pricing in fulfilment contracts may be of practical significance.

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4. Territorial and customer restrictions in exclusive, selective, and free distribution systems

The new VBER reorganises the list of hardcore restrictions in order to distinguish exclusive distribution systems (Article 4(b) VBER), selective distribution systems (Article 4(c) VBER), and distribution systems that are neither exclusive nor selective (so-called "free distribution") (Article 4(d) VBER). Although this restructuring does not in itself imply any change to the prior rules applicable to resale restrictions, the new VBER broadens the scope of the resale restrictions that are, by way of exception, not considered hardcore in the case of each of these three types of distribution systems. These changes provide greater scope for, in particular, (i) imposing active (but not passive) sales restrictions on distributors in order to incentivise investments on the part of distributors thereby protected from active selling by competing distributors, and (ii) protecting the integrity of selective distribution systems used in part of the EU/EEA where different distribution systems are applied in other parts of the EU/EEA.

Exclusive distribution. As regards exclusive distribution, the new VBER introduces the possibility of shared exclusivity, whereby a supplier may appoint up to a maximum of 5 distributors per exclusive territory or customer group and prevent active selling into that territory or customer group by distributors outside of that territory or not appointed to supply that customer group (regardless of whether the latter are themselves part of an exclusive or a free distribution system). In contrast, under the former VBER, active sales could not be restricted into territories or customer groups where more than one distributor was appointed by the supplier. In addition, a supplier may now oblige its distributors to pass on the restriction on active sales to their immediate buyers (although not further down the distribution chain).

Selective distribution. As regards selective distribution, Article 4(c)(i) VBER allows suppliers to restrict buyers and their customers from making active or passive sales to unauthorised distributors located in any territory where the supplier operates a selective distribution system. This applies regardless of whether those buyers or customers are themselves located inside or outside the territory where selective distribution is used, meaning that – unlike under the former VBER – a supplier can prevent a distributor in an area where either exclusive or free distribution is used, as well as that distributor's customers, from selling to unauthorised resellers in the area where the selective distribution system is operated. Restrictions on cross-supply between members of the selective distribution system, as well as territorial and customer restrictions in the area where selective distribution is used, remain hardcore restrictions.

Despite consideration having been given to relaxing the former position, the VGL confirm that the combination of selective distribution with exclusive distribution in the same territory cannot benefit from the block exemption (e.g., where a supplier operates an exclusive system at the wholesale level and a selective system at retail level). As under the former rules, it will only be in exceptional cases outside of the safe harbour provided by the VBER that a supplier will be able to impose active sales restrictions on authorised wholesalers (where this is the only way to protect the investments which wholesalers in other territories need to make) (VGL, para. 183). As under the former regime, the supplier will nonetheless be able to commit to limit the number of authorized distributors it appoints in an area where the selective distribution system is operated (under a quantitative system), as well as commit not to make any direct sales in that territory itself. This limited protection for authorised distributors appointed in such a territory may be supplemented by imposing a location clause on authorised distributors appointed elsewhere.

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5. Active and passive sales

Article 4 of the new VBER continues to distinguish between restrictions of active sales and restrictions of passive sales: whereas active sales may be restricted into territories or customer groups exclusively allocated by the supplier to up to five distributors or reserved exclusively to the supplier, passive sales may not be restricted in these circumstances without losing the benefit of the VBER. According to Article 1(1)(l) of the VBER, active sales consist of actively targeting customers by means of direct communication or through targeted advertising and promotion, whether online or offline. By contrast, passive sales are sales made to customers in response to unsolicited requests. In line with the position under the former VGL, setting up an online store or maintaining a website is regarded as a form of passive selling, since it allows potential customers to reach the seller, notwithstanding that the operation of an online store may have effects beyond the seller's physical trading area. The same is considered true of search engine optimisation or offering an app in an app store. By contrast, the new VGL generally consider that offering a language option in an online store differing from the languages commonly used in the seller's territory is a form of active selling into the territories where those other languages are used, which represents a change in approach compared to the former VGL. However, the VGL state that offering an English language option cannot be regarded as a form of active selling into English-speaking territories given that English is widely understood throughout the EU.

The VGL characterise participation in public procurement as being a form of passive selling, irrespective of the type of public procurement procedure. As a result, a vertical agreement which restricts the buyer's ability to participate in public procurement is a hardcore restriction. Similarly, responding to invitations to tender issued by non-public

6. Online sale restrictions

By virtue of Article 4(e) VBER, any restriction which prevents "the effective use of the internet" by the buyer or its customers to sell the contract goods or services qualifies as a hardcore territorial restriction. In contrast, Article 4(e) also provides that suppliers may impose on buyers (i) other restrictions of online sales or (ii) restrictions on online advertising that do not have the object of preventing the use of an entire online advertising channel.

Consequently, restrictions which *prohibit* the buyer from selling over the internet, whether expressly or *de facto*, clearly fall within the scope of Article 4(e) VBER, and various examples are given in the VGL of restrictions of this nature. Whilst this is not controversial, extending the scope of the hardcore restriction to obligations which, whilst not prohibiting the use of the internet, prevent the *effective use* of the internet serve to blur the limits of the hardcore restriction. This, in turn, generates considerable legal uncertainty, whilst also causing various debatable distinctions to be made when the VGL attempt to provide examples of what would, and would not, cross this wavering line.

As a starting point, the VGL state that this line will be crossed where the restrictions significantly diminish either (i) the aggregate volume of the contract goods sold online, or (ii) the possibility for end users to purchase the goods online. This could be read to suggest that a restriction applied to only one distributor may not in itself be sufficient for it to be considered hardcore and that, instead, an overall assessment of the cumulative effect of the restrictions applied across a supplier's distribution network would be needed before concluding that any of them qualify as hardcore; this, however, does not seem consistent with the wording of Article 4(e) VBER, according to which any restriction on the ability of *the buyer* (i.e., a single buyer) to effectively use the internet to make sales prevents the application of the block exemption.

The VGL go on to state that the assessment of whether an obligation amounts to a restriction of the effective use of the internet to make sales cannot depend on either (i) market-specific circumstances (presumably making it irrelevant whether, for example, marketplaces are a more significant route to market for retailers in Germany than in France) or (ii) the individual characteristics of the parties to the agreement (an example of which could presumably be their individual cost structures, suggesting it should not be relevant in making such an assessment that an obligation may be harder for certain less profitable retailers to meet).

These underlying principles may be useful, to some extent, in arguing for a more liberal interpretation of the scope of the hardcore restriction, but in practice the more specific guidance provided by the VGL of various types of obligations is more important. Extrapolating, on the basis of the ruling in *Coty*, the VGL establish the general rule that restrictions related to the manner in which goods are sold online will generally not be considered to prevent the effective use of the internet (to make sales) where two conditions are met: (i) the buyer remains free to operate its online store, and (ii) the buyer remains free to advertise online (VGL, para. 208). For the most part, these two conditions underlie the fairly detailed analysis, included in the VGL, of which specific restrictions are covered by the block exemption and which fall foul of Article 4(e).

<u>Sales criteria</u>. In a welcome departure from the previous strict block exemption regime which required all online sales criteria to be equivalent to the supplier's criteria for off-line sales, a supplier can now benefit from the block exemption where it applies online sales criteria that are not equivalent to, and could be seen as stricter than, those imposed for sales by its distributors in brick-and-mortar shops. These may relate to, for example, the appearance of the online store, the way goods are displayed online, a requirement to cover the cost of customer returns of products sold online or an obligation to provide an online help-desk. Although typically important in the context of selective distribution systems, these types of obligations can be imposed in any type of distribution system. As under the previous regime, a supplier may also make admission to a distribution system conditional on the distributor operating a certain number of brick-and-mortar shops, thereby potentially excluding pure player online retailers. Nonetheless, where the supplier requires a buyer to make a minimum level of sales through offline channels, the VGL maintain the current requirement that the level must be set in terms of a minimum absolute amount (in value or volume) but not as a proportion of the buyer's total sales (as that could limit the amount of online sales).

<u>Online marketplace bans</u>. Based on *Coty*, the VGL confirm that online marketplace bans can benefit from the block exemption, provided the buyer is able to use its own online store and advertise online. Putting to rest concerns in relation to the July 2021 draft of the new VBER, this confirmation seems unqualified.

Where the VBER is not applicable and the marketplace restriction falls to be assessed under Article 101 TFEU, the VGL provide for an effects-based assessment: the restriction should not be considered to infringe Article 101(1) TFEU where its restrictive effects on the level of competition in the market are unlikely to be appreciable. This will be the case where (i) inter-brand competition is strong at the supplier and distributor levels (which should, in itself, be sufficient to exclude an infringement of Article 101(1) as emphasised by the ECJ recently in *Visma*), (ii) where the scope of the ban is limited, or (iii) where the relative importance of the restricted marketplace as a sales channel in the relevant market is low (a factor that, in contrast, should not be taken into account in assessing whether a restriction is exempted by the VBER).

Even if a restriction does not escape Article 101 TFEU based on an effects assessment, the VGL suggest that the restriction stands a good chance of withstanding challenge on quality-related grounds where the supplier operates a selective distribution system and does not have an existing contractual relationship with the marketplace. The supplier must nonetheless act consistently. Importantly, any quality-related justification relied on by a supplier will not meet the conditions of Article 101(1) TFEU, or, if relevant Article 101(3) TFEU, where (i) the supplier itself uses the marketplace that the buyer is prevented from using, (ii) the ban is not uniformly applied to all the supplier's distributors, or (iii) the operator of the marketplace is itself an authorised member of the supplier's selective distribution system.

<u>Online advertising restriction</u>s. As regards online advertising restrictions, they can benefit from the block exemption, provided they do not have the object of preventing the use of an entire advertising channel by the buyer. As price comparison services and search engine advertising are each considered a separate advertising channel, a prohibition on a buyer from using all price comparison services or all search engine advertising is treated as a hardcore restriction. Less extensive restrictions, however, are block exempted. For example, the supplier can impose certain quality or content standards in relation to the advertising or the provider of the advertising services, or require the buyer to refrain from using the supplier's brand name in the domain name of its online store. A more detailed analysis of the treatment of restrictions on price comparison services and search engine advertising, both within and outside of the scope of VBER, is provided below.

Price comparison services: As the services provided by price comparison sites, unlike online marketplaces, are considered to be an online advertising channel, as noted above, an outright prohibition on a distributor from using their services to promote its own online store is treated as a hardcore restriction. However, a partial restriction which does not apply to the entire channel may escape being characterised as a hardcore restriction: more specifically, a prohibition on the use of one, or only some, price comparison services will be block exempted unless they are the most widely used services and the remaining services are not *de facto* able to attract customers to the buyer's online store. Applying this rather imprecise test in practice will require a very case specific assessment of whether a prohibition on the use of some, but not other, service providers is likely to remain within the safe harbour of the VBER, which arguably is more appropriate for a self-assessment under Article 101 TFEU than to determine the applicability of a block exemption. Subjecting the use of price comparison services to quality criteria will also benefit from the VBER.

Where the VBER is not applicable and the restriction on the use of price comparison services falls to be assessed under Article 101 TFEU, it appears from the VGL that – even where the restriction amounts to a hardcore restriction – an effects assessment is required to determine if the restriction is liable to have an appreciable restrictive effect on competition (by, for example, increasing consumer search costs and softening retail price competition or limiting the ability of distributors to reach potential customers and, as a result, leading to market partitioning). The factors relevant to making this effects assessment overlap with those applicable in the case of marketplace restrictions (e.g., the strength on the market of the supplier and its competitors, as well as the extent of the use of such restrictions), but other factors, less obviously related to effects, seem to creep into the analysis under the VGL, perhaps reflecting the fact that – unlike a marketplace ban – a price comparison ban is a hardcore restriction.

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Where effects are to be assumed, the VGL seem to set a higher bar in terms of potential justifications than in relation to marketplace bans, given that price comparison services – in contrast to marketplaces – re-direct potential customers to the online store of the authorised distributor, meaning that the supplier is more able to protect quality by imposing requirements directly on the distributor's own store where any sale takes place.

Search engine advertising: As the services provided by search engines are also considered to be an online advertising channel, the application of the VBER to restrictions on their use is analysed in the same way as in respect of restrictions on price comparison services. Thus, an outright prohibition on a distributor from using these search engine services to promote its own online store is treated as a hardcore restriction (as it would prevent the use of an entire advertising channel), but a partial restriction – depending on its extent – may well not. It is noteworthy, in line with the very strict approach applied by the Commission in *Guess*, that a prohibition on the use of the supplier's brand name in bidding to be referenced in search engines is treated as equivalent to an outright ban. Interestingly, the VGL provide no guidance on how to assess restrictions on search engine advertising included in agreements falling outside the scope of the VBER. Perhaps this is related to the fact that, in *Guess*, the Commission held that the restriction in question was a 'by object' restriction, which would, in principle, exclude the possibility of an effects assessment. There would nonetheless seem to be no basis for subjecting restrictions on search engine advertising services to a stricter standard than restrictions of the use of price comparison services.

<u>Dual pricing</u>. The treatment of dual pricing – a requirement that the buyer pays a different wholesale price for products resold online compared to products resold offline – is much more liberal under the new rules than under the previous block exemption regime where it was considered a hardcore restriction. While it is tempting to consider that dual pricing is now generally block exempted, the VGL provide caveats: in particular, this practice may be considered to prevent the effective use of the internet to make sales where the extent of the price difference makes online sales "unprofitable" or "financially unsustainable", which is contrasted with the scenario where the price difference is reasonably related to the difference in costs incurred by the buyer in selling on and off-line, which is block exempted. Arguably, this sits uncomfortably with the suggestion made by the VGL, referred to above, that the assessment of whether a restriction qualifies as hardcore should not depend on the individual characteristics of the buyer. Interestingly, however, the Commission's Explanatory Note indicates that it will not be necessary to carry out complex cost calculations or share detailed cost calculations in order to demonstrate that dual pricing is block exempted, which suggests that the Commission at least may not be minded to second-guess the pricing differential applied by suppliers, save in rather egregious cases.

7. Non-compete obligations

The new VBER continues to make specific provision for the treatment of non-compete obligations in vertical agreements, i.e., any obligation on the buyer not to manufacture, buy or sell goods or services that compete with the contract goods or services or any obligation on the buyer to purchase more than 80% of its total demand for the contract goods or services and their substitutes from one supplier. As under the former VBER, the new VBER provides that non-competes whose term is not indefinite or does not exceed five years will benefit from the block exemption's safe harbour. Where the term of a non-compete exceeds five years or is indefinite, it will continue to be excluded from the safe harbour and fall to be individually assessed under Article 101 TFEU. The inclusion of a non-compete that does not benefit from the VBER will not prevent the remainder of the vertical agreement benefiting from the safe harbour.

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In a change from the position under the former VBER and VGL, the new VGL clarify that non-compete obligations that are tacitly renewable beyond a period of five years can still benefit from the block exemption where the buyer can effectively renegotiate or terminate the agreement with a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the 5-year period (VGL para. 248). This move away from the mechanical application of the five-year time limit applicable under the former VBER will give parties more flexibility in the inclusion of non-compete clauses in their agreements.

8. Parity obligations

Parity obligations, sometimes called Most Favoured Nation clauses ("MFNs") require a seller of goods or services to offer the goods or services to another party on conditions that are no less favourable than the conditions offered by the seller to certain other parties. While such provisions have long been used across all sectors of the economy without attracting significant attention from competition law enforcers, the imposition of such obligations by online intermediation service providers has, in recent years, become the focus of concern and extensive scrutiny by competition authorities (such as in the case of hotel booking sites and other online platforms). Online intermediation service providers commonly impose such parity obligations on the buyers of their services, which require the buyer not to offer more favourable conditions to customers over the buyer's own website (so-called "narrow" parity obligations) or go further and require the buyer not to offer more favourable conditions to customers via any competing online intermediation service provider (so-called "across-platform" or "wide" parity obligations).

Article 5(d) of the new VBER now excludes retail "across-platform" parity obligations imposed by online intermediation service providers with respect to sales to end users from the benefit of the block exemption, meaning that such obligations will be subject to individual self-assessment of their compatibility with Article 101 TFEU. The new VGL provide new guidance for this purpose. All other types of parity obligations in vertical agreements continue to benefit from the block exemption, including "narrow" parity obligations imposed by online intermediation service providers and parity obligations imposed outside the context of online intermediation services.

In excluding retail "across-platform" parity obligations from the VBER, the Commission reasons that this type of parity obligation is more likely to produce anticompetitive effects, such as facilitating collusion between providers of online intermediation services or foreclosing entry or expansion of competing providers. By contrast, while "narrow" online parity obligations eliminate the competitive constraint of the buyer's direct sales channels, this is regarded as addressing the "free-rider" problem facing online intermediation service providers without reducing competition between such providers. However, it should be noted that Article 6 of the new VBER specifically provides that the benefit of the block exemption may be withdrawn in concentrated platform markets where the cumulative use of "narrow" parity obligations by online intermediation service providers restricts competition between them.

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9. Agency

The new VGL maintain the general position that, in order for restrictions on the sale of the principal's goods or services to fall outside the scope of Article 101(1) TFEU (for example, restrictions related to the prices, territories or customers at, or to which, they are sold), the agent should bear no significant financial or commercial risks in relation to the contracts concluded on behalf of the principal. However, by comparison to the former VGL which stated expressly that whether or not the agent bears (not insignificant) risk is the only factor in determining whether the agent is such a 'genuine agent', the new VGL inject a potentially important (and, consequently, unwelcome) dose of uncertainty by providing that an agency agreement is "less likely" to escape Article 101(1) TFEU where the agent represents a "large number of principals" apparently even if the agent does not bear risk.

In addition to the guidance carried over from the former VGL, the new VGL provide guidance on the method of reimbursement for an agent's costs to ensure that the agent does not bear risk. In essence, the VGL do not prescribe a particular method as long as the principal ensures that the agent does not bear any significant degree of the relevant risks. Whichever method is used, it should allow the agent to easily distinguish between the amounts intended to cover the relevant risks and other payments, such as remuneration for agency services. Furthermore, it may be necessary for the principal to provide a simple method for the agent to declare and request a top-up where actual costs incurred by the agent end up exceeding the initially agreed payments.

The new VGL contain important new guidance on "dual role" agents, i.e., undertakings that act as both agent and reseller for the same principal/supplier in relation to products belonging to the same product market. A distributor-agent can qualify as a 'genuine' agent where:

1. the activities and risks covered by the agency relationship can be effectively delineated (for example, because it relates to products that are sufficiently differentiated form those sold under the distributor relationship); and

2. the agency – or, as the case may be, the distributor – relationship is not forced upon the agent (for example, where the agency relationship is not de facto imposed by the principal through a threat to terminate the distribution relation).

If these conditions are fulfilled, a dual role agent may be able to qualify as a genuine agent where all costs directly or indirectly relevant to the agency relationship are paid by the principal. These are defined broadly so as to include costs also benefiting the distributor activity, even if previously incurred, with the sole exception of costs that were exclusively incurred to sell differentiated products. All in all, the very strict conditions applicable to dual agency, and the potentially very serious consequences of misapplying the guidance, may make this option of limited value in practice.

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