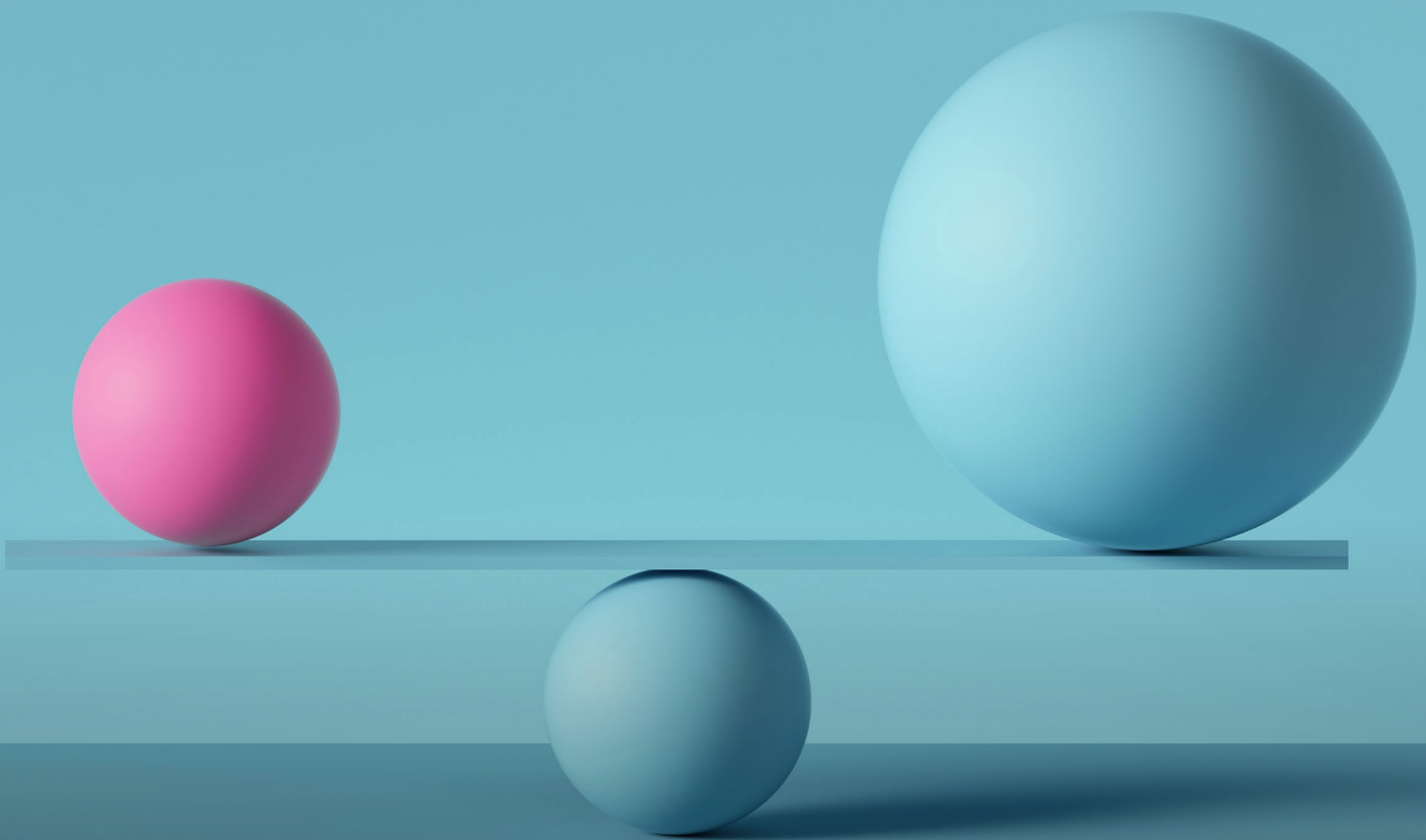


# PROPOSED NEW EU COMPETITION RULES FOR DISTRIBUTION AGREEMENTS – A REBALANCING FOR THE DIGITAL AGE



BY JAMES KILLICK, TILMAN KUHN & PETER CITRON<sup>1</sup>



<sup>1</sup> James Killick and Tilman Kuhn are Partners, Peter Citron is a Counsel at White & Case LLP. The views expressed here are the authors' personal views and should not be attributed to White & Case LLP or any of its affiliates or clients.

# CPI ANTITRUST CHRONICLE

## AUGUST 2021

### CPI Talks...

*With Ioannis Lianos*



### Digital Markets: The Challenges of National Enforcement in a Global World

*By Rachel Brandenburger & Christopher Hutton*



### Proposed New EU Competition Rules for Distribution Agreements – A Rebalancing for the Digital Age

*By James Killick, Tilman Kuhn & Peter Citron*



### Controlling Market Power in Digital Business Ecosystems: Incorporating Unique Economic and Business Characteristics in Competition Analysis and Remedies

*By Diana L. Moss*



### Fix It or Forget It: A “No-Remedies” Policy for Merger Enforcement

*By John Kwoka & Spencer Weber Waller*



### Recapturing the Business Side of Innovation in Antitrust Merger Analysis

*By Kent Bernard*



### “Something Is Happening Here but You Don’t Know What It Is. Do You, Mrs. Jones?” Dark Patterns as an Antitrust Violation

*By Jay L. Himes & Jon Crevier*



### Failure To File Reportable Mergers – Update from China

*By Jet Deng & Adrian Emch*



Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for access to these articles and more!

CPI Antitrust Chronicle August 2021

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)  
Competition Policy International, Inc. 2021© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

## Proposed New EU Competition Rules for Distribution Agreements – A Rebalancing for the Digital Age

*By James Killick, Tilman Kuhn & Peter Citron*

On July 9, 2021, the European Commission (“EC”) published for public consultation a draft revised Vertical Block Exemption Regulation (“VBER”) and draft revised guidelines on vertical restraints (“Vertical Guidelines”). The EC has made substantial revisions, in particular adjustments to the rules governing dual distribution, dual pricing, and parity obligations.

### Scan to Stay Connected!

Scan or click here to sign up for CPI's FREE daily newsletter.



On July 9, 2021, the European Commission (“EC”) published for public consultation a draft revised Vertical Block Exemption Regulation (“VBER”) and draft revised guidelines on vertical restraints (“Vertical Guidelines”). The EC has made substantial revisions, in particular adjustments to the rules governing dual distribution, dual pricing, and parity obligations.

The draft new rules aim to address the tectonic shifts over the last decade in the way business operates, in particular with the growth of e-commerce and online platforms. Emerging new distribution formats started challenging traditional brick-and-mortar shops long ago, but the industry has undergone radical change more recently with suppliers increasingly engaging in dual distribution (i.e. selling both through retailers and through their own stores, primarily online), price comparison websites offering direct purchase options, traditional online pure players opening brick-and-mortar shops, more online retailers offering sales opportunities for other retailers via online marketplaces, and the like. These new distribution formats have challenged suppliers to think about how to design their go-to-market strategy, and consider “steering measures,” such as online sales restrictions, which have been scrutinized by a number of competition authorities.

At the time of the last review of the EU vertical regime 12 years ago, a key concern was to protect online sales and ensure that suppliers could not inhibit reseller development of online sales channels. The balance has changed with the explosion in online sales, growth of online platforms, and struggling brick-and-mortar shops – a trend that has been further accelerated by the COVID-19 pandemic. The EC now considers that “online sales have developed into a well-functioning sales channel and therefore no longer needs special protection.”

## I. THE VBER AND VERTICAL GUIDELINES

The VBER provides parties to vertical agreements (i.e. agreements entered into between businesses operating at different levels of the supply chain) with increased certainty about the compatibility of their agreements with Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”), by creating a safe harbor exemption.

If neither party’s market share exceeds 30 percent, vertical agreements, which do not contain any so-called “hardcore restrictions” (including, for example, resale price maintenance or territorial/customer restrictions), de lege benefit from an exemption. Agreements, which do not satisfy the VBER conditions, may still be compatible with Article 101(1) TFEU, but these agreements require individual assessment pursuant to Article 101 (3) TFEU.

The Vertical Guidelines aim to help companies to self-assess whether their agreements are covered by the VBER or may qualify for an individual exemption pursuant to Article 101(3) TFEU.

The current VBER, which has been in force for 11 years, expires on May 31, 2022. The draft revised VBER and draft revised Vertical Guidelines follow an extensive evaluation exercise undertaken by the EC over several years, including a 2019 public consultation, stakeholder workshop, support studies, and a working paper. The EC’s evaluation has, in particular, been focused on identifying the changes that are necessary to the EU regime as a result of the growth of online sales and new market players (such as online platforms).

## II. DRAFT REVISED VBER AND VERTICAL GUIDELINES – WHAT IS NEW?

### A. Dual Distribution

Dual distribution covers situations where a supplier not only sells its goods or services through independent distributors (such as retailers) but also directly to end customers in direct competition with its independent distributors. The rise of online sales – in particular through suppliers' own online shops – has resulted in a significant increase in such instances of dual distribution.

The current VBER exempts dual distribution arrangements – despite the fact that the supplier and the independent distributors are technically competitors at the retail level. The EC is concerned that this exception for dual distribution is likely to exempt vertical agreements where possible horizontal concerns are no longer negligible. While engaging in dual distribution itself is, of course, not prohibited, the way a supplier who has set up a dual distribution system operates in practice may trigger competition concerns, for example the extent to which the supplier exchanges competitively sensitive information (such as prices, customers, or sales volumes) with distribution partners, which are competitors on the retail level.

To address this concern, the EC is now proposing to make the following adjustments to the existing safe harbor for dual distribution:

- Exclude providers of online intermediation services from the benefit of the safe harbor if they have a hybrid function, namely when they sell goods or services in competition with enterprises to which they provide online intermediation services (Article 2 (7)).
- Limit the current safe harbor for dual distribution to instances where the parties' aggregated market share in the retail market does not exceed 10 percent, in line with the existing market share threshold for agreements between competitors used in the De Minimis Notice (Article 2 (4)).
- Create an additional but more limited safe harbor for dual distribution where the supplier and its distributors have an aggregated market share at retail level above 10% but still do not exceed the 30 percent market share threshold in Article 3 of the VBER. In such a scenario, all aspects of the vertical agreement remain exempted, except for information exchanges between the parties to the vertical agreement, which have to be assessed under the rules applicable to horizontal agreements (Article 2 (5)).

To benefit from the safe harbors listed in (b) and (c) above, the vertical agreements should include neither any “by object” restrictions under Article 101(1) TFEU, nor any hardcore restrictions under Article 4 of the revised VBER.

The EC has identified a potential gap because the current VBER does not extend to dual distribution by wholesalers and importers who often fulfil a similar role as suppliers. To remedy this gap, the EC now proposes to expand the scope of the dual distribution exception to include wholesalers and importers (Article 2(4)(a)).

The draft revised Vertical Guidelines do not contain any guidance on information exchange in dual distribution arrangements. This will be covered by the EC's new revised Horizontal Guidelines (which have not yet been published).

### B. Parity Obligations (“MFNs”)

Parity obligations – which have recently been the subject of a plethora of diverging national competition authority and court decisions concerning such clauses used by booking platforms – require an enterprise to offer its contracting party the same or better conditions as on other outlets (be it other platforms or any other sales channel). Parity clauses are generally exempted under the current VBER (provided the market share threshold is met and there are not hardcore restrictions).

The EC proposes to remove the benefit of the block exemption for across-platform retail parity obligations imposed by providers of online intermediation services.<sup>2</sup> Under this type of “wide” parity obligation, suppliers are prevented from offering better terms on other platforms. This type of parity obligation is now added to the list of so-called gray-listed clauses (or excluded restrictions - Article 5(d)) and, thus, will have to be

<sup>2</sup> The EC is likely to have sought to establish clarity in this area as a result of the hotel bookings cases, where multiple national competition authorities adopted different views on the parity obligations at issue.

assessed individually under Article 101 TFEU. The EC's concern is that "wide" parity obligations may make it more difficult for market entrants to establish a market presence, limit price competition, and restrict access to different sales channels.

The VBER continues to exempt retail parity obligations relating to direct sales or marketing channels (so-called "narrow" parity), e.g. where suppliers are prevented from offering better terms on their own websites. The exemption applies provided the general conditions for the application of the VBER are fulfilled, in particular the 30 percent market share threshold in Article 3.

### ***C. Dual Pricing and Criteria for Online Shops***

Dual pricing involves charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline. Many national competition authorities have investigated dual pricing cases affecting online selling, which have been resolved by the abandonment of the dual pricing provisions in question.

The current Vertical Guidelines specify that an agreement that the distributor shall pay a higher price for products intended to be resold online than for products intended to be resold offline constitutes a hardcore (passive sales) restriction. Hence, the only way for a supplier to support a buyer's offline sales efforts specifically was to pay a lump sum.<sup>3</sup>

The draft revised Vertical Guidelines (para. 195) now soften the stance and specify that the VBER allows suppliers to set different wholesale prices for online and offline sales by the same distributor, in so far as this is intended to incentivize or reward an appropriate level of investments and relates to the costs incurred for each channel.

In the context of a selective distribution system, the draft revised Vertical Guidelines (para. 221) state that the criteria imposed by suppliers in relation to online sales no longer have to be overall equivalent to the criteria imposed on brick-and-mortar shops, on the grounds that online and offline channels have different characteristics. By way of example, the draft revised Vertical Guidelines state that a supplier may establish specific requirements to ensure certain service quality standards for users purchasing online, such as the set-up and operation of an online after-sales help desk, a requirement to cover the costs of customers returning the product or the use of secure payment systems.

As with other online sales restrictions (see below), the draft revised VBER only block exempts dual pricing and the lack of equivalence (imposing criteria for online sales that are not overall equivalent to the criteria imposed on brick-and-mortar shops) if these restrictions do not, directly or indirectly, have as their object to prevent buyers or their customers from selling their goods or services online. This introduces effectively a requirement of individual assessment within the VBER (defeating the central purpose of a block exemption), and may lead to differences in interpretation by national competition authorities and national courts, with a possible strict approach taken by some.

---

<sup>3</sup> A supplier can also impose minimum offline sales requirements or offline sales targets which trigger discounts that then apply to all purchases.

## ***D. Online Sales Restrictions***

Restrictions that, directly or indirectly, in isolation or combination with other factors, have as their object to prevent the buyers or their customers from selling their goods or services online or from effectively using one or more online advertising channels, are defined as restrictions of active or passive sales, and thus as hardcore restrictions under Article 4 of the VBER.

The draft revised Vertical Guidelines provide additional examples of direct and indirect obligations that have the object of preventing distributors from selling online and also of restrictions that might be permitted.<sup>4</sup> They clarify the following:

- A restriction of the use of price comparison websites,<sup>5</sup> or paid referencing in search engines, amounts to a hardcore restriction under the VBER, as the ability to advertise allows a distributor to attract potential customers to its website, which is a prerequisite for being able to sell online.
- Online advertising restrictions that do not exclude specific online advertising channels are block exempted, for example, if such restrictions are linked to the content of online advertising or set certain quality standards.
- While the operation of a website is a form of passive selling, translating that website in a language not commonly used in the territory of the distributor is a form of active selling.

## ***E. Active Sales Restrictions***

Active sales restrictions are limitations of the buyer's ability to actively approach customers in a specific territory or customer groups defined by other criteria.

The current VBER does not foresee the use of shared exclusivities between two or more distributors in a particular territory which can be shielded from active sales by distributors outside of "their" territory, i.e. there can only be one exclusive distributor per territory/customer group. This makes it difficult for some suppliers to implement distribution networks that are tailored to their specific needs.

The draft revised VBER (Article 4 (b)) introduces the possibility of shared exclusivity, allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group. The draft revised Vertical Guidelines specify that the number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts. At Para.102, they state that the number of exclusive distributors should be restricted to a "limited number," and should not be a "large number." They warn that exclusive distribution "shall not be used to shield a large number of distributors from competition located outside the exclusive territory, as this would lead to partition of the internal market." It may prove challenging in practice to assess how many distributors are permissible in view of the volume of business in a particular territory, and there is a risk of different interpretations across Member States.

Further, the draft revised VBER now provides a clear position on a much-debated issue, namely that suppliers in exclusive distribution systems may oblige their buyers to pass on active sales restrictions to their customers. According to Article 4(b), such a pass-on is possible where the customer of the buyer has entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier. The change aims to enhance the protection of the investment incentives of exclusive distributors.

The draft revised VBER grants substantially enhanced protection to selective distribution systems. It allows the restriction of all sales (active or passive) by an exclusive or open distributor (where a supplier operates neither an exclusive nor a selective distribution system) to unauthorized resellers in a territory where the supplier operates a selective distribution system.

---

4 There have been a number of recent cases at the EU and national level dealing with online sales restrictions, such as Case C-439/09 *Pierre Fabre*, Case C-230/16, *Coty*, the European Commission decision in *Guess*, and the German FCO decision in *Asics*.

5 This confirms the position taken in the EC's Final Report of its e-commerce sector inquiry, and follows the ruling of the German Federal Supreme Court in the *Asics* case that a restriction on the use of price comparison websites, which was not based on quality requirements, constitutes a hardcore restriction. These positions arguably conflicted with the ECJ's *Coty* ruling; see Kuhn/Rust, "Between *Coty*, *Guess* and the new V-BER—where do we stand on e-commerce restrictions?," ECLR 2019, 376 *et seq.*

## ***F. Agency***

Genuine agency agreements continue to fall outside the scope of Article 101 (1) TFEU.

The draft revised Vertical Guidelines include a new section on agency. The EC explains (para. 44) that:

Undertakings providing online intermediation services are categorized as suppliers under the draft revised VBER and can therefore in principle not qualify as agents for the purposes of applying Article 101 (1) TFEU.

Providers of online intermediation services generally act as independent economic operators and not as part of the undertakings of the sellers to which they provide online intermediation services.

## **III. WHAT STAYS IN?**

The EC has decided to retain RPM as a hardcore restriction, resisting arguments made during the evaluation to take a more lenient approach. It is likely that RPM will continue to be the target of aggressive enforcement by the EC and national competition authorities.

The draft revised Vertical Guidelines provide expanded guidance on RPM, including in relation to price monitoring, Minimum Advertisement Pricing (“MAP”) policies (which prohibit retailers from advertising prices below a certain amount set by the supplier), and fulfillment contracts (defined as an agreement between a supplier and a buyer that executes a prior agreement between the supplier and a specific end user). With respect to MAP policies, the revised Vertical Guidelines (para. 174) specify that they may amount to RPM in cases where the suppliers sanction retailers for ultimately selling below the respective MAPs, require them not to offer discounts, or prevent them from communicating that the final price could differ from the respective MAP.

The EC has also decided to retain the gateway 30 percent market share for the VBER to be applicable.

Non-compete obligations continue not to be covered by the VBER if their duration is indefinite or exceeds five years. However, the draft revised Vertical Guidelines (para. 234) specify that non-compete obligations which are tacitly renewable beyond a period of five years are covered by the draft VBER if the buyer can effectively renegotiate or terminate the contract with a reasonable notice period and at a reasonable cost.

## **IV. NEW UK REGIME**

On June 17, 2021, the UK Competition and Markets Authority (“CMA”) published a consultation document setting out its proposed recommendations for the UK’s post-Brexit approach to vertical agreements. Responses to the consultation will inform the CMA’s final recommendation to the Secretary of State on whether to replace the retained VBER when it expires on May 31, 2022.

Unlike the EC, the CMA is not proposing to introduce an additional market share threshold for dual distribution, but recommends retaining the dual distribution exemption, as well as extending the exemption to wholesalers and/or importers. The CMA is considering providing guidance on information exchange in the context of dual distribution.

As opposed to the EC, which is proposing to treat them as “excluded restrictions,” the CMA recommends that wide parity obligations be treated as hardcore restrictions.

If there emerges significant divergence from the EU system, there may be additional costs and restructuring burdens for businesses in the future, which currently structure their distribution arrangements on a pan-European (including the UK) basis.

## V. NEXT STEPS AND TIMELINE

Date	Event
July 9, 2021	Publication of draft EU VBER and accompanying guidelines
July 22, 2021	Deadline for parties to submit comments on draft UK rules
September 17, 2021	Deadline for parties to submit comments on draft EU rules
June 1, 2022	New EU rules will enter into force until May 31, 2034 New UK rules will enter into force for 6 years

## VI. CONCLUSION

The draft revisions do not seem like a big overhaul. The basic structure and themes of the VBER are being kept, but the EC is addressing individual lessons learned from the past decade, especially with respect to new digital business models. It seems slightly disappointing that the revision is not more economics-driven (e.g. economists tend to argue that vertical restraints can only be an issue where they have horizontal effects, and e.g. RPM without market power is not a problem). Still, while some of the changes may at first seem marginal, the devil is in the detail and some of them will have a significant effect in practice, for example the ability of a supplier to protect its selective distribution system from sales from outside the territory in which the system is operated. Further, additional issues will be addressed in other EC instruments, such as the revised Horizontal BERs and Guidelines, which will apparently address information exchange between a supplier and its re-sellers in dual distribution structures. Moreover, some of the changes seem to suggest an individual assessment in order to determine whether a clause is covered by the BER, which leads to a degree of legal uncertainty and conflicts with the very purpose of a block exemption. Therefore, the debate will continue both until the BER is adopted and probably beyond.

## CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit [competitionpolicyinternational.com](http://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

