

## The new VBER – what changes for supply and distribution agreements?

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This week, the European Commission finally adopted its long-awaited new Vertical Block Exemption Regulation (**VBER**). Together with the also updated vertical guidelines, the new rules define competition law requirements for distribution and supply agreements for the next decade. When the new VBER enters into force in June, it will bring significant changes, particularly concerning e-commerce and online distribution. We summarise the most important changes.

### **VBER in a nutshell**

The VBER and the accompanying Vertical Guidelines are the most relevant guidance for agreements between non-competitors under EU competition law. They establish a framework to help businesses self-assess the competition law risk of commercial contracts and thereby reduce compliance costs. By providing clear rules for the application of the antitrust law to various distribution, agency and supply constellations, the VBER shape the design of agreements between suppliers, distributors, wholesalers and retailers not only at European level, but in all EU member states.

To this end, the VBER provides a safe harbour for specific types of agreements between companies that are active at different levels of the production or distribution chain. Where an agreement falls within this safe harbour, the Commission generally considers that there is sufficient certainty that it is on balance efficiency-enhancing and therefore fulfils the conditions for an exemption from the prohibition of cartels in Article 101(1) TFEU. Agreements that benefit from such a block exemption under VBER are therefore very likely to comply with antitrust law. If, on the other hand, they do not fall within the safe harbour of the VBER, a comprehensive antitrust review is required.

### **Why was the VBER reviewed?**

The revised VBER is the result of a lengthy review process and extensive discussion of the existing rules with various stakeholders. In the Commission's view, the existing rules dating back to 2010 were in need of an overhaul. The aim was to provide businesses with clearer and simpler rules that reflect recent shifts in the commercial landscape brought about by the digital economy, namely the growth of e-commerce and the emergence of new business models such as multi-sided platforms, online market places and price comparison tools.

Following heated debate during the public consultation, some initially planned amendments to the VBER were eventually dropped by the Commission in the final VBER. Most notably, the Commission refrained from introducing controversial new market share thresholds for information sharing in dual distribution constellations. Nonetheless, the changes that found their way into the final VBER are significant. The existing safe harbour has been extended to previously not covered agreements and significantly narrowed in relation to others.

## **In which areas has the safe harbour been extended?**

Several changes will likely be welcomed by businesses that consider the current VBER as too restrictive. Most notably, suppliers may in the future impose certain restrictions on a buyer's ability to actively target individual customers (so-called active sales restrictions), particularly in selective or exclusive distribution constellations. The new VBER will also allow suppliers to appoint multiple exclusive distribution partners for the same exclusive territory or exclusive customer group (shared exclusivity; according to the new guidelines, this should not exceed 5 exclusive distributors).

Further notable changes concern selective distribution and the relationship between online and offline sales: Under the new rules, suppliers will be able to charge the same distributor different wholesale prices for products to be sold online and offline. They will also be able to impose different criteria for online and offline sales in selective distribution systems. To protect exclusive territories or customer groups, suppliers may in the future require distributors to pass on specific active sales restrictions to their customers. These previously restricted practices will be exempted under the new VBER, provided the general conditions for an exemption are met.

## **In which areas has the safe harbour been narrowed?**

On the other hand, the safe harbour provided by the VBER has been narrowed regarding several key aspects, most notably concerning dual distribution agreements and Most Favoured Nation (**MFN**) clauses:

Dual distribution describes a scenario where a supplier sells its goods or services both through an independent distributor and directly to end customers – thus competing with its distributors on the retail market. From a distributor's perspective, suppliers are both partners at the supply level and competitors at the retail level, whereas from a customer's perspective, they constitute alternative supply options. Due to this hybrid situation, dual distribution can potentially give rise to conflicts of interest and concerns of information sharing. Previously, dual distribution agreements were covered by the VBER provided that the market share of both the supplier and the distributor did not exceed 30% each. In the future, this exemption will not include information exchange that is either not directly related to the implementation of the distribution agreement and/or not necessary to improve the production or distribution of the contract goods or services in question.

Another restriction concerns MFN clauses or parity obligations. These are obligations that require a seller to offer the same or better terms to its counterparty than those offered on third-party distribution channels, e.g., other platforms or direct distribution channels such as the seller's own website. Under the new VBER, cross-platform or "wide" retail parity clauses (i.e., where a company pledges to offer the same or better prices and conditions as on all other distribution channels) will be considered an excluded restriction, i.e. they will under no circumstances fall under the safe harbour provided by VBER and must therefore be thoroughly assessed individually under Article 101 TFEU. In summary, considerably more caution is required when it comes to dual distribution and parity obligations in the future.

## **Other changes**

Further clarifications and simplifications will enable businesses to further finetune contract terms to antitrust requirements. These concern resale price maintenance (**RPM**) and minimum advertised prices (**MAPs**), restrictions on online sales and the use of online intermediation services and marketplaces, price comparison tools and hybrid platforms. Lastly, the new Vertical Guidelines further clarify and refine the extensive existing framework for selective distribution, exclusive distribution and agency agreements.

## **Outlook: Transitional period and HBER review**

The revised VBER and vertical guidelines will enter into force on 1 June 2022. They provide for a one-year transitional period until 31 May 2023. Businesses are well advised to use this time to thoroughly assess whether their existing or planned distribution and supply agreements comply with the new VBER. They should also anticipate the impact of other upcoming changes to the antitrust framework: The current Horizontal Block Exemption Regulations (**HBERs**) and related guidance concerning cooperation agreements between competitors are currently under review as well. They are expected to enter into force in January 2023.

BLOMSTEIN will continue to monitor all developments with regard to the new VBER and HBER and its implication for businesses. If you have any questions on the new rules for vertical agreements, Anna Huttenlauch, Max Klasse and the entire competition law team will be happy to advise you.