

# THE NEW EUROPEAN VERTICAL BLOCK EXEMPTION: UNANSWERED QUESTIONS FOR ONLINE DISTRIBUTORS AND PLATFORMS



BY ESTHER KELLY & FIONA GARSIDE <sup>1</sup>



<sup>1</sup> Esther Kelly is a partner, and Fiona Garside is a Senior Expertise Lawyer in the Antitrust, Regulation and Foreign Investment Practice at Ashurst LLP. The views and opinions expressed in this article belong solely to the authors. Any errors remain the responsibility of the authors.

# CPI ANTITRUST CHRONICLE SEPTEMBER 2022

## THE NEW EU AND UK VERTICAL REGIMES: IMPROVEMENTS, DIVERGENCES, AND MISSED OPPORTUNITIES?

By Alison Jones & Karen Slaney



## HARDCORE RESTRICTIONS IN REGULATION 2022/720 ON VERTICAL RESTRICTIONS

By Kassiani Christodoulou & Marion Carbo



## THE NEW EUROPEAN VERTICAL BLOCK EXEMPTION: UNANSWERED QUESTIONS FOR ONLINE DISTRIBUTORS AND PLATFORMS

By Esther Kelly & Fiona Garside



## NEW VERTICAL BLOCK EXEMPTIONS AND GUIDELINES IN EUROPE: KEY CHANGES AND EMERGING QUESTIONS

By Charlotte Colin-Dubuisson & Sima Ostrovsky



## BUILDING A COHERENT LEGAL FRAMEWORK FOR VERTICAL PRICE RESTRICTIONS IN CHINA

By Sandra Marco Colino



## INTERIM MEASURES APPLIED TO DIGITAL PLATFORM EXCLUSIVITY CASES: THE BRAZILIAN RECENT EXPERIENCE

By João Felipe Achcar de Azambuja



## THE NEW EUROPEAN VERTICAL BLOCK EXEMPTION: UNANSWERED QUESTIONS FOR ONLINE DISTRIBUTORS AND PLATFORMS

By Esther Kelly & Fiona Garside

On June 1, 2022, the European Commission's new Vertical Block Exemption Regulation ("VBER") and its accompanying guidelines (the "Guidelines") came into force. The VBER provides a safe harbor for vertical agreements where the parties' market shares are below 30 percent and certain conditions are met. Since the previous rules were drafted, the importance and prevalence of e-commerce has increased significantly. The new rules are designed to provide guidance which is fit for purpose in the digital age. This article focuses on the revised guidance for online distribution (in particular, for dual distributors). In this context, the European Commission has emphasized the principle that restrictions should not prevent the "effective" use of the internet, but questions remain about when restrictions will be sufficiently severe that they infringe this rule. For providers of online-intermediation services (e.g. certain online marketplaces and application stores), their categorization as suppliers will have an important impact on the restrictions which they are able to impose on those selling through their platforms. While the VBER provides a welcome update to the previous rules in relation to online distribution, questions remain and companies and their advisors will be watching the European Commission's enforcement activities with interest for further guidance.

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

CPI Antitrust Chronicle September 2022

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)

Competition Policy International, Inc. 2022<sup>©</sup> Copying, reprinting, or distributing

## Scan to Stay Connected!

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



# I. INTRODUCTION

On June 1, 2022, the European Commission's new Vertical Block Exemption Regulation ("VBER") and its accompanying guidelines (the "Guidelines") came into force. The Regulation provides a so-called safe harbor for certain vertical agreements where the parties' market shares are below 30 percent and certain other conditions are met. Within this safe-harbor, companies and their advisors have significant, although not absolute, comfort that their arrangements are unlikely to infringe the prohibition on anti-competitive coordinated conduct (Article 101 of the Treaty on the Functioning of the European Union, "Article 101"). Importantly, the exemption can be withdrawn (as discussed below).

The VBER reform process, sparked by the looming expiration of the prior vertical block exemption (the "2010 Regulation"), aimed to simplify the rules and tailor them to the changing world of digital and online commerce – futureproofing them where possible.<sup>2</sup> Self-assessment is a burdensome exercise for companies, particularly, but not only, for small and medium sized enterprises and those operating in multiple jurisdictions, with potentially inconsistent or conflicting rules. This is particularly important for e-commerce -- a method that new entrants commonly use to access a wider range of potential customers. The 2010 Regulation had faced ongoing concern about its complexity and the difficulty of adapting certain intricately drafted rules to novel situations.

The review process was thorough and public, with the European Commission consulting hundreds of industry associations, companies, law firms and other interested parties, while receiving contributions from at least 20 National Competition Authorities ("NCAs").<sup>3</sup> The reform also drew on other work including the European Commission's e-commerce sector enquiry (part of the 2015 Digital Single Market Strategy) and recent precedent.

Although online sales and platform sales were well-advanced when the 2010 Regulation was being drafted, in the interim, as everyone knows, the sector has exploded. The Working Document notes that the share of individuals in the EU purchasing online increased by 100 percent since 2008.

According to Commissioner Vestager, the VBER "will provide companies with up-to-date guidance that is fit for an even more digitalized decade ahead."<sup>4</sup> The VBER will remain in force for 12 years, until May 31, 2034. The following will focus on the revised guidance in the context of online distribution (especially for dual distributors) and for providers of so-called online-intermediation services (e.g. certain online marketplaces, application stores, price comparison sites, and social media sites).

## II. ONLINE DISTRIBUTION: NOTABLE CONCERNS, CLARIFICATIONS, AND OUTSTANDING QUESTIONS

Online distribution is arguably one of the areas in which the VBER brings about the most significant reforms and clarifications. This is welcome in light of increased enforcement by the European Commission and NCAs – as well as some notable divergences in approach. As noted, the European Commission issued a spate of enforcement decisions relating to online sales between 2016 and 2022<sup>5</sup> and accepted commitments in relation to most favored nation ("MFN") clauses.<sup>6</sup> NCA enforcement, always more active in relation to vertical agreements, remained intense (with a total of around 400 vertical cases between 2010 and 2020). Increasingly, however, concerns began to arise as to consistency of enforcement, particularly in the online context.

---

<sup>2</sup> European Commission, Evaluation of the Vertical Block Exemption Regulation (Staff Working Document SWD(2020) 173 final), 8 September 2020 (the "Working Document"), available: [https://ec.europa.eu/competition/consultations/2018\\_vber/staff\\_working\\_document.pdf](https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf).

<sup>3</sup> See, for example, European Commission, EU competition rules on vertical agreements – evaluation, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1936-Evaluation-of-the-Vertical-Block-Exemption-Regulation/public-consultation>.

<sup>4</sup> Press Release, European Commission, Antitrust: Commission adopts new Vertical Block Exemption Regulation and Vertical Guidelines (10 May 2022).

<sup>5</sup> Fines: Case AT.40469 *Denon & Marantz* (24 July 2018) (for imposing fixed or minimum resale prices on online retailers for widely used consumer electronics products); Case AT.40428 *Guess* (17 December 2018) for restricting retailers in its selective distribution system from certain online selling and advertising activities and from selling cross-border to consumers in other Member States (so-called geo-blocking); Cases AT.40436 *Ancillary Sports Merchandise* (25 March 2019), AT.40432 *Character merchandise* (9 July 2019) and AT.40433 *Film merchandise* (30 January 2020) (for restricting sales of licensed merchandising products); Case AT.40528 *Melia (Holiday Pricing)* (21 February 2020) (for discriminating between hotel customers based on their place of residence in agreements with tour operators).

<sup>6</sup> Commitments: Case AT.40153 *E-book MFNs and related matters (Amazon)* (4 May 2017) (regarding MFN clauses in distribution agreements with e-book publishers in Europe); Case AT.40023 *Cross-border access to pay-tv* (26 July 2016 and 7 March 2019), 2016: Paramount, 2019: (for clauses in film licensing agreements for pay-tv in Europe between Sky UK, Disney, NBC Universal, Sony, and Warner Bros).

## **A. Issues identified with the 2010 Regulation**

The European Commission's most recent consultation noted ongoing concerns and controversies regarding verticals enforcement in online trade and acknowledged that this was the area in which respondents expressed the most concerns. The Staff Working Document identified market trends with which we are all familiar. At the heart of the changes appeared to be consumer demand for a "seamless omni-channel experience" as well as the rise of differing types of online sales channels (including price comparison sites and hybrid platforms).

In terms of substance, free-riding concerns had continued and intensified. New business practices have arisen (or old ones expanded), including monitoring rivals' prices, increasing resort to most favored nation or retail parity clauses, and increased selective distribution. The rise of dual-role platforms drew attention, as these players acted as intermediary service providers and retailers. Guidance on restrictions on the use of trademarks and brands online was noted as particularly desirable following the *Guess*<sup>7</sup> case law.

## **B. Revisions to address online distribution**

The VBER includes a number of revisions that will impact online distribution, of particular note are: (1) the new hardcore restriction of preventing effective use of the internet; (2) relaxation of the dual pricing rules; (3) relaxation of the "equivalency" principle in selective distribution; and (4) clarification on so-called MFNs or retail parity obligations.

### 1. New Hardcore Restriction: Effective Use of the Internet

As noted above, one of the more controversial aspects of the law of vertical distribution in recent years was the question of how and when suppliers could restrict use of the internet by their distributors.<sup>8</sup> The VBER tries to introduce a guiding thread with a new hardcore restriction. VBER Article 4(e), classes as hardcore: any restriction that directly or indirectly has the object of preventing distributors or their customers effectively using the internet to sell the goods or services in question. Examples are provided in the Guidelines: notably, those that have the object of preventing the use of at least one "entire online advertising channel."

### 2. Dual Pricing: Relaxation of the Rules

The VBER provides a helpful window for companies looking to charge distributors different wholesale prices for online and offline/brick-and-mortar sales – and combat free riding concerns in selective distribution systems.

Such differential pricing is permitted if it is reasonably related to the difference in cost between selling online and offline; must not have the object of restricting cross-border sales, preventing the effective use of the internet, nor should it limit the absolute amount of products that a distributor can sell online.

In this context, it is, of course, important to remember that this exemption relates to the wholesale prices charged to distributors, who must remain free to set their downstream prices to customers as they wish (whether online or on-premises).

### 3. Selective Distribution and Equivalency Between Online and Offline Criteria

In the selective distribution context, suppliers may now impose different criteria in relation to online sales compared to brick-and-mortar sales, recognizing that the two channels are fundamentally different. Although, as with the other relaxations mentioned above, restrictions still may not have the object of preventing the effective use of the internet for the distributor or its customers to sell the goods or services in question.

---

<sup>7</sup> *Supra* note 5.

<sup>8</sup> Following the European Court of Justice's rulings in *Pierre Fabre* and *Coty*, there has been controversy over whether the distinguishing factor between the two cases was the fact one included a complete restriction on online selling or the fact that one involves luxury goods and the other relates to other branded goods.

#### 4. MFNs / Retail Parity Obligations: Clarification on "Wide" v. "Narrow" Clauses

Under the 2010 Regulation, parity clauses or MFNs did not appear as hardcore or excluded restrictions. However, enforcement by the European Commission and the NCAs has, in the meantime, made their validity a hot topic.<sup>9</sup> Under the VBER, this position is revised. The key difference is between so-called "wide" and "narrow" MFNs. Wide MFNs are those which apply to all sales venues. They contrast with "narrow" MFNs, which only require a party not to undercut their counterparty on their own website (e.g., a hotel may agree not to offer cheaper rooms on its own website than on one price comparison site but can offer different prices as between different third-party sites). The so-called "wide" form of MFNs now appear as excluded restrictions (so taking that particular clause outside the scope of the block exemption – and demanding individual assessment under Article 101).

Narrow MFNs will, in principle, remain exempted where the parties remain below the thresholds (and no hardcore restrictions appear in the agreement). However, the European Commission does highlight that in certain cases such clauses may be likely candidates for withdrawal of the benefit of the block exemption.

### C. Notable Outstanding Questions Regarding Online Distribution

#### 1. What does "Restricting the Effective Use of the Internet" Mean?

As noted, the notion that suppliers cannot restrict the "effective" use of the internet by distributors or their customers is a thread that runs through the VBER (Article 4(e) and the Guidelines). The obvious question then becomes, when does a restriction on internet use become so severe that it breaches this rule. The Guidelines provide a number of examples, many of which center around the long-established principle that passive sales (where a customer decides to approach a distributor themselves) should not be restricted, these include:<sup>10</sup>

- Requiring distributors to prevent customers from outside a specific territory viewing their site or re-routing them (although "offering" links to other territories is permissible);
- Terminating transactions with credit cards from outside a specific territory;
- Requiring sales only in physical spaces;
- Prohibiting the use of brand names on distributors' websites;
- Prohibiting the distributor from using an entire online advertising channel.

The examples are instructive, but questions remain.

Of particular note is the notion of an "entire online advertising channel." Advertising channel is not clearly defined – although examples are provided ("such as price comparison services or search engine advertising"). The Guidelines indicate that prohibiting bidding on advertising words with certain trademarks or brand names, restricting the provision of price information to price comparison sites in general constitutes a hardcore restriction. However, there are ambiguities here. The Guidelines note that it should be permissible to prohibit the use of a particular price comparison site, but not the most-used price comparison site in a particular context. Naturally, this raises a number of questions. In some markets, it might be obvious which site is the most used, but one can imagine relatively absurd situations in which one site technically is the "most widely used" simply because it has a single extra user than another site (something a supplier likely cannot know).

The Guidelines indicate that the threshold there is whether the "remaining services in that advertising channel are de facto not capable of attracting customers to the buyer's [the distributor's] online store" (emphasis added).<sup>11</sup> Likewise, the Guidelines accept that it "may" be proportionate for a supplier of luxury goods to prohibit its selective / authorized distributors from using online marketplaces "as long as this does not prevent the effective use of the internet." Apparently this will be the case where an authorized distributor "remains free to operate its own online store and to advertise online in order to raise awareness of its online activities and attract potential customers."<sup>12</sup>

9 Case AT.40153 *E-book MFNs and related matters (Amazon)* (4 May 2017); Press Release, European Commission, Antitrust: Commission publishes market study on hotels' distribution practices (26 August 2022); Market study on the distribution of hotel accommodation in the EU COMP/2020/OP/002, Final Report by Valdani Vicari and Associati and LE Europe (26 August 2022), [https://competition-policy.ec.europa.eu/system/files/2022-09/kd0722783enn\\_hotel\\_accommodation\\_market\\_study.pdf](https://competition-policy.ec.europa.eu/system/files/2022-09/kd0722783enn_hotel_accommodation_market_study.pdf).

10 Guidelines, para. 206.

11 Guidelines, para. 206.

12 Guidelines, para. 150.

By contrast, the VBER indicates in the recitals that online sales restrictions should not benefit from the block exemption if "their objective is to significantly diminish the aggregate volume of online sales of the contract goods or services in the relevant market or the possibility for consumers to buy the goods or services online" (emphasis added).<sup>13</sup>

These tests are not the same – and fail to distinguish between the ability of a particular distributor to use the internet or for consumers to access the goods via the internet as a general matter. In practice, a significant degree of common sense will need to be applied when conducting self-assessments (and enforcement actions).

## 2. How Can Companies Justify Dual Pricing?

The VBER accept dual pricing as between sales to distributors for online versus offline commerce. The Guidelines indicate that this does not require the parties to carry out "complex cost calculations or share detailed cost information in order to demonstrate this."<sup>14</sup> In practice, however, this may prove more challenging than it first appears. The Guidelines themselves suggest "an ex-post balancing of accounts on the basis of actual sales" based on an "appropriate method" agreed by the parties.<sup>15</sup> In reality, of course, suppliers do not know the costs of their distributors and, particularly where they also compete to some extent with them, such knowledge raises its own competition law challenges. It will be important to consider the level of aggregation of the data (both sales and cost data), as well as frequency of reporting. Time will tell how this will be enforced. In the meantime, companies and their advisors will have to look to past precedents on information exchange in the Article 101 context to inform their approach (and likely conduct any such process via outside advisors under appropriate confidentiality obligations).

### III. ONLINE INTERMEDIATION SERVICES: TREATMENT AND OUTSTANDING QUESTIONS

The VBER and the Guidelines place particular emphasis on the role of so-called "online intermediation services" ("OIS") which "allow undertakings to offer goods or services to other undertakings or to final consumers, with a view to facilitating the initiation of direct transactions between undertakings or between undertakings and final consumers."<sup>16</sup>

#### **A. Treatment of OIS in the VBER**

Importantly, as regards OIS, the relevant market share threshold is calculated based on the relevant market for the supply of OIS themselves.<sup>17</sup>

The VBER does not apply where providers of OIS have a so-called "hybrid function," i.e., where the provider of those services "is also a competing undertaking on the relevant market for the sale of the intermediated goods or services."<sup>18</sup>

The rationale for such a provision appears clear, namely that in those cases, the European Commission considers that there is an "incentive to favor their own sales and the ability to influence the outcome of competition between undertakings that use their online intermediation services. Such vertical agreements may therefore raise concerns for competition in general on relevant markets for the sale of the intermediated goods or services."<sup>19</sup>

#### **B. Notable Questions Regarding OIS in the VBER**

As regards the likely treatment of OIS, open questions remain. Of those, most notable are perhaps (a) market definition; (b) to what extent the VBER and guidelines remain instructive for so-called "hybrid" platforms; and (c) the prospect of withdrawal of the benefit of the VBER.

---

<sup>13</sup> VBER, recital 15.

<sup>14</sup> European Commission, Explanatory note, [https://competition-policy.ec.europa.eu/system/files/2022-05/explanatory\\_note\\_VBER\\_and\\_Guidelines\\_2022.pdf](https://competition-policy.ec.europa.eu/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf).

<sup>15</sup> Guidelines, para. 209.

<sup>16</sup> VBER, Recital 10.

<sup>17</sup> Guidelines, para. 67(b).

<sup>18</sup> VBER, Recital 14.

<sup>19</sup> Guidelines, para. 105.

As regards market definition, this issue will be critical for OIS as it determines application of the market share threshold. However, as the Guidelines make clear, this will be a case-by-case assessment and will involve considering complex issues regarding substitution as between online and offline sales, OIS for different categories of goods or services, and between OIS and direct sales (e.g., from the supplier via their own website).

As regards "hybrid" platforms, these are not covered by the exemption. In assessing whether a platform has a "hybrid" function, the Guidelines indicate that not only actual but also potential competition will be taken into account. Suppliers of such services will naturally look to the VBER and Guidelines for self-assessment. The analysis is likely to be complex, taking into account both vertical and horizontal aspects of OIS' relationships with counterparties. The Guidelines re-direct to the horizontal guidance for the assessment of collusive effects, whereas the Guidelines themselves can inform the assessment of vertical effects (read: do not include hard core restrictions under VBER). It is worth bearing in mind the suggestion in the Guidelines, that, absent restrictions that would be hardcore under VBER, and absent market power, enforcement against hybrid OIS is unlikely to be a priority.<sup>20</sup>

For OIS, the specter of withdrawal of the benefit of the VBER, under Article 6, looms particularly large. The provision, although understandable from an enforcement perspective, necessarily limits the comfort which the VBER provides for any company. For OIS, this prospect is particularly daunting and means that self-assessment should be especially thoughtful. This is because the VBER and Guidelines specifically note the prospect of such withdrawal "where the relevant market for the supply of online intermediation services is highly concentrated and competition between the providers of such services is restricted by the cumulative effect of parallel networks of similar agreements restricting buyers of the online intermediation services from offering, selling or reselling goods or services to end users under more favorable conditions on their direct sales channels."<sup>21</sup> OIS may well not be aware if there are parallel networks of such agreements, and therefore self-assessment of the risk of withdrawal may be challenging.

## IV. CONCLUSIONS

The VBER provides a welcome update to the previous rules in the area, increasing, as the European Commission notes, clarity for companies and advisors, particularly in the critical field of e-commerce.

However, as always, questions remain, which will need to be resolved in practice and the prospect of withdrawal of the benefit of the exemption (under Article 6) remains as questionable as ever from a legal certainty perspective.

Time will tell how enforcement proceeds, and companies will be well-advised to take a holistic look at their current vertical distribution arrangements and closely follow enforcement practice in the coming months.

---

<sup>20</sup> Guidelines, para. 108.

<sup>21</sup> Guidelines, para. 259.



## 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.

