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MODERNISATION OF VBER AND VERTICAL GUIDELINES KEY DEVELOPMENTS

Herlinde Burez



Modernisation of VBER and Vertical Guidelines - rationale for the changes

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Paul Bridgeland
DG Competition

VBER

the basics

- **Regulation 2022/720.** Entered into force on 1 June 2022 & is here to stay for 12 years
- **An evolution, not a revolution**
- **Vertical Guidelines**
 - How to apply VBER
 - How to assess whether vertical agreement not covered by VBER can benefit from individual exemption under Article 101 TFEU



VBER KEY DEVELOPMENTS

- **Part 1. For distribution systems**
- Part 2. For dual distribution
- Part 3. For e-commerce

DISTRIBUTION SYSTEMS

main go-to-market options

Vertical
Integration

Agency

Independent
buyer

INDEPENDENT BUYER

exclusive distribution

- **Exclusive distributor is protected against active sales by other distributors of the supplier**
 - See new definition of 'active sales' (art. 1(1)(l) VBER)
 - Online sales can be active sales as well
- **When is a distributor exclusive? Two cumulative conditions (art. 1(1)(h) VBER) & an opportunity**
 - Exclusivity condition
 - Parallel imposition requirement
 - Roll-over possibility

INDEPENDENT BUYER

exclusive distribution

- **First condition: exclusivity**
 - Then: 1 distributor
 - **New:** possibility of 'shared exclusivity'
 - territory or customer group may be allocated exclusively to a maximum of 5 distributors (art. 1(1)(h) VBER)

INDEPENDENT BUYER

exclusive distribution

- **Second condition: parallel imposition**
 - Then and now: protection from active sales by all other distributors of the supplier
 - **New:** shared exclusivity: no protection from active and passive sales by the other exclusive distributors (maximum 5) in the exclusive territory or customer group, but protection from active sales by all other distributors
 - Requirement often difficult to meet in practice; now some flexibility to get the requirement of parallel imposition right (§122 VG)

INDEPENDENT BUYER

exclusive distribution

- **Possibility : roll-over of active sales restriction**
 - Under former VBER: prohibition on active sales to other distributors of the supplier, but not to their customers
 - Consequence: prohibition on active sales was easy to circumvent
 - **New: possible to impose active sales restriction not only on the other distributor, but also to extend it to their direct customers** (art. 4(b)(i), 4(c)(i)(1) and 4(d)(1) VBER):
 - Consequence: opportunity for better protection of exclusive distributors

INDEPENDENT BUYER

selective distribution

- **New: better protection for authorised distributors**
 - Distributors outside selective territory, and their customers, can be prohibited to sell to unauthorised distributors in selective territory (art. 4(b)(ii), 4(c)(i)(2) and 4(d)(ii) VBER)
 - So, unlimited pass-on of active and passive sales ban to unauthorised distributors to protect closed nature of selective system
 - Gradual roll-out of selective distribution in EU = possible
- **Confirmation: no VBER needed for pure qualitative selectivity**
(§148 VG)

Exclusive distribution and selective distribution

Exclusive distribution: shared exclusivity and pass-on of active sales restrictions

Selective distribution: more protection against sales by unauthorized distributors

- Evaluation indicated a decrease in the use of exclusive distribution.
- Expert report indicated that the single exclusivity rule was unduly inflexible and the no pass-on rule allowed distributors to circumvent the exclusive distribution system
- Evaluation and expert report indicated the need for better protection of authorized distributors (filling a gap in the VBER rules)
- ▶ More flexible rules to facilitate the use of pro-competitive exclusive and selective distribution

More clarity on territorial restraints in the VBER

Re-organised hardcore list; new definitions of exclusive distribution and active and passive sales

- Non-experts found the VBER hardcore list difficult to understand/apply
- Moving the definitions into VBER promotes harmonised application of the rules across the EU
- Active and passive sales definitions now cover new (online) sales techniques

INDEPENDENT BUYER

RPM

- **Clarification**: price range and MAP = RPM (§185 and §187 (d) VG)
- **New exception**: fulfilment contract with fixed resale price
 - \neq RPM, provided that the supplier decides who will fulfil the contract (§193 VG)
- **New exception**: some distributors use product as repeated loss leader
 - Targeted minimum resale price or MAP \neq RPM (§197 VG)

Resale price maintenance

New guidance on minimum advertised prices (MAPs) and fulfilment contracts

- MAPs and fulfilment contracts not covered by 2010 Guidelines – the evaluation and enforcement practice indicated a need for guidance

AGENCY

genuine vs. non-genuine agency

- **New**: even though main principles remain the same, even **more narrow interpretation of 'genuine agency'** (§30ff VG)
- **New**: guidance with regard to **dual role as agent/distributor** for the same principal/supplier (§36-39 VG)
- **New**: guidance on application of the **genuine agency exception to platforms** (§46 VG)

Agency

New guidance on the application of the genuine agency exception to dual-role agents and to online platforms

- Stakeholders requested guidance on dual-role agents outside the VBER review process (Commission working paper)
- Enforcement practice indicated legal uncertainty about the application of the genuine agency exception to online platforms



VBER KEY DEVELOPMENTS

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DUAL DISTRIBUTION

then and now

- **Rule then and now: VBER does not apply to agreements between competitors**
- **Exception then and now: VBER applies to manufacturers with dual distribution**
 - Manufacturer with a dual role:
 - as supplier of its distributors (vertical relation)
 - as downstream competitor of its distributors (horizontal relation)

DUAL DISTRIBUTION

extension of safe harbour

- **New**: VBER not only applies to manufacturers, but also to importers and wholesalers with a dual role (art. 2(4) VBER)
 - Manufacturer, importer or wholesaler with a dual role:
 - as supplier (vertical relation)
 - as downstream competitor of its distributors (horizontal relation)

DUAL DISTRIBUTION

exceptions

- **New**: VBER does not apply to exchange of information in dual distribution which is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the contract goods or services, or which fulfils neither of the two conditions (art. 2(5) VBER).
 - Inside VBER (§99 VG) versus outside VBER (§100 VG)
 - If outside, only information exchange is outside; other provisions remain covered by the VBER (§102 VG)
 - For information exchange outside VBER, safeguard measures (“firewalls”) (§103 VG)

Dual distribution

Dual distribution exception extended to more levels of the supply chain; new guidance on information exchange in dual distribution

- Evaluation indicated that the scope of the dual distribution exception was too narrow (the rationale for the exception applies to more levels of the supply chain)
- Evaluation indicated concerns about information exchange in dual distribution (dual distribution now more widely used due to growth of e-commerce)



VBER KEY DEVELOPMENTS

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DISTRIBUTOR ONLINE SALES

general

- **New:** prohibition to restrict online sales = upgrade from VG to hardcore restriction in VBER (art. 4(e) VBER)
 - “... the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold ... without prejudice to the possibility of imposing on the buyer: (i) other restrictions of online sales; or (ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel.”
 - So: restriction of effective use of the internet for online sales by distributor or its customers = hardcore customer or territorial restriction
 - Other restrictions (= how ?) are ok

DISTRIBUTOR ONLINE SALES

via marketplaces

- **Prohibition to sell via online marketplaces = allowed, if the distributor...**
 - remains free to sell via its own online store, **AND**
 - can advertise online, via price comparison services and online search engines (§150 and §208 VG)

DISTRIBUTOR ONLINE SALES

extension of safe harbour

- **New: safe harbour extended to:**
 - dual pricing for products sold offline or online (§209 VG)
 - imposition of non equivalent offline and online criteria in selective distribution system (§235 VG)....
 - ... always provided that it does not prevent the effective use of the internet by the distributor and its customers to sell contract products online

DISTRIBUTOR ONLINE SALES

online advertising

- **New**: what about restricting or banning online advertising?

- No restrictions that have the object of preventing the use of an entire online advertising channel (art. 4(e)(ii) VBER and (§206(g) VG)

“Prohibiting the use of particular price comparison services or search engines is generally not a hardcore restriction, as the buyer may use other online advertising services to raise awareness of its online sales activities. However, prohibiting the use of the most widely used advertising services in the particular online advertising channel may amount to a hardcore restriction, if the remaining services in that advertising channel are de facto not capable of attracting customers to the buyer’s online store.”

PLATFORM AGREEMENTS

- **New**: art. 2(6) VBER: **agreements relating to the provision of online intermediation services (OIS) are out-of-scope *if* the OIS provider has a hybrid role** (meaning that it also sells itself the products that are sold by third parties on its platform)
- **New**: **providers of OIS as supplier under VBER** (art. 1(1)(d) VBER).
Consequences (calculation market shares, application of hardcores and excluded lists) (§67 VG)

PLATFORM AGREEMENTS

parity clauses

- **New:** VBER no longer applies to 'across-platform retail parity' (art. 5(1)(d))
 - *“any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services”*
- **But VBER still covers parity clauses that concern conditions...**
 - ... offered through own sales channels (so-called 'narrow' retail parity)
 - ... under which manufacturers, wholesalers or retailers purchase input products (classic MFC)

Online sales and advertising restrictions

New VBER Article 4(e); detailed guidance on specific restrictions; relaxation of the rules on dual wholesale pricing and the equivalence principle

- Evaluation indicated that e-commerce was now well developed and no longer required special protection
- Rules needed updating to reflect *Pierre Fabre* and *Coty* case law
- Intention to promote a harmonised approach to online sales restrictions across the EU
- New guidance covers online restrictions encountered in the ECN's enforcement practice

Agreements with online platforms

New definition of online intermediation services; VBER treats providers of OIS as suppliers; hybrid platforms carve-out; exclusion from VBER of across-platform retail parity clauses

- Evaluation indicated legal uncertainty about:
 - whether VBER applied to online intermediation services
 - when to treat platforms as:
 - suppliers of intermediation services (marketplaces), or
 - buyers/resellers of goods/services (retailers)
- Enforcement experience indicated competition concerns relating to:
 - the dual role of hybrid platforms (intermediary and seller)
 - across-platform retail parity clauses (“wide” parity)

Background materials

Commission Evaluation staff working document: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0172>

Evaluation support study: <https://op.europa.eu/en/publication-detail/-/publication/93f52e95-a92e-11ea-bb7a-01aa75ed71a1/language-en>

Expert report on active sales restrictions: https://competition-policy.ec.europa.eu/system/files/2021-06/kd0821131enn_VBER_active_sales.pdf

Expert report on online sales restrictions: https://competition-policy.ec.europa.eu/system/files/2021-06/kd0921156enn_VBER_online_sales.pdf

Expert report on information exchange in dual distribution: https://competition-policy.ec.europa.eu/system/files/2022-02/kd0122032enn_VBER_dual_distribution_2.pdf

Commission Impact assessment staff working document: https://competition-policy.ec.europa.eu/system/files/2022-07/20220510_revised_VBER_and_vertical_guidelines_impact_assessment_report.pdf

Explanatory note on the main changes: https://ec.europa.eu/competition-policy/document/download/567ac81f-1e99-41ca-ac7f-a10ca1f7d5ce_en?filename=explanatory_note_VBER_and_Guidelines_2022.pdf

