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Vertical Agreements

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

This edition of the Chronicle looks at recent developments in the antitrust analysis of vertical agreements in jurisdictions around the world. It is accepted in most jurisdictions that vertical agreements (i.e., agreements between parties that occupy different places in the supply chain) are less likely to raise antitrust concerns than horizontal agreements. Nonetheless, they still occasionally raise concerns, and tend to be analyzed under specific rules and regulations adopted under the underlying competition rules in each jurisdiction. Recent developments in online platform markets have rendered even more complex the application of well-honed principles concerning vertical agreements, which tend to raise novel concerns.

Alison Jones & **Karen Slaney** open by looking at the implications of new vertical systems in the EU and the UK. In 2022, both the EU and the UK reviewed and overhauled their regimes governing vertical agreements. The reform processes were provoked by the expiry in May 2022 of Regulation 330/2010, which block exempted many vertical agreements from Article 101(1) TFEU in the EU and, through the retention of the EU block exemption as part of UK law following Brexit, from the Chapter I prohibition set out in the Competition Act 1998 in the UK. The paper also highlights the post-2022 divergences between the EU and UK rules, and the implications they raise for those distributing their goods or services in both the EU and the UK.

Charlotte Colin-Dubuisson & **Sima Ostrovsky** and **Kassiani Christodoulou** & **Marion Carbo** take up the baton by further analyzing the new EU regime. Ensuring that hardcore restrictions are defined with sufficient clarity is key to the effectiveness of the rules. Following the adoption of the new VBER in May 2022, this article focuses on the changes made to the provisions concerning hardcore restrictions and the additional guidance provided in the accompanying Vertical Guidelines.

Turning to South America, and Brazil specifically, **João Felipe Achcar de Azambuja** underlines how antitrust enforcement in digital markets requires a cautious approach, yet their fast-changing nature also calls for quick responses. In certain circumstances, interim measures may serve as tools to enable some level of preliminary intervention before it is too late, but could be especially challenging when imposed on digital platforms without in-depth market knowledge. This paper discusses the role of interim measures applied to digital platform exclusivity cases in the context of the recent Brazilian experience with the *iFood* and *Gympass* probes.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

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

By Alison Jones & Karen Slaney

In 2022 both the EU and the UK overhauled their regimes governing vertical agreements following the expiry of Regulation 330/2010, which had block exempted many vertical agreements from both Article 101(1) TFEU in the EU and from the Chapter I prohibition set out in the Competition Act 1998 in the UK. This paper examines the new EU and UK vertical systems, emphasizing the core changes they have introduced, and considers whether they meet the objectives of the respective reform and review processes and whether, despite significant improvements, some opportunities for positive development of the regimes may have been missed. It notes that although post-Brexit there was scope for the UK to depart from the approach adopted in the EU, the path taken has essentially been one of consistency, albeit with divergences which reflect the different enforcement experiences of the EU and UK competition authorities.

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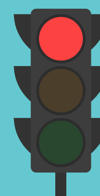

HARDCORE RESTRICTIONS IN REGULATION 2022/720 ON VERTICAL RESTRICTIONS

By Kassiani Christodoulou & Marion Carbo

The Vertical Block Exemption Regulation is a valuable tool, helping businesses to self-assess the compliance of their sale and distribution agreements with EU competition rules and facilitating the work of European enforcement authorities, as it exempts vertical agreements falling within its scope from Article 101(1) of the Treaty. Ensuring that the scope of the VBER is appropriately defined is therefore crucial for reducing businesses' compliance costs and granting them flexibility in the design of their distribution systems, while ensuring the effective enforcement of the competition rules. Ensuring that hardcore restrictions are defined with sufficient clarity is key to the effectiveness of the rules. Following the adoption of the new VBER in May 2022, this article focuses on the changes made to the provisions concerning hardcore restrictions and the additional guidance provided in the accompanying Vertical Guidelines.

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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.

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

By Charlotte Colin-Dubuisson & Sima Ostrovsky

With the revised European vertical rules in effect since June 1, 2022, businesses are grappling with the meaning and implications of certain new additions to the vertical regime as they have a one-year transitionary period to bring their distribution arrangements in line with the new order. While the aim of the amendments has been to simplify and clarify the rules, they have not managed to escape complexity and ambiguity despite the extensive consultation with stakeholders. Businesses are no doubt analyzing with interest the additional flexibility presented by the amendments relating to shared exclusivity and dual pricing while trying to make sense of the new guidance on information exchange in the context of dual distribution and the new hardcore restriction involving minimum advertised prices ("MAPs"). Intermediaries (physical or online) also have much food for thought with the new rules on online platforms and agency. In this article, we zoom in on a few developments, including information exchange, MAPs, shared exclusivity and dual pricing, to assess the flexibility and the uncertainty that they present.

SUMMARIES

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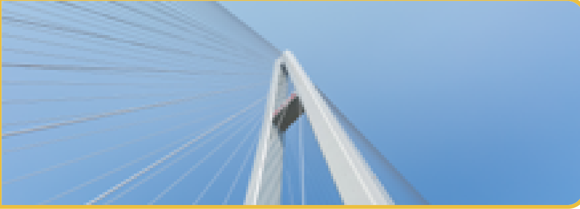

BUILDING A COHERENT LEGAL FRAMEWORK FOR VERTICAL PRICE RESTRICTIONS IN CHINA

By Sandra Marco Colino

On August 1, 2022, a reform of China's Anti-Monopoly Law ("AML") came into effect. The changes affect, inter alia, the regulatory framework for vertical price fixing and minimum resale price maintenance ("RPM"). The reform largely follows the Supreme People's Court in *Yutai*, attempting to reconcile the positions of the antitrust agencies and the judiciary. This article explores the application of the AML to vertical price fixing and minimum RPM over the years, and the implications of the adjustments made to China's basic competition legislation. The article covers the original drafting of the AML, the judicial and administrative positions, the landmark *Yutai* judgment, the AML reform and recent administrative decisions. In doing so, the article attempts to shed light on the road ahead for the legality of vertical price restrictions in China.

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

By João Felipe Achcar de Azambuja

Antitrust enforcement in digital markets requires a cautious approach, yet their fast-changing nature also calls for quick responses. In certain circumstances, interim measures may serve as tools to enable some level of preliminary intervention before it is too late, but could be especially challenging when imposed on digital platforms without in-depth knowledge on the investigated conduct or even on the market itself. This paper discusses the role of interim measures applied to digital platform exclusivity cases in the context of the Brazilian recent experience with the iFood and Gympass probes, from which one can draw important lessons to similar investigations in the future. To avoid the risk of overenforcement in the imposition of interim measures, we argue that a competition authority should be able to monitor their effects and amend or adjust its decisions overtime to ensure that they are specifically tailored to inhibit the occurrence or aggravation of competitive harm that may not be restored – otherwise antitrust enforcement may inhibit innovation and disruption in digital platforms, to the expense of consumers.

WHAT'S NEXT?

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CPI ANTITRUST CHRONICLES November 2022

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Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

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

BY ALISON JONES & KAREN SLANEY[1]

1 Professor of Law, King's College London, and Solicitor, Freshfields Bruckhaus Deringer. Senior Knowledge Lawyer, Freshfields Bruckhaus Deringer.

I. INTRODUCTION

In 2022 both the EU and the UK overhauled their regimes governing vertical agreements. The reform processes were provoked by the expiry on May 31, 2022 of Regulation 330/2010,[2] which block exempted many vertical agreements from Article 101(1) TFEU in the EU and, through the retention of the EU block exemption (the "Retained VBER")[3] as part of UK law following Brexit, from the Chapter I prohibition set out in the Competition Act 1998 ("CA98") in the UK.

This paper examines the new EU and UK vertical systems, emphasizing the core changes they have introduced, and considering whether they meet the objectives of the respective reform and review processes. It also highlights the post-2022 divergences between the EU and UK rules, and the implications they raise for those distributing their goods or services in both the EU and the UK.

It starts in Section 2 by examining the position in the EU, considering both the background to the reforms and the principal changes introduced. It notes the particular influence of the single market project on the development of EU law and how it has been adapted to the online context. Section 3 goes on to examine the position in the UK, tracking the evolution of the UK's approach to vertical agreements. It notes that although post-Brexit there was scope for the UK to depart from the approach adopted in the EU, the path taken has essentially been one of consistency, albeit with divergences which reflect the different enforcement experiences of the EU and UK competition authorities.

Section 4 concludes that, despite significant improvements, some opportunities for positive development of the regimes may have been missed and unnecessary complexities created.

II. THE EU VERTICALS REGIME

A. Background, Modernization and the Post-1999 Regimes

Prior to 1999, a core critique of the European Commission ("Commission") was its interventionist approach under Article 101 towards agreements, especially vertical agreements. Broadly, it was criticized for interpreting the concept of a restriction of competition in Article 101(1) too broadly – to encompass, reflecting the single market objective, many restraints on cross-border trade and, in line with ordoliberal thinking,[4] many restraints on firms' economic freedom – so generating both practical and conceptual difficulties. Practically, by creating a central role for Article 101(3) in the Article 101 framework, and the Commission in its enforcement (as national courts and NCAs could not at that time apply Article 101(3)), a severe bottle-neck problem was formed which plagued the enforcement system constructed by Regulation 17;[5] numerous vertical agreements infringed Article 101(1), but the Commission was not able to formally exempt more than a handful of agreements each year. As Carles Esteva Mosso explained, under this "previous, more form-based approach to the interpretation of "restriction of competition," a large number of agreements were considered to be caught by the test of Article 101(1) and required exemption under Article 101(3) . . ."[6]

Conceptually, it was complained that the weak analysis conducted under Article 101(1), combined with the rigidity of the early vertical block exemption regulations ("BERs")[7] adopted to help resolve the bottle neck problem, eliminated "what should be the heart of the matter and antitrust (i.e. economics/law) substantive analysis of a particular agreement or practice, i.e. its competitive harms and benefits."[8] The net result was a perceived system failure – the Commission intensely regulated the content of vertical agreements and the scheme wrongly condemned, and deterred, many distribution agreements designed to promote competition within the EU.

2 [2010] OJ L102/1. See also the accompanying Guidelines on Vertical Restraints, [2010] OJ C130/10.

3 The Retained VBER is one of the "retained exemptions" created by a combination of the operation of the European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020.

4 See e.g. W. Möschel, "The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy" (2001) 157 *Journal of Institutional and Theoretical Economics* 4 and P. Behrens, "The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU" in P. Nihoul & I. Takahashi, *Abuse Regulation in Competition Law*, Proceedings of the 10th ASCOLA Conference (2015).

5 Reg 17 [1959-1962] OJ Spec Ed 87.

6 C. Esteva Mosso, Deputy Director-General in DG Competition at the Commission, "The Contribution of Merger Control to the Definition of Harm to Competition," Brussels, GCLC Conference, February 2016, 2.

7 See e.g. Reg 1983/83 [1983] OJ L173/1 and Reg 1984/83 [1983] OJ L173/7 (successors of Reg 67/67 [1967] OJ Spec. Ed. 10) and Reg 4087/88 [1988] OJ L359/46.

8 BE. Hawk, "System Failure: Vertical Restraints and EC Competition Law" (1995) 32 *CMLRev* 973, 2.5.

These types of complaints led the Commission to recognize that change was required, and to the triggering of its modernization program, which commenced in January 1997, with its adoption of a Green Paper on Vertical Restraints. The Green Paper's conclusions, and the debate it generated, led to the adoption in 1999 of a "new-style" regime, centered around a more economic, flexible, overarching Verticals Block Exemption Regulation ("VBER")[9] and the publication of accompanying Guidelines on the appraisal of vertical agreements,[10] setting out a more coherent approach to analysis under Article 101 based on the economic objective underpinning it. The 1999 VBER provided a safe harbor for many vertical agreements, broadly where stipulated market share thresholds were satisfied, the agreement was not between competitors (with an exception for dual distribution, where the parties competed only at the downstream level), and where the agreement did not contain specified hardcore restraints (especially resale price maintenance ("RPM") provisions or, with specified exceptions, restraints on the territory into which or the customers to whom the buyer can sell the contract goods). These hardcore restraints largely mirrored the types of restraints that had been persistently found to be restrictive of competition by object in the case-law.[11] The Commission's view, consequently, was that these hardcore restraints were presumptively illegal – they were liable to infringe Article 101(1) and unlikely to satisfy the conditions of Article 101(3), for which reason the VBER did not apply. The VBER also did not exempt certain excluded restraints, which had to be analyzed individually to determine their compatibility with Article 101.[12] The Guidelines provided direction not only on the application of the VBER, but also on the application of Article 101 to vertical agreements or restraints falling outside of it.

These changes marked a major shift in Commission policy, which recognized that tested against a consumer welfare benchmark, many vertical agreements are unproblematic. The overhaul did not, however, lead to a softening of approach towards vertical agreements which impose absolute territorial restraints on distributors, so prohibiting opportunities for parallel or cross-border trade, perpetuating price differences between Member States, and violating the higher EU principle of market integration. Rather, ever since *Consten and Grundig*[13] in 1966, clauses in a distribution agreement which prohibit cross-border trade have generally been found to infringe Article 101 and have been categorized as hardcore restraints in the VBER. Further, over time these principles have been adapted to the e-commerce context and extended to bans, and *de facto* bans, on internet selling (*Pierre Fabre*).[14] EU competition authorities have made it clear that they consider these practices to constitute serious infractions which, if uncovered, will attract significant fines, see for example *VW*,[15] *Nintendo*,[16] *Guess* (geo-blocking),[17] *Video Games*,[18] *Ping* (UK),[19] *Stihl*, (France),[20] *Bikeurope* (France).[21]

The 1999 regime has now been reviewed and updated twice, in 2010[22] and in 2022, following comprehensive and lengthy evaluation processes and impact assessments.[23] Despite the introduction of important modifications following each evaluation, to deal with legal develop-

9 [1999] OJ L336/21.

10 [2000] OJ C291/1.

11 See e.g. Cases 56 and 58/64, *Consten and Grundig* EU:C:1966:41 and Case 243/83, *Binon* EU:C:1985:284,

12 Restraints which do not preclude the benefit of the VBER from applying but which are not covered by it. The agreement may therefore still benefit from the VBER if the excluded restraints are, following an individual assessment, either found not to infringe Art 101 or, to infringe Art 101 but to be severable from the remaining provisions of the agreement.

13 *Consten and Grundig*, n 10. See also e.g. Case C-501/06 P, *GlaxoSmithKline Services Unlimited v. Commission* EU:C:2009:610, para. 61.

14 Case C-439/09, EU:C:2011:649.

15 COMP/35.733, *Volkswagen* [1998] OJ L124/60 (fines reduced on appeal, Case T-62/98, *Volkswagen AG v. Commission* EU:T:2000:180, *aff'd* Case C-338/00 P, *Volkswagen AG v. Commission* EU:C:2003:473).

16 COMP/35.706 and 36.321 [2003] OJ L255/33, *aff'd* (but fines reduced) Case T-12/03, *Itochu v. Commission* EU:T:2009:130 and Case T-13/03, *Nintendo and Nintendo of Europe v. Commission* EU:T:2009:131, Case C-260/09 P, *Activision Blizzard Germany GmbH v. Commission* EU:C:2011:62).

17 AT/40.428, *Guess* 17 December 2018.

18 See e.g. AT/40.413 20 Jan 2021. The investigation in this case complements Reg 2018/302 [2018] OJ L/601/1 on unjustified geo-blocking which applies throughout the EU.

19 Case 50230, *Ping* 24 August 2017, aff'd Case 1279/1/12/17 *Ping Europe Ltd v. CMA* [2018] CAT and [2020] EWCA Civ 13.

20 Decision 18-D-23, 28 October 2018,

21 Decision 19-D-14, 1 July 2019.

22 See n 2 and text.

23 The consultation strategy document for the evaluation of the 2010 VBER was published in 2018, http://ec.europa.eu/competition/consultations/2018_vber/index_en.html, and followed by an evaluation phase with public consultation (see e.g. Staff Working Document and its annexes summarizing the results of the evaluation of the VBER, published on October 7, 2020), an impact assessment phase with further public consultation and the publication of a draft revised block exemption and Guidelines for comment.

ments and market changes, especially the growth of e-commerce and the increased power of online platforms, the general scheme of the 1999 system[24] has been preserved. In the review leading up to the 2022 VBER, however, the Commission considered whether or not the VBER and Guidelines required fine-tuning:

- to ensure that it did not create either false positives (e.g. by exempting new practices with potentially anticompetitive effect such as parity clauses, information exchange in dual distribution scenarios, or certain practices of online platforms) or false negatives (e.g. by taking an overly restrictive view of certain online sale restrictions);
- to clarify the rules in certain areas (especially how they apply to e-commerce);
- to simplify the rules; and/or
- to rebalance the regime away from online retail, towards brick and mortar (and brands).

The 2022 review also provided the Commission with an opportunity to reflect more broadly on the nature of the system which, because of its heavy reliance on a broad safe harbor and presumptions of illegality, placed a premium on compliance with the VBER and which had not developed to provide guidance on how the rules apply to newer forms of distribution arrangements or vertical restraints, especially in the online setting.

B. The 2022 Reforms

It has been seen that the 2022 system preserves the basic structure of its predecessor. At its center therefore are Vertical Guidelines[25] and the VBER, Regulation 2022/720,[26] whose application depends on the parties satisfying the VBER's 30 percent market share thresholds (Article 3), on the agreement not being between competitors (with an exception for dual distribution, Article 2(4)-(6)) and on the agreement not containing any hardcore restraints (Article 4). Some important changes and clarifications have nonetheless been introduced.

For example, the VBER and Guidelines provides greater detail on how the VBER applies to vertical agreements in the online platform economy, including those entered into by "providers of online intermediation services" ("OIS providers"),[27] which are now much more prevalent than at the time of the 2010 VBER. The Guidelines recognize that although platforms "enable new ways of doing business" they are not always easy "to [categorize] using the concepts applied to vertical agreements in the brick and mortar environment."[28] As the Commission's view is that such arrangements generally fall within the scope of Article 101(1) (agreements involving online platforms will generally fail to fulfil the requirements for constituting an "agent" for competition law purposes[29]), the VBER and Guidelines clarify that where the vertical agreement relates to the provision of OIS, the OIS provider is to be categorized as a supplier of those services (and an undertaking that offers or sells goods or services on its platform is categorized as a buyer). This has important implications for the application of the VBER (market share thresholds, and hardcore and excluded restraints).

The new regime also provides clarity on how the dual distribution exception, expanded to include importers and wholesalers, to the "not competitors" rule applies. Although during the review the Commission expressed concern about the increased (since 2010) competitive risks raised by information exchanges in dual distribution scenarios, in the end it accepted that such exchanges benefit from the VBER unless it "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."[30] However, the 2022 VBER also introduced Article 2(6), which removes the benefit of the VBER entirely for agreements relating to the provision of online intermediation services where the OIS provider competes on the market for the sale of the intermediated goods or services.[31] Consequently, agreements concluded by hybrid online platforms frequently fall outside of the scope of the VBER and have to be appraised individually for their compatibility with Article 101.

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24 Relying on a presumption of illegality for object and hardcore restraints, a wide-ranging safe harbor for agreements satisfying the conditions of the VBER, and Guidelines setting out a general framework of analysis

25 [2022] OJ C248/1.

26 [2022] OJ L134/4.

27 Defined in VBER, Art 1(1)(e), broadly where the provider facilitates the initiating of direct transactions between two other parties.

28 Guidelines, para 62.

29 Guidelines, para 46.

30 VBER, Art 2(5). See also Expert report for the Commission on "Information exchange in dual distribution" prepared by S. Pautke & JM. Schultze.

31 See further Guidelines, paras. 104-109.

The VBER does not alter dramatically the type of hardcore restraints (set out in Article 4) prohibited by the VBER, which although expressed in a different form remain principally the same. However:

- The Guidelines now make it clear that RPM includes imposing minimum advertised prices (MAPs),[32] but that the imposition of a resale price in a fulfilment contract is not RPM;[33]
- The provisions prohibiting territorial and customer restraints have been expanded to clarify that they prohibit restrictions on: (i) the territory into which, or the customers to whom, the buyer party to the agreement or its customers may sell the contract goods or services subject to certain exceptions which depend on the type of distribution agreement adopted – whether exclusive distribution, selective distribution or other, "free," distribution; (ii) cross-supplies between members of a selective distribution system, and (iii) the effective use of the internet by the buyer or its customers to sell the contract goods or services (Article 4(e)). The latter provision is designed to clarify, taking account of the rulings of the Court of Justice in Pierre Fabre[34] and Coty,[35] when suppliers are permitted under the VBER to control, prevent or limit sales by buyers over the internet. The 2022 regime provides that although indirect means to prevent effective use of the internet are prohibited (including e.g. requiring buyers to block or reroute customers from different territories, to terminate transactions to customers with foreign credit card details, or to sell only from a physical space or in the physical presence of specialized personnel; prohibiting the buyer from user the supplier's trademarks or brand names online, from establishing or operating one or more online stores, or from using an entire online advertising channel, such as search engines or price comparison services),[36] restrictions relating to the use of particular online sales channels, such as online marketplaces, or the imposition of quality standards for online sales, can generally benefit from the VBER.[37] In contrast to the position adopted in the 2010 Guidelines, it is also accepted that dual pricing provisions affecting different offline and online sales channels (e.g. requiring a distributor to pay a higher price for products intended to be resold online than for ones sold offline in a bricks and mortar store) can benefit from the exemption where designed not to make selling online unprofitable or financially unsustainable, but to incentivize or reward an appropriate level of investments in online or offline sales channels.[38]
- The new VBER expands the concept of an exclusive distribution agreement to a distribution system where the supplier allocates a territory or group of customers either to itself, a single buyer, or a group of up to five buyers (so accepting shared exclusivity). It also provides that some of the exceptions to the prohibition on the supplier restricting the territory into which, or the customers to whom, a buyer can sell the products (permitted resale restrictions), can be imposed on direct customers of the buyer as well as the buyer. Further, greater guidance is provided on the important distinction drawn between restraints on active and passive selling (see especially Articles 1(l)(m) and Guidelines, paragraphs 211-215)[39] (the VBER allows a restriction on active (but not passive) sales by a buyer into an exclusive territory or to an exclusive consumer group exclusively allocated either to itself or to a maximum of five other distributors).

Finally, the VBER makes two important changes to the list of excluded restraints.

- Although the VBER remains inapplicable to non-compete obligations which are indefinite or in excess of five years,[40] it does now apply to non-compete obligations that are tacitly renewable, provided that the buyer can effectively renegotiate or terminate the agreement (the buyer is effectively allowed to switch at the end of a five-year period).[41]
- Across-platform retail parity obligations (wide retail parity clauses) imposed by OIS providers are now excluded from the VBER, that is direct or indirect obligations which cause buyers of such services not to offer, sell or resell goods or services to end users under more favorable

32 Guidelines, para 187.

33 Guidelines, para 193.

34 Case C-439/09, EU:C:2011:649.

35 Case C-230/16, EU:C:2017:941.

36 Guidelines, para 206.

37 Guidelines, para 208. See also Expert report for the Commission on "Cases dealing with online sales, and online advertising, restrictions at EU and national level" prepared by A. Jones.

38 Guidelines, para 209.

39 See also Expert report for the Commission on "Active sales restrictions in different distribution models and combinations of distribution models" prepared by F. Wijckmans & S. Jaques.

40 Under the 2010 VBER the exclusion applied if the arrangement was tacitly renewable.

41 Guidelines, para 247.

conditions via competing online intermediation services.[42] All other types of parity obligation, however, including narrow retail parity obligations relating to the direct sales channels of buyers of online intermediation services, obligations relating to the conditions under which goods or services are offered to undertakings that are not end users, and obligations relating to the conditions under which manufacturers, wholesalers, or retailers purchase goods or services as inputs (most favored customer obligations),[43] can benefit from the VBER.

III. THE UK VERTICALS REGIME

A. Background

The UK's attitude towards vertical agreements has also evolved over time – but in a different way to that in the EU. Initially, the UK chose not to embrace the more interventionist approach adopted by the Commission and assumed a more laissez-faire one, excluding most vertical agreements, apart from those incorporating RPM, from the scope of the CA98.[44] Concern mounted however, both about the (albeit deliberate) lack of consistency with EU law, and the tension it created with the principle of supremacy of EU law,[45] and the fact that the approach might be too permissive allowing some vertical agreements creating collusion or exclusion risks to go unchecked. Following consultation and an impact assessment,[46] the UK consequently decided to repeal the Verticals Exclusion Order with effect from April 2005. This change, together with the CA98 procedure for "parallel exemption" from UK competition law for agreements satisfying the conditions of an EU block exemption[47] and the adoption of EU Council Regulation 1/2003,[48] allowed the UK's competition authority, then the Office of Fair Trading ("OFT") (now the Competition and Markets Authority ("CMA")), to apply both Articles 101 and the Chapter I prohibition to vertical agreements. It also meant that UK competition law became aligned with the EU's "modernized" regime (see the Guidance on Vertical agreements).[49]

B. The Retained VBER and Proposed Reforms

Fast-forward to December 2020. Following the UK's exit from the EU and the end of the "transition period" during which EU law continued to apply in the UK (including the parallel exemption for agreements falling under the EU block exemption), it has been seen that the 2010 VBER was "retained" in UK law. Agreements concluded post January 1, 2021, thus continued to be exempt from the Chapter I prohibition, provided they satisfied the criteria of the Retained VBER. The UK Secretary of State had to decide, however, acting in consultation with the CMA, what to do on the expiry of the VBER. Hence throughout the latter half of 2021, the CMA held stakeholder roundtables and consulted widely on avenues for reform.

This represented the first occasion for the UK to "make its mark" post-Brexit in terms of setting forth competition legislation specific to the UK, free from encumbrances inherent in the EU regime, including hostility towards territorial restraints provoked principally by single market rather than consumer welfare concerns. It thus heralded an opportunity to reshape UK competition law to the benefit of UK consumers and businesses. Indeed, whilst most respondents to the CMA's consultation acknowledged the desirability of a degree of alignment and consistency between EU and UK law, given that many UK businesses operate cross-border, the CMA was encouraged not to adopt the new EU regime "wholesale," in particular, where the new EU legislation and Guidelines did not accord with the needs of the broader UK economy.

C. The Vertical Agreements Block Exemption Order and Guidance

In the end, however, in making its recommendation to the Secretary of State, the CMA concluded that "large-scale and fundamental changes to the current exemption for vertical agreements are not appropriate."[50] Drawing on feedback received during the consultation and on relevant

42 VBER, Art 5(1)(d).

43 Guidelines, para. 254.

44 See CA98 s.50(1) and the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310, Arts 2-4. greements Under the UK Competition Act 1998: Past, Present, and the Post-Brexit Future", *Competition Policy International* December 10 2020.

45 See e.g. Case 14/68, *Walt Wilhelm v. Bundeskartellamt* EU:C:1969:4 and Case C-360/92 P, *Publishers' Association* EU:C:1995:6.

46 See e.g. its 2001 White Paper, A World Class Competition Regime Cm 5233, July 2001 and DTI Modernisation – A consultation on the Government's proposals for exclusions and exemption from the Competition Act 1998 in light of Regulation 1/2003, April 2003.

47 CA98 s10 allowed block exemptions to apply to agreements affecting trade within the UK even if they do not affect trade between Member States.

48 [2003] OJ L1/1.

49 See OFT 419, December 2004 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf and Jones, n 44.

50 Consultation Document, "The retained Vertical Agreements Block Exemption Regulation," 17 June 2021, para. 2.11.

evidence from the EU evaluation (to which the CMA had contributed), the CMA proposed replacement of the Retained VBER with a UK Vertical Agreements Block Exemption Order ("VABEO") and accompanying Guidance ("VABEO Guidance") – "tailored to the needs of businesses operating in the UK and UK consumers."[51]

The CMA determined that a block exemption was a relevant and useful tool for businesses providing a "safe harbor" for vertical agreements likely to satisfy the requirements for exemption under section 9 of the CA98, through promoting efficiencies, promoting non-price competition, and/or promoting investment and innovation.[52] Much like the Commission, however, the CMA recognized that revisions were necessary to bring the rules up to date and to reflect developments, most notably the proliferation of e-commerce and post-2010 decisional practice.

1. Broad EU and UK Alignment

Those familiar with the Retained VBER will recognize the analytical framework of the new VABEO,[53] which like the VBER exempts qualifying agreements insofar as they do not contain so-called "hardcore restrictions," or "excluded restrictions" that infringe Chapter I and cannot be severed from the rest of the vertical arrangement. The good news for those seeking to comply with both the EU and UK rules is that the VABEO is largely consistent with its European counterpart, at least in terms of fundamental principles. For example, the 30 percent market share threshold below which market power is not presumed has been maintained (Article 6), as has the dual distribution exception, which in line with the VBER has also been expanded to include importers and wholesalers (Article 3(5)). The list of hardcore restrictions (in Article 8), mirroring those set out in the VBER, focus on RPM and territorial and customer restraints, and incorporates a new restriction of preventing the effective use of the internet. Moreover, the VABEO Guidance[54] has been expanded and amended to provide further clarification and detail on the application of the VABEO to vertical agreements in the online platform economy, similarly defining providers of OIS as suppliers for the purposes of the VABEO, and also setting out the view that OIS providers are generally incapable of fulfilling the conditions of agency. Like the EU Guidelines, the VABEO Guidance also softens the provisions in relation to dual pricing.

2. Points of Divergence

Despite convergence in many material respects, some points of divergence have been introduced. For example, unlike the VBER, the VABEO does not exclude OIS providers from the benefit of the dual distribution exception. According to the CMA, there was insufficient evidence for treating dual distribution involving hybrid platforms differently from other dual distribution arrangements. Given the fast-moving nature of digital markets, however, this matter will be monitored until the next review of the VABEO.[55]

As regards the new concept of "shared exclusivity," the VABEO neither limits nor caps the number of exclusive distributors that can be appointed to a maximum of five, but allows instead a "limited number" of buyers (Article 8(3)). Additionally, the VABEO is more permissive and flexible as it allows the combination of exclusive and selective distribution within the same territory, provided they are established at different levels of the distribution chain.[56] The VBER in contrast only allows combinations of exclusive and selective distribution to be pursued in distinct territories.[57]

Conversely, the UK VABEO treats parity clauses more strictly than the VBER,[58] including wide retail parity clauses in its list of hardcore restrictions (Article 8(2)(f)). In accounting for the difference in approach, the CMA cites its considerable experience of scrutinizing such obligations, which suggests that wide retail parity obligations soften competition between horizontal competitors and reduce the incentives of intermediaries (such as online platforms) to compete on price, to innovate, or to enter markets and expand.[59] Likewise, in treating such restrictions as hardcore,

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51 *Ibid.* para. 2.1.

52 *Ibid.* para 2.3.

53 The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, SI 2022/516.

54 Vertical Agreements Block Exemption Order, CMA Guidance, 12 July 2022.

55 UK Competition law: Vertical Agreements Block Exemption Regulation, CMA's recommendation, 3 October 2021, para. 4.19 (CMA's Recommendation).

56 See Para. 8.81 of the VABEO Guidance.

57 See Para. 236 of the Vertical Guidelines.

58 See n 42 and text.

59 Para 5.90 of the CMA's Recommendation.

as opposed to excluded, the CMA stated that it had not seen compelling evidence of possible efficiency justifications for wide retail parity obligations (above and beyond the efficiencies that can be brought about by the use of narrow retail parity obligations).[60]

With regards to excluded restrictions, the UK has not followed the EU's more permissive approach to tacitly renewable non-competes. Rather, preserving the status quo it has maintained such provisions as excluded restrictions (Article 10). Again, the CMA considers that there is insufficient evidence to justify a change.[61]

The VABEO also strengthens CMA powers to gather information and to cancel the block exemption. Article 12 of the VABEO imposes an obligation on parties to provide the CMA with information in connection with those vertical agreements to which they are a party, if requested to do so, within 10 working days. Failure to do so without reasonable excuse may result in cancellation, i.e. withdrawal, of the block exemption. The VBER contains no equivalent information gathering power and the Commission may only withdraw the benefit of the VBER to a specific agreement where it concludes that it infringes Article 101.[62]

While not a substantive divergence, it is worth noting that the VABEO is set to expire on 1 June 2028, only 6 years after its entry into force. Its European counterpart, in contrast, only expires in 2034. This was a deliberate policy move by the UK to allow the CMA to conduct a further review in the short-term and to take into account ongoing market developments, including the growth in online sales, the UK's withdrawal from the EU and the impact of the COVID-19 pandemic.[63]

3. Jurisdiction

Finally, a recurring issue which arose during the UK consultation process, was how the CMA intended to approach jurisdiction under the new regime and, for example, whether it would be likely to prioritize enforcement against agreements (whether or not concluded outside of the UK), preventing sales into,[64] or outside of, the UK.

In the EU, Article 101's jurisdictional requirement – the effect on trade concept – has been interpreted broadly to catch agreements where it is possible to foresee that the agreement may have an influence, direct or indirect, actual or potential on the pattern of trade between EU Member States.[65] Consequently, both EU agreements and agreements covering third countries concerning imports or exports are capable of affecting trade between EU Member States.[66] For example, an agreement appointing a distributor outside of the EU (e.g. in the UK) and prohibiting that distributor from making sales outside of its contractual territory may affect trade in the EU if, in the absence of the agreement, resale to the EU would be both possible and likely[67] (such agreements will however only infringe Article 101 if found to appreciably restrict competition (by object or effect) and not to satisfy the conditions of Article 101(3)).[68] Only if importation is not a realistic commercial prospect, for example because of the nature of the product or because any price differential would be eroded by transport costs or customs duties, is the agreement likely to fall outside the jurisdictional reach of Article 101. Agreements between undertakings located in third countries may therefore affect trade and be caught by Article 101 if the agreement is operated through the medium of a subsidiary within the EU,[69] is implemented within the EU[70] or has immediate and substantial effects within the EU.[71]

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60 *Ibid*. para. 5.99.

61 *Ibid*. para. 6.18.

62 VBER, Art 6 and Reg 1/2003, Art 29(1)(2).

63 Department for Business, Energy and Industrial Strategy, Draft Vertical Agreements Block Exemption Order, Government Response to Consultation, para. 1.37.

64 See e.g. the approach in Switzerland where EEA distribution agreements preventing imports into Switzerland have been condemned under Swiss law, see D. Mamane & K. Hummel, "Extraterritorial Reach of Swiss Competition Law: The BMW Case and Its Consequences for Worldwide Distribution Agreements" (2016) 7(5) *JECLAP* 326.

65 Case 56/65, *STM* EU:C:1966:38.

66 Guidelines on the effect on trade concept contained in Articles [101] and [102] of the Treaty, para 100.

67 Case C-306/96, *Javico* EU:C:1998:41, para. 27 and Guidelines on the effect on trade concept, *ibid*, para 109.

68 Case C-306/96, *Javico* EU:C:1998:41.

69 Case 48/69, *Dyestuffs* EU:C:1972:70.

70 Cases 89/85 etc., *Woodpulp* EU:C:1988:477.

71 Case C-413/14 P, *Intel* EU:C:2017:632, paras 41-46.

An important question therefore is whether UK law is to be interpreted in a similar way. The VABEO Guidance sheds some light on this matter, stating that an agreement containing hardcore territorial or customer restraints only falls within the scope of Chapter I if it may affect trade within the UK and is implemented, or intended to be implemented, in the UK. Further, insofar as the Chapter I prohibition is engaged, where a vertical agreement only concerns restrictions relating to exports outside the UK or imports/reimports from outside the UK, the CMA is unlikely to regard it as having the object of restricting competition within the UK. The CMA would instead assess whether such a vertical agreement has the effect of restricting competition within the UK, taking into account the nature of the products or services, as well as the real operating conditions and the structure of the market concerned.[72]

4. COMMENT AND CONCLUSIONS

The new vertical regimes in the EU and the UK provide welcome clarity on a range of issues which were uncertain under the previous regime, including, whether, and if so when, platforms, dual distribution, limitations (as opposed to absolute prohibitions) on online selling, and parity clauses can benefit from the block exemption and how active selling efforts are to be distinguished from passive ones in the e-commerce context.

Some commentators may, nonetheless, be concerned by gaps, inconsistencies, and missed opportunities.

The regime remains heavily reliant on legal rules – a safe harbor for vertical agreements meeting the conditions of the VBER or VABEO and a presumption of illegality for agreements incorporating hardcore restraints. These rules cannot provide for every eventuality or scenario. It seems likely therefore that, as with the 1999 and 2010 regimes, questions and uncertainties will arise as to how unforeseen forms of distribution arrangements or restraints are to be assessed or treated under the new system. As the Guidelines and modern jurisprudence have done little to develop a coherent and modernized antitrust framework for individual assessment of vertical agreements, the answer to these questions may not be easy to find.

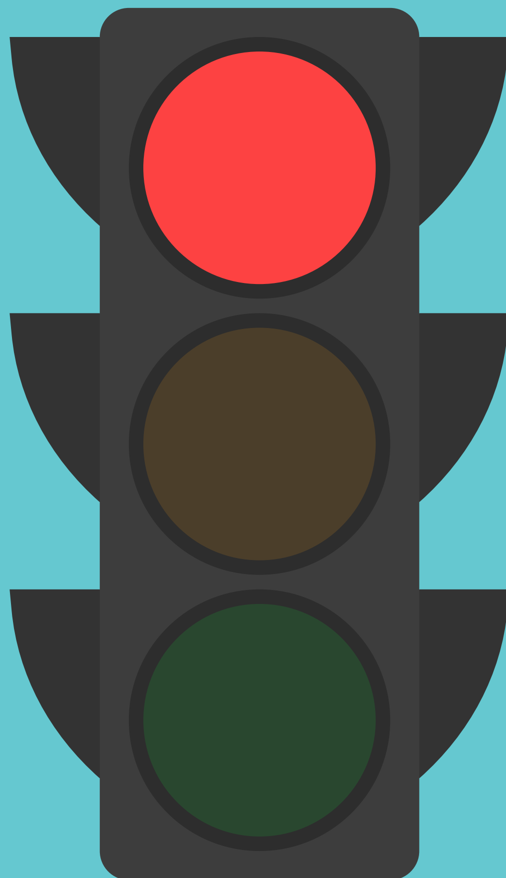
In addition, a regime which relies heavily on rules will inevitably create error risks. Although the VBER and VBAEO provide for withdrawal of the block exemptions for agreements in certain circumstances, the 2022 systems do not weaken or alter the strong presumption against hardcore restraints or provide significant guidance as to when price, territorial or customer restraints may be justifiable under Article 101. Not all potential false positives created by the regime have thus been addressed.

Further, although the UK has the chance to re-assess the VABEO in six years times, there may be disappointment that it did not take the opportunity to unshackle itself from the EU system and provide a framework more closely centered around a consumer-welfare objective, free of the single market imperative. There may also be some dissatisfaction that having opted for the convergence route, the UK nevertheless decided to introduce some not insignificant divergences into the system. Although relatively limited in number, the notable differences between the new EU and UK rules present compliance challenges for agreements spanning both the EU and the UK.

Finally, for U.S. companies in particular, the revisions to both the EU and UK regimes serve as an important reminder that antitrust tolerance towards vertical agreements is much lower outside the U.S.

72 VABEO Guidance, para 8.32.

HARDCORE RESTRICTIONS IN REGULATION 2022/720 ON VERTICAL RESTRICTIONS



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I. INTRODUCTION

On May 10, 2022, the Commission adopted a revised Vertical Block Exemption Regulation ("VBER"),[2] followed by revised Vertical Guidelines.[3]

Like previous Block Exemption Regulations for vertical agreements, the new VBER aims to provide businesses with guidance that can help them self-assess the compliance of their supply and distribution agreements with Article 101 of the Treaty on the Functioning of the European Union ("the Treaty") and to facilitate the enforcement work of the Commission, national competition authorities and national courts.[4] It does so by creating legal certainty (a so-called "safe harbor"), whereby vertical agreements that meet the conditions of the VBER are exempted from the prohibition of Article 101(1) of the Treaty, as they are regarded as normally satisfying the conditions of Article 101(3) of the Treaty.[5] As a result, businesses no longer need to self-assess the compatibility of their vertical agreements with Article 101 of the Treaty, but may only assess whether their agreements fall within the scope of the VBER.

The new VBER and Vertical Guidelines follow the economic, effects-based approach introduced in the 1999 version of the VBER.[6] They acknowledge that vertical agreements are generally less harmful to competition than horizontal agreements. In particular, the complementary nature of the activities of the parties to a vertical agreement generally implies that the parties will have the incentive to increase their competitiveness through the vertical agreement and that vertical restraints provide greater scope for efficiencies by optimizing manufacturing and distribution.

They also set out that the likelihood that the efficiency-enhancing effects of a vertical agreement will outweigh any anti-competitive effects resulting from the restrictions it contains depends on the degree of market power of the parties to the vertical agreement and, therefore, on the extent to which they face competition from other suppliers of interchangeable goods or services. This is because undertakings with market power may, in certain cases, use vertical restraints to pursue anti-competitive purposes that ultimately harm consumers.[7]

However, the rules also provide that agreements which contain certain severely anti-competitive restrictions, so-called "hardcore restrictions" are unlikely to result in such efficiency-enhancing effects, as they do not create objective economic benefits, do not benefit consumers or are not indispensable to the attainment of such pro-competitive effects. Hardcore restrictions are generally restrictions of competition by object and unlikely to fulfil the conditions of Article 101(3) of the Treaty.

Against that background, the VBER sets out a clear framework for establishing whether a vertical agreement can benefit from the safe harbor.

First, it can be presumed that vertical agreements generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits, where the market share of the supplier (on the market where it sells the contract products) and of the buyer (on the market where it buys the contract products) do not exceed 30 percent. Above this threshold, there can be no such presumption, and therefore the VBER does not apply. Businesses would have to make an individual assessment as to the compliance of their vertical agreements with competition rules in those cases.

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2 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, C/2022/3015, OJ L 134, 11.5.2022, p. 4-13.

3 Communication from the Commission Guidelines on vertical restraints ("Vertical Guidelines"), 2022/C 248/01, OJ C 248, 30.6.2022, p. 1-85.

4 Commission Staff Working Document, Impact Assessment Report accompanying the documents Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and Communication from the Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on vertical restraints, SWD(2022)139 ("VBER Impact Assessment SWD"), p. 25.

5 Regulation No 19/65/EEC of 2 March of the Council on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices, OJ 36, 6.3.1965, p. 35, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999, OJ L 148, 15.6.1999, p. 1.

6 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, p. 21-25.

7 Section 2 of the Vertical Guidelines.

Second, vertical agreements containing hardcore restrictions cannot benefit from the safe harbor created by the VBER, irrespective of the market share of the parties. Where a vertical agreement contains a hardcore restriction, the whole agreement is excluded from the scope of the VBER and has to be individually assessed.[8]

The hardcore restrictions are listed in Article 4 of the VBER. This article focuses on the changes made that Article in the new VBER, for which further guidance is provided in the corresponding sections of the new Vertical Guidelines.

In line with the overall objectives of the review of the VBER, the changes made in Article 4 sought to ensure that the VBER does not exempt agreements for which there is no certainty that they meet the conditions of Article 101(3) of the Treaty, and that it does not exclude from the block exemption agreements for which such certainty exists. The structure of Article 4 has also been simplified and clarifications and updates have been added to reflect market and case law developments.[9]

II. ARTICLE 4(A) – PRICING RESTRICTIONS

The first type of hardcore restrictions identified in Article 4 concerns restrictions on the buyer's ability to determine its sale price and, in particular, resale price maintenance obligations ("RPM"), namely the imposition of a fixed or minimum resale price by the supplier on the distributor. Given that RPM eliminates price competition between distributors, it is considered a by object restriction under Article 101 of the Treaty[10] and a hardcore restriction under Article 4(a) of the VBER.

RPM was already a hardcore restriction under the previous VBER. During the review, some stakeholders questioned the categorization of RPM as a hardcore restriction.[11] As there was no clear evidence that RPM is on balance efficiency-enhancing and, thus, fulfils the conditions of Article 101(3) of the Treaty, the Commission did not make substantive changes to Article 4(a) in the new VBER. As a result, RPM remains a hardcore restriction and agreements that involve RPM cannot benefit from the block exemption. However, the hardcore categorization does not exclude the possibility that parties may be able to justify the use of RPM in individual cases if the conditions of Article 101(3) are met.

Furthermore, the review identified difficulties with applying the VBER to atypical price restrictions[12] and a lack of clarity as regards the conditions under which RPM can benefit from the exception provided by Article 101(3) of the Treaty.[13] To improve legal certainty, the Commission made structural changes to the Vertical Guidelines, by consolidating the previously scattered guidance on RPM in Section 6.1.1. of the new Vertical Guidelines. It also provided additional guidance to further clarify the rules on pricing restrictions and facilitate businesses' self-assessment.

In particular, Section 6.1.1 of the Vertical Guidelines provides examples of efficiencies that may result from RPM, and which may fulfil the conditions of Article 101(3) of the Treaty in individual cases outside the scope of the block exemption. These include the use of RPM to achieve an expansion of demand during the launch of a new product or to avoid the undercutting of a coordinated short-term low price campaign in a franchising system.

The Vertical Guidelines also include guidance on other types of pricing restrictions, such as a prohibition on a distributor to advertise prices for the contract products below a level set by the supplier (minimum advertised prices restrictions or ("MAPs")). Although in principle MAPs leave the distributor free to sell at a price that is lower than the advertised price, de facto they disincentivize the distributor from setting a lower sale price by restricting its ability to inform potential customers accordingly and, in that way, remove a key parameter of competition between

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8 Article 5 of the VBER also excludes certain restrictions from the benefit of the safe harbor, irrespective of whether the market shares of the parties exceed 30 percent. These are restrictions for which it cannot be assumed with sufficient certainty that they fulfil the conditions of Article 101(3) of the Treaty. However, contrary to hardcore restrictions, these restrictions are not generally regarded as falling within the scope of Article 101(1) of the Treaty or failing to satisfy the conditions of Article 101(3) of the Treaty. They are subject to an individual assessment. Moreover, unlike vertical agreements containing hardcore restrictions, which fall entirely outside the scope of the VBER, vertical agreements containing excluded restrictions can still benefit from the safe harbor, if the excluded restriction in question can be severed from the rest of the vertical agreement.

9 VBER Impact Assessment SWD, p. 25-26.

10 Judgments of 3 July 1985, in Case C-243/83, EU:C:1985:284, *Binon v. AMP*; 1 October 1987 in Case C-311/85, EU:C:1987:418, *VVR v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*; 19 April 1988, in Case C-27/87, EU:C:1988:183, *Erauw-Jacquery v. La Hesbignonne*.

11 Commission staff working document, Evaluation of the Vertical Block Exemption Regulation ("VBER Evaluation SWD"), Brussels, 8 September 2020, SWD(2020) 172 final, p. 171-174.

12 VBER Evaluation SWD, p. 169.

13 VBER Evaluation SWD, p. 170.

retailers. Therefore, the Vertical Guidelines state that, for the application of Article 4(a) of the VBER, MAPs will be treated as an indirect form of RPM, but also provide guidance on circumstances under which MAPs may fulfil the conditions of Article 101(3) of the Treaty in individual cases outside the scope of the block exemption.

Another area where Section 6.1.1 of the new Vertical Guidelines provides additional clarifications concerns certain types of fulfilment contracts, namely instances where a supplier enters into a vertical agreement with a buyer for the execution of a supply agreement concluded directly between the supplier and a specific customer. Such contracts will not be regarded as RPM, on condition that the sale price has been pre-agreed between the supplier and the customer and that the buyer fulfilling the contract is selected by the supplier. This is, for example, the case where customers purchase goods from an undertaking active in the online platform economy which is operated by a group of independent retailers under a common brand and where that undertaking determines the price of the goods and forwards the orders to the retailers for fulfilment.[14] By contrast, where the undertaking that provides the fulfilment services is selected by the customer, the imposition of a resale price by the supplier may restrict competition at the level of the provision of the fulfilment services and may amount to RPM.

III. ARTICLE 4(B) TO (D) – TERRITORIAL AND CUSTOMER RESTRICTIONS

The second type of hardcore restrictions identified in Article 4 relate to the territories in which and the customers to whom the buyer can sell the contract products. This type of restrictions is considered hardcore, as they are capable of partitioning the internal market and reducing competition across territories or customer groups. Therefore, the buyer in a vertical agreement should in principle be allowed to actively approach customers (active selling) as well as to respond to unsolicited customer requests (passive selling). The VBER only allows for restrictions of active and passive selling under very limited circumstances, notably when necessary to protect investments by exclusive distributors or to prevent sales to unauthorized distributors located in a selective distribution territory. In all other instances, restrictions of active or passive sales are by object restrictions under Article 101 of the Treaty[15] and hardcore under Article 4 of the VBER.

The review revealed that the rules setting out when restrictions of active and passive sales are hardcore under the previous VBER were perceived as unclear and complex.[16] Feedback from stakeholders also indicated that the rules were too rigid and, to some extent, prevented businesses from shaping their distribution systems according to their needs.[17] Other areas of the rules, such as the distinction between active and passive sales, were considered as no longer up to date.[18]

The new VBER and Vertical Guidelines implement structural and substantive changes that aim to address these issues, while maintaining the overall approach, in line with the requirement to only exempt vertical agreements for which there is sufficient certainty that the conditions of Article 101(3) of the Treaty are met.

First, Article 4 of the VBER has been re-structured, so that the hardcore restrictions relevant to the most common types of distribution system are grouped together. In particular, Article 4(b) covers territorial or customer restrictions in exclusive distribution systems; Article 4(c) covers selective distribution system, and Article 4(d) covers all other types of distribution agreements ("free distribution"), i.e. distribution under neither an exclusive nor a selective distribution system (Article 4(d)).

Second, to improve legal certainty and promote harmonized application throughout the EU, the definition of active and passive sales has been moved from the Vertical Guidelines to the new VBER and adapted to take account of new sales techniques that that have emerged or became more widely used with the growth of e-commerce. Article 1(l) of the new VBER defines active sales as actively targeting customers using all forms of direct communication or targeted advertising, whether offline or online. It specifies that the use of search engine advertising or price comparison services that target particular territories, the use of a website with a country-specific top-level domain or the use in an online store

14 This guidance is without prejudice to the assessment under Article 101 of the Treaty of the horizontal agreements between the retailers that set up and operate such a fulfilment model.

15 Judgments of 13 July 1966 in Joined Cases 56 and 58-64, ECLI:EU:C:1966:41, Établissements Consten *S.A.R.L. and Grundig-Verkaufs-GmbH v. Commission*; 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, *GlaxoSmithKline Services Unlimited v. Commission.*

16 VBER Evaluation SWD, p. 176-177.

17 VBER Evaluation SWD, p. 190.

18 VBER Evaluation SWD, p. 216.

of languages that are not commonly used in the territories where the distributor is established[19] amount to active sales. Article 1(m) of the new VBER defines passive sales as sales made in response to unsolicited requests from individual customers that were not actively targeted by the distributor, and include sales resulting from participation in public procurement or responding to private invitations to tender. Additional guidance on active and passive selling is provided in Section 6.1.2.2 of the new Vertical Guidelines.

Third, the rules on exclusive and selective distribution have been revised to grant suppliers and distributors more flexibility in setting up their distribution systems, to the extent that this does not result in a severe restriction of competition.

As regards exclusive distribution, a definition has been included in Article 1(h) of the VBER to improve clarity, providing that the essence of exclusive distribution is that the supplier allocates a territory or customer group exclusively to certain buyers and restricts all its other buyers from selling actively into that territory or customer group. Moreover, the review introduced two additional exceptions, whereby certain restrictions of active sales are no longer considered hardcore. Those restrictions are considered on balance efficiency-enhancing, since they provide increased protection for the investments made by exclusive distributors.

The first new exception concerns shared exclusivity, namely the possibility for the supplier to appoint more than one exclusive distributor. Under the new VBER, shared exclusivity is block-exempted up to a maximum of five distributors per exclusive territory or customer group. The setting of a maximum number of (shared) exclusive distributors is intended to provide legal certainty for suppliers that want to set up an exclusive distribution system and provide them with more flexibility to determine the appropriate number of exclusive distributors depending on the size of the particular territory or customer group and the type of products concerned. The (rather low) maximum number of (shared) exclusive distributors limits the risk that the exclusive distributors will free-ride on each other's investment efforts. As a result, the exclusive distributors can benefit from the protection resulting from the restriction of active sales by all non-exclusive distributors, but they remain free to make active and passive sales within the shared, exclusively allocated, territory or customer group.

The second new exception provides that the restriction of active sales into exclusive territories can now be "passed on" one level further down the distribution chain. Namely, a supplier can instruct its distributors to prohibit their direct customers from making active sales into territories or to customer groups for which the supplier operates an exclusive distribution system. This provides exclusive distribution with a higher level of protection by limiting active selling also by the direct customers of the buyer.

As regards selective distribution, the new VBER provides that a supplier may restrict any of its buyers from selling either actively or passively to unauthorized distributors located in a territory where the supplier operates a selective distribution system. Previously, the supplier could only impose this restriction on the appointed members of the selective distribution system. Consequently, the supplier could not, within the block exemption, prevent distributors located in a territory where the supplier operated a free distribution system from selling to unauthorized distributors in territories where the supplier operated a selective distribution system. This change is intended to give greater protection to selective distribution, with the aim of enabling suppliers to incentivize investments in brands and retail services.

Lastly, to improve clarity, the new Vertical Guidelines describe in Section 4.6.2 the different steps that should be followed to assess the compliance of selective distribution systems with Article 101 of the Treaty. They also clarify, as this appeared to have been not well understood under the previous rules, that selective distribution systems can benefit from the safe harbor of the VBER regardless of the nature of the product concerned, the nature of the selection criteria (qualitative or quantitative) imposed by the supplier, and whether or not the supplier discloses its selection criteria.

IV. ARTICLE 4(E) – ONLINE SALES AND ADVERTISING RESTRICTIONS

Beyond the changes made to the hardcore restrictions already included in the previous VBER, the new VBER introduces a new provision, Article 4(e), relating to restrictions of online sales and online advertising.

The previous VBER did not contain specific provisions for online sales and advertising restrictions, so these benefitted from the safe harbor, provided that they did not amount to hardcore restrictions under Article 4 (or excluded restrictions under Article 5). Similarly, the Vertical Guidelines only provided limited guidance on the assessment of online sales restrictions.

19 However, the Vertical Guidelines clarify that offering an English language option in an online store does not as such indicate that the seller is targeting English-speaking territories, as English is widely understood and used throughout the EU.

During the review, the digitalization of the market emerged as the most significant change since the adoption of the previous VBER.[20] Stakeholders noted that the rules were not well adapted to e-commerce, new market players' ways of doing business and new market behaviors, such as consumers' expectation for seamless switching between online and offline channels. Stakeholders also stressed that the new rules should reflect the case law adopted over the last decade in relation to online sales and advertising restrictions.

Article 4(e) does not introduce any substantive change to the assessment of online sales restrictions. Rather, it clarifies and consolidates how the rules relating to restrictions on the territories in which and the customers to whom the buyer can sell the contract products set out in Article 4(b) to 4(d) of the VBER are applied to online sales and advertising restrictions. It also seeks to improve legal certainty by providing for a single framework for the assessment of all types of online sales and advertising restrictions. More concretely, Article 4(e) provides that restrictions of online sales or online advertising are hardcore where they have the object, directly or indirectly, in isolation or in combination with other factors controlled by the parties, of preventing the effective use of the internet for selling the contract goods or services by the buyer in a vertical agreement. Other restrictions of online sales can thus benefit from the safe harbor of the VBER. Article 4(e) of the VBER applies irrespective of the distribution system used by the parties to the vertical agreement.

Article 4(e) reflects the case law of the Court of Justice of the European Union in this area, and in particular the judgments in the cases *Pierre Fabre* and *Coty*. In the *Pierre Fabre* case,[21] the Court found that a clause banning authorized distributors in a selective distribution system from selling *via* the internet had as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system. It also found that the clause amounted to a hardcore restriction under the VBER, as it prohibited *de facto* the internet as a method of marketing. In the Coty case,[22] the Court found that a clause banning the use of online marketplaces to sell the contract goods was not a hardcore restriction under the VBER. This was because it did not restrict the territories into which or the customers to whom the authorized distributors could sell, notably because the distributors remained free to sell online, e.g. through their own online stores, and could raise awareness of their online activities through online advertising.

Article 4(e) consolidates that case law, by setting out when online sales restrictions are hardcore by reference to the prevention of the effective use of the internet (in line with the findings in the *Pierre Fabre* case) and by clarifying that restrictions that do not prevent the effective use of the internet can benefit from the block exemption (in line with the judgment in Coty). It also takes into account the emphasis given by the Court to the ability of a distributor to raise awareness of its online activities, by taking a somewhat stricter stance regarding restrictions of online advertising and providing that prohibiting the use of an entire online advertising channel amounts to a hardcore restriction.

Additional guidance on the application of this rule is provided in recital 15 of the VBER and Section 6.1.2 of the Vertical Guidelines. For instance, the rules explain that a restriction of online sales that aims at significantly diminishing the aggregate volume of online sales of the contract products on the market or the possibility for consumers to buy the contract products online amounts to a hardcore restriction. The rules also recall that the categorization of a restriction as hardcore should not depend on market-specific circumstances or the individual characteristics of the parties. Article 4(e) must be applied to the vertical agreement as a whole, including for establishing whether the use of multiple online sales or advertising restrictions has the object of preventing the effective use of the internet.

Section 6.1.2 of the Vertical Guidelines also includes examples of types of restrictions that will generally benefit from the block exemption, such as a requirement to operate an offline store, a requirement that a minimum volume of sales is made offline, a ban on the use of online marketplaces or the imposition of quality requirements for online sales. It also includes examples of types of restrictions that will generally qualify as hardcore under Article 4 of the VBER, such as a requirement to make a certain share of total sales offline, a ban on the use of the supplier's brand on the distributor's website or a ban on the use of entire online advertising channels.

V. CONCLUSION

The VBER is a valuable tool, helping businesses to self-assess the compliance of their sale and distribution agreements with EU competition rules and facilitating the work of European enforcement authorities, as it exempts vertical agreements falling within its scope from Article 101(1) of the Treaty. Ensuring that the scope of the VBER is appropriately defined is therefore crucial for reducing businesses' compliance costs and granting them flexibility in the design of their distribution systems, while ensuring the effective enforcement of the competition rules. The scope

20 VBER Evaluation SWD, p. 30 and following.

21 Judgment of 13 October 2011 in Case C-439/09, EU:C:2011:649, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi.*

22 Judgment of 6 December 2017 in Case C-230/16, EU:C:2017:941, *Coty Germany GmbH v. Parfümerie Akzente GmbH.*

of the block exemption is defined by means of the hardcore restrictions, together with the market share threshold; ensuring that the hardcore restrictions are defined with sufficient clarity is therefore key to the effectiveness of the rules.

On the basis of a thorough and interactive review process, during which the Commission invited comments from all types of stakeholders, sought the opinion of experts in the field and analyzed market trends and case law developments, the new VBER and Vertical Guidelines seek to provide a set of rules that are comprehensive, up-to-date and increase legal certainty.

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

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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.[2] 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").[3] 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."[4] 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[5] and accepted commitments in relation to most favored nation ("MFN") clauses.[6] 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.

2 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.

3 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.

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

5 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).

6 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[7] 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. <u>New Hardcore Restriction: Effective Use of the Internet</u>

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.[8] 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. <u>Dual Pricing: Relaxation of the Rules</u>

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 <u>wholesale prices charged to distributors</u>, who must remain free to set their downstream prices to customers as they wish (whether online or on-premises).

3. <u>Selective Distribution and Equivalency Between Online and Offline Criteria</u>

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.

7 *Supra* note 5.

8 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.[9] 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:[10]

- 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).[11] 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."[12]

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_accomodation_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).[13]

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."[14] 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.[15] 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."[16]

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.[17]

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."[18]

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."[19]

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.

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13 VBER, recital 15.

14 European Commission, Explanatory note, https://competition-policy.ec.europa.eu/system/files/2022-05/explanatory_note_VBER_and_Guidelines_2022.pdf.

15 Guidelines, para. 209.

16 VBER, Recital 10.

17 Guidelines, para. 67(b).

18 VBER, Recital 14.

19 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.[20]

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."[21] 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.

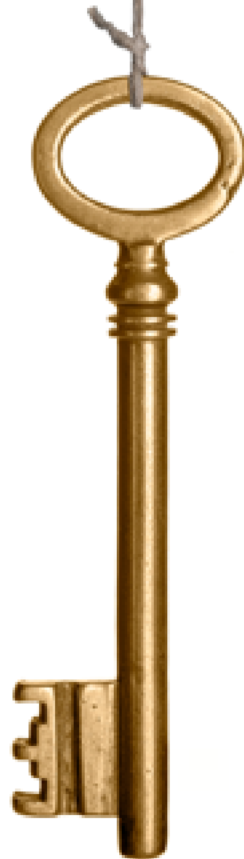
However, as always, questions remain, which will need to be resolved in practice and the prospect of withdrawal of the benefit of the exemption (under Article 6) remains as questionable as ever from a legal certainty perspective.

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.

20 Guidelines, para. 108.

21 Guidelines, para. 259.

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



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I. INTRODUCTION

Summer 2022 has been marked by the back-to-back adoption of the refreshed EU Vertical Block Exemption Regulation ("EU VBER"),[2] the UK Vertical Agreements Block Exemption Order ("UK VABEO"),[3] and their respective Vertical Guidelines.[4]

There are now two distinct sets of rules in Europe that companies must get to grips with when assessing the restrictions included in their supply or distribution arrangements. This, of course, serves to complicate the legal environment rather than simplifying it, contrary to what was expected and advocated for when the revision processes where launched.

In terms of timing, both texts provide for a one-year transitionary period for pre-existing vertical agreements (i.e. agreements entered into force before the adoption of the revised VBER and VABEO). In practice, this means that (i) all new agreements entered into after May 31, 2022 at the EU level and June 1, 2022 for the UK, must comply with the revised rules; and (ii) all pre-existing agreements have until May 31, 2023 in the EU and June 1, 2023 in the UK to be brought into line with the new rules.

The overall exemption mechanism remains the same in both jurisdictions i.e. the exemption will apply provided the 30 percent market share threshold is not exceeded by the supplier and the reseller, and the agreement does not contain hardcore restrictions. However, the exemption renewal process has introduced a few notable changes, which might be seen either as opportunities or risks, depending on where the businesses operate in the supply chain. These changes, however, are already raising questions as to their application, which somewhat thwart the simplification aims of the consultation process.

Against this backdrop, in this article we focus on the following four notable additions to the new vertical rules: hybrid platforms and information exchanges in the context of dual distribution; minimum advertised prices ("MAPs") and the treatment of intermediaries (agency and fulfilment contracts) in the context of resale price maintenance ("RPM"); shared exclusivity; and dual pricing.

II. DUAL DISTRIBUTION: A NEW ERA ?

Dual distribution (where the supplier competes with its resellers at the downstream level) is an exception to the requirement, under the vertical rules, that the supplier and reseller must not be competitors. The focus of the European Commission ("Commission") on this form of distribution, which was hotly debated during the revision process, has been largely due to the significantly increased uptake in dual distribution since 2010 when the previous VBER was adopted in Europe. In its 2017 e-commerce report, the Commission indicated that 64 percent of respondent manufacturers had launched their own direct-to-consumer websites within the last 10 years.[5]

While the relationship between suppliers and resellers in a dual distribution set-up remains vertical, since they also compete at the downstream level, this raises some antitrust concerns. In particular, the authorities are focused on information exchange,[6] which is thought to raise the risk of collusion at the retail level or as restricting the distributors' ability to compete effectively at the retail level, thereby reducing intra-brand competition. Some concerns were also raised in relation to online platforms selling online intermediation services ("OIS") competing with their buyers.

A. So, What's New?

The real novelty of the revised EU rules is that OIS providers competing with their buyers at retail level (i.e. hybrid platforms) are now excluded from the benefit of the dual distribution exception. In practice, this means that hybrid platforms cannot benefit from the VBER exemption, and their arrangements must be assessed under the horizontal rather than vertical rules. In this respect the UK VABEO is more lenient as hybrid platforms are still covered by the dual distribution exception.

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2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720&qid=1652368074897.

3 https://www.legislation.gov.uk/uksi/2022/516/contents/made.

4 Vertical agreements block exemption order guidance (publishing.service.gov.uk) EUR-Lex - 52022XC0630(01) - EN - EUR-Lex (europa.eu).

5 See para. 179 of the Commission's Final report on the E-commerce Sector Inquiry of 2017 (available here: https://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf) and its Impact assessment report on the new VBER (here) p. 13, available here: 20220510_revised_VBER_and_vertical_guidelines_impact_assessment_report.pdf (europa.eu).

6 See impact assessment report on the new VBER (here) p. 13.

The second change concerns information exchange in a dual distribution scenario but is much less fundamental. Indeed, the revised rules both in the EU and the UK clarified (albeit with a slightly different test) that information exchange must be specifically assessed in a dual distribution scenario. In its initial proposal, the Commission had proposed to establish a new market share threshold of 10 percent above which information exchange within dual distribution systems would need to be self-assessed. Following quasi-unanimous criticism, this proposal was abandoned in the EU and was not seriously entertained in the UK.

Rather, the VBER establishes a (new) test under which companies operating in a dual distribution system must satisfy two conditions when exchanging information to ensure that it is exempt. Suppliers and resellers need to ensure that the information they 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.[7] The test in the UK VABEO is narrower and only requires the information sharing to be *"required to implement that vertical agreement"* (and generally not to restrict competition by object).[8]

B. What Does This Mean in Practice?

What these two EU conditions mean exactly is not entirely clear, especially the second limb, and one can expect that it will be challenging to come to a clear-cut conclusion in the short term. If the conditions are not met, the exchange of information needs to be self-assessed, but the safe harbor continues to apply to the rest of the agreement. There is no guidance for the actual self-assessment, except for a few suggested risk mitigating measures.

Both the EU and the UK guidelines contain a (near identical) whitelist and a blacklist for information that will generally meet the exemption test. While some consider the examples as useful, others (including the authors) believe that these lists, albeit not exhaustive, are too rigid and may even serve as a deterrent for legitimate information sharing.

The other quirk with this new approach to information sharing is the burden of proof. The wording of Article 2(5) VBER seems to suggest that both conditions for permissibility of information sharing are presumed to be met as a matter of principle (the UK appears to have a similar presumption). This means that the Commission or a claimant would need to demonstrate that this information was in fact illegitimate. But, in practice, businesses will most likely always need to conduct some form of self-assessment to ensure that they have the requisite evidence to demonstrate the legitimacy of the information exchange.

All in all, this is not a revolutionary change in the vertical regime. It was never clear under the old rules whether information exchange within a dual distribution was exempted. A footnote in the 2010 Vertical Guidelines specifically stated that *"[d]irect information exchange between competitors is not covered by the Block Exemption Regulation,"* albeit in the context of category management.[9] And, in practice, many suppliers already had safeguards for the information exchanged with their competing resellers downstream (and vice versa). The revised VBER and VABEO and accompanying guidelines, while clarifying the framework of analysis, are therefore not game changers.

III. RESALE PRICE MAINTENANCE – REIMAGINED?

Both in the VABEO and VBER, the authorities' approach to RPM, and more generally price restrictions, remained largely unchanged. These restrictions continue to fall in the hardcore bucket despite concerted attempts by various stakeholders to argue in favor of a much more lenient (effects-based) approach, in line with the US doctrine. However, there are a number of interesting changes on the fringes.

A. Minimum Advertised Price – The Last-minute Change

The first interesting change in the RPM space is that both the EU and UK rules now expressly list MAPs as an indirect means of imposing RPM.[10] This was not an express restriction in the versions of the EU and UK Guidelines that were subject to consultation. The last minute "clarification" in the final published versions suggests a tightening of the approach to RPM both in the UK and the EU.

7 See para. 96 of the new EU Vertical Guidelines.

8 See para. 6.22 of the UK Guidance.

9 See footnote 55 of the EU Vertical Guidelines.

10 See para. 187 of the new EU Vertical Guidelines and para. 8.12 of the UK Guidance.

An MAP is the lowest price at which resellers can advertise a supplier's products either offline or online. This concept is not new, but MAP policies had not been under the spotlight until recently in Europe. In the US, the Federal Trade Commission has provided some guidance on the topic[11] and has been actively challenging MAP policies since 2000, for example in relation to advertising restrictions in the pre-recorded music space.[12]

In practice, this means that suppliers and resellers have an additional area of caution to observe in their distribution policies. MAPs aimed at protecting a certain price positioning or luxury brand image, even if, in practice, resellers are able to discount from prices at the point of sale, are generally no longer acceptable.

The only exception to this comes in the form of an additional efficiency defense included in the EU and UK guidance where suppliers could technically use an MAP *"to prevent a* ***particular distributor*** *from using the product of a supplier as* ***a loss leader.****"*[13] However, this "exception" comes with a number of conditions: (i) the product concerned must be resold below wholesale price; and (ii) the specific distributor's loss-leading behavior must be regular; and (iii) capable of damaging the brand image of the supplier.

Suppliers will certainly see this new exception as a positive development. But given the risks attached to an RPM infringement (i.e. the loss of the exemption for the entire vertical agreement), we are likely to see this exception getting the same treatment as the other RPM exceptions in the past (e.g. short-term price campaigns), which remained only "theoretical" possibilities. While there may be a lot of short-term interest in applying the new exception, in-house legal may be reticent in recommending this route for fear of opening a pandora's box (i.e. allowing legitimate pricing intervention to embolden sales teams to intervene in non-exceptional cases). What seems more likely is that the new MAP exception may encourage suppliers to query with resellers any pricing below the wholesale level.

Whichever way they choose to deal with a loss leader situation, suppliers will need to have solid evidence to demonstrate that their reaction was legitimate and meets the conditions laid down in the Vertical Guidelines.

B. Intermediaries: Some Limited Concessions?

While MAPs represent an additional restriction in the hardcore bucket, the EU Commission and the Competition and Markets Authority ("CMA") have tried to show some flexibility in other RPM-related areas. During the consultation process, stakeholders rallied for a more lenient approach in scenarios where suppliers negotiate the commercial conditions and the wholesale price for their products with end-customers but involve intermediaries to handle the logistical support (i.e. invoicing, delivery, orders etc.). In a number of sectors, these intermediaries take the title for the products (i.e. briefly become the owners of the goods before delivering them), which has previously disqualified them from being classed as an "agent" under the old vertical rules. As a result, suppliers could not impose on these intermediaries the prices and conditions pre-negotiated with the end-customer, often on a multi-national basis,[14] despite obvious economies of scale and even if this was imposed by the end-customer. In response to these concerns, the EU and UK authorities have proposed two changes with new guidance on temporary transfer of title and fulfilment contracts.

Firstly, in the section dedicated to **agency** agreements allowing to fall outside the scope of Article 101 TFEU, the Commission has specified that, despite the principle (which remains) that the agent does not acquire the title to the goods bought or sold under the agency agreement, *"the fact that the agent may temporarily, for a very brief period of time, acquire the property in the contract goods while selling them on behalf of the principal, does not preclude the existence of an agency agreement that falls outside the scope of Article 101(1) of the Treaty, provided that the agent does not incur any costs or risks in relation to the transfer of property."*[15] The UK adopted a similar formulation, hidden away in a footnote of the Guidance.[16]

In practice, this means that suppliers operating their business through intermediaries (whether chosen or not by the end-customer), acting as real agents from a competition law perceptive, can negotiate prices directly with end-customers and impose these resale prices on

11 https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-imposed-requirements.

12 https://www.ftc.gov/legal-library/browse/cases-proceedings/9710070-universal-music-video-distribution-corpand-umg-recordings-inc.

13 See para. 197 of the new EU Guidelines and para. 8.21 (c) of the UK guidance.

14 See Concurrences N°1-2021 I On-Topic I The VBER and Vertical Guidelines: Revision or Reform? Reflection on critical issues, p. 16 on this specific question.

15 See paras. 33 a) and 192-193 of the new EU Vertical Guidelines.

16 See footnote 22 of the UK Guidance.

intermediaries, even if the intermediaries take ownership of these products for a brief period of time. While suppliers no doubt welcome this clarification, the conditions to benefit from this exception are very strict as the intermediaries must still qualify as a "genuine" agent for the purpose of competition law, by taking no costs or risk in relation to the supply of the product and transfer of title.

Secondly, the Commission and the CMA have also introduced (alleged) flexibility by allowing **fulfilment contracts** to escape RPM risk even if the intermediary is not a genuine agent. The EU and UK guidance specify that a fulfilment contract involves a supplier entering into a *"vertical agreement with a buyer for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer."*[17] In the context of such fulfilment contracts, a supplier can impose a resale price without it amounting to RPM but only if the supplier (and not the customer) *"selects the undertaking that will provide the fulfilment services."* In short, the RPM risk could be avoided if: (i) the supplier and end-customer enter a main supply agreement with a pre-agreed price; (ii) the supplier enters into a distinct fulfilment agreement with a "fulfilment intermediary" for the purpose of executing (fulfilling) the main agreement; and (ii) the supplier and not the end-customer chooses the fulfilment intermediary.

The third limb makes this additional flexibility somewhat less flexible. The stated reason for the additional requirement that the fulfilment intermediary must be chosen by the supplier is that in the case of a customer choosing the fulfilment agent, the imposition of a resale price may restrict competition for the provision of fulfilment services. Given that often the end-customer chooses the fulfilment agent, this exception may have limited application in many distribution arrangements.

Some uncertainty also arises due to the additional example provided by the Commission and the CMA relating to fulfilment contracts in the online environment, namely *"where customers purchase goods from an undertaking active in the online platform economy which is operated by a group of independent retailers under a common brand and that undertaking determines the price for the sale of the goods and forwards orders to the retailers for fulfilment."* This scenario seems extremely specific and does not fully correspond to the pre-negotiation scenario between a supplier and end-customers described earlier in this section.

While the additional flexibility has been welcomed in the RPM space, where many are still disappointed that the European authorities are not taking a more enlightened (effects based) approach, the exceptions are quite narrow and will require careful execution to avoid falling on the wrong side of the ordinarily hardcore restriction.

IV. SHARED EXCLUSIVITY: ADDITIONAL FLEXIBILITY FLANKED BY NEW UNCERTAINTIES

The other notable change in the VBER and VABEO concerns exclusive distribution, which is an exception to the hardcore territorial and customer restrictions.

According to the previous EU Vertical Guidelines,[18] suppliers could implement an exclusive distribution by allocating an exclusive territory or customer group to itself or *"only to one distributor"* and protecting that exclusive distributor *"against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, irrespective of sales by the supplier."*

The three key changes in the new EU vertical rules are as follows:[19]

- the supplier can now appoint **up to five (exclusive) resellers** for the same territory or customer group;
- the supplier cannot restrict active or passive **cross-selling** among these exclusive distributors within the exclusive territory or customer group; and
- the supplier can require its buyers to **pass on** the restriction of active sales into exclusive territories or to exclusive customer groups to their **direct customers** (but not further down the chain).

While these changes have been presented by the Commission as additional flexibility for suppliers when operating their distribution network, these changes already raise a number of practical questions and difficulties.

17 See paras. 192 and 193 of the new Vertical Guidelines and para. 8.18 of the UK Guidance.

18 See para. 51.

19 See paras. 121-124 and 220 of the new EU Vertical Guidelines.

Firstly, the appointment of up to **five exclusive distributors** obviously raises the question of incentives. Indeed, from the reseller's perspective the real benefit of exclusive distribution was to benefit from an assured level of sales in compensation for the investments in the promotion of the supplier's brand. What will be the incentive of the so-called exclusive distributors to invest in the brand promotion if they are in fact not exclusive in markets where there is already a very limited number of retailers? This point will no doubt lead to some contentious negotiations between suppliers and retailers but at the heart of it, this amendment puts in question the very definition of "exclusive" distribution.

Interestingly, in the UK Guidance, the drafting is even more broad and allows suppliers to appoint "**a limited number**" **of exclusive distributors**," without specifying the number. But the UK Guidance expressly bakes in the incentives point by requiring that the number of appointed distributors should be determined "*in proportion to the allocated geographical area or customer group*" so as to incentivize investment by the distributors.[20] The proportionality calculation will not likely be straight forward, so it is arguable that the EU formulation at least provides a bit more certainty.

Secondly, unlike the previous rules, the updated Guidelines no longer expressly include the qualifications of "*irrespective of sales by the supplier.*" It is unclear from the revised formulation whether the supplier's sales should also be restricted into the exclusive territory or customer group (which was not the case previously). This is of course a very important point for suppliers operating dual distribution systems where they sell in competition with their distributors. To the extent the removal of the reference to the supplier's sales being permitted was intentional, this would mean that when operating an exclusive distribution system, suppliers will need to appoint themselves as one of the co-exclusive distributors to ensure they have the flexibility to sell into the exclusive territories / customer groups.

V. DUAL PRICING: IS THIS REALLY THE END OF THE HARDCORE RESTRICTION?

The last change worth commenting on is the removal of dual pricing from the list of hardcore restrictions from the VBER and VABEO. Dual pricing refers to a situation where a supplier imposes on a same reseller different wholesale prices depending on whether the products are intended to be resold online or offline. Under the previous EU Vertical Guidelines,[21] differential pricing for offline and online sales was prohibited because this was a "*restriction of passive selling*" which limited "*the distributor's access to a greater number and variety of customers.*"

The new EU Vertical Guidelines provide an exemption for dual pricing but under rather strict conditions (which are mirrored in the UK Guidance).[22] The rationale behind the relaxation of the rules is that this "*may incentivise or reward an appropriate level of investments in online or offline sales channels.*" The key limit is that this should not have "*the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers.*" Should this be the case, the restriction is then hardcore again.

To help navigating this qualification, the EU and UK guidelines specify that differential pricing is likely to be a hardcore restriction if:

- the difference in the wholesale price makes selling online unprofitable or financially unsustainable; or
- dual pricing is used to limit the quantity of products made available to the buyer for sale online.

Conversely, dual pricing is covered by the exemption if:

- the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel; or
- when products are sold through a combination of offline and online channels, where the price difference takes into account investments or costs related to that type of distribution.

Finally, this section ends by suggesting that suppliers and resellers can agree on the appropriate method to implement dual pricing, including, for example, an ex-post balancing of accounts on the basis of actual sales.

The proposed formulation is a bit confusing. On the one hand, the EU and UK authorities state that dual pricing is in principle fine. On the other hand, they flag that if the suppliers are not careful this will be treated as hardcore. The risk to be taken by suppliers (and resellers?) so

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20 See paras 10.57-10.59 of the UK Guidance.

21 See para. 52 of the EU Vertical Guidelines.

22 See para. 209 of the new EU Vertical Guidelines and para. 8.42 of the UK Guidance.

to benefit from this new exception seems quite high given the number of requirements to fall on the right side of the hardcore line.

In practice, suppliers and resellers do expect dual pricing to feature in the next round of distribution agreement negotiations. But this new approach to dual pricing raises a lot of practical questions. Just to highlight a few:

- Does the reference to "*wholesale prices*" include broader price-related terms, e.g. rebates?
- What information would the supplier need to access to ensure that the dual pricing mechanism does not make selling online unprofitable or financially unsustainable for the reseller. Similarly, what information would the reseller need to put forward to demonstrate that dual pricing prevents them from selling online or offline? More importantly, is it even acceptable to share this information in a dual distribution scenario given the new information exchange guidance?
- How are suppliers and distributors meant to assess the differences in investments and costs incurred by the resellers depending on the sales channel without sharing sensitive information in a dual distribution scenario?
- What level of cost differences justify a dual pricing mechanism? A mere difference, even if limited? A significant difference?
- What does the reference to suppliers and resellers being able to agree a "method to implement dual pricing" require? Is this an obligation to agree or can suppliers simply impose the method and the necessary information it should have access to through reporting obligations?

A lot of questions to be answered, which gives the overall impression that the Commission and the CMA are giving additional flexibility with one hand and taking it back with the other. The devil is in the detail and all these important changes will give rise to a lot of legal and operational discussions between suppliers and resellers during their commercial negotiations.

BUILDING A COHERENT LEGAL FRAMEWORK FOR VERTICAL PRICE RESTRICTIONS IN CHINA

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I. INTRODUCTION

In the 14 years that have passed since the entry into force of the Anti-Monopoly Law ("AML"),[2] China's first competition legislation, few topics have been as contentious as the treatment of vertical price restraints. The "prohibition in principle plus exemption" approach[3] established in the original version of the AML for both vertical price fixing and minimum resale price maintenance ("RPM") raised doubts as to whether anticompetitive effects had to be demonstrated to sustain a breach of the law. This in turn led to tensions between the administrative and judicial interpretations of the rules. For the former, effects would not be necessary for a violation to occur, while the latter insisted on linking illegality to actual harm.

On August 1, 2022, a reform of the AML came into effect that modifies, or at least clarifies, the rules affecting vertical price fixing and minimum RPM in China.[4] The reform largely follows the Supreme People's Court Yutai judgment,[5] which attempted to reconcile the positions of the antitrust agencies and the judiciary. This article explores the application of the AML to vertical price fixing and minimum RPM over the years, and the implications of the recent changes made to China's basic competition legislation. It covers the original drafting of the AML, the judicial and administrative positions, the landmark Yutai case, and the post-*Yutai* developments (focusing on both the AML reform and recent administrative decisions). In doing so, the article attempts to shed light on the road ahead for the legality of vertical price restrictions in China.

II. THE AML'S INITIAL POSITION ON VERTICAL PRICE RESTRAINTS

Article 14 of the AML declares monopoly agreements illegal when they fix "the prices of commodities resold to a third party" (vertical price fixing) or they restrict "the lowest prices for commodities resold to a third party" (minimum RPM).[6] Article 15 includes a list of exemptions, applicable when the arrangements pursue at least one of the following aims: "improving technologies, or engaging in research and development of new products"; "improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production"; "increasing the efficiency and competitiveness of small and medium-sized undertakings"; "serving public interests in energy conservation, environmental protection and disaster relief"; "mitigating sharp decrease in sales volume or obvious overproduction caused by economic depression"; "safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts"; or "other purposes as prescribed by law or the State Council."[7] For the first five exemptions to apply, the parties must prove that no substantial restrictions of competition will ensue and that consumers will participate in the benefits of the agreement.[8]

The wording of Article 14 in the initial version of the AML appeared to suggest that the ban on monopoly agreements vertically fixing prices or imposing minimum RPM would be categorical. However, Article 13 of the AML states that for monopoly agreements to be contrary to the law they need to be "designed to eliminate or restrict competition."[9] This clarification raised doubts as to whether enforcers and plaintiffs relying on Article 14 would need to demonstrate that the monopoly agreement under consideration was devised with the purposes described in Article 13, and if effects would be necessary for the restraints to be unlawful. It led to inconsistencies in the interpretation of the Article 14 prohibitions that persisted until the Supreme People's Court had the chance to rule on the matter, as discussed in the next section of this article.

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2 Anti-Monopoly Law of the People's Republic of China ("AML") (中國人民共和國反壟斷法) promulgated by the Standing Committee of the National People's Congress (effective Aug. 1, 2008) http://www.npc.gov.cn/zgrdw/englishnpc/Law/2009-02/20/content_1471587.htm.

3 *Interview with Wu Zhenguo, Director General, Anti-Monopoly Bureau of the State Administration for Market Regulation (SAMR), People's Republic of China*, ANTITRUST MAGAZINE 18 (June 21, 2021) https://www.samr.gov.cn/xw/zj/202107/P020210707589294998827.pdf.

4 Decision of the Standing Committee of the National People's Congress on Amending the Anti-Monopoly Law of the People's Republic of China (June 24, 2022), http://www.npc.gov.cn/npc/c30834/202206/e42c256faf7049449cdfaabf374a3595.shtml.

5 *Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau*, Supreme People's Court, case No. (2018) Zui Gao Fa Xing Shen No. 4675 (hereinafter *Yutai*).

6 AML, *supra* note 2, Art. 14.

7 *Ibid*, Art. 15.

8 *Ibid*.

9 *Ibid*, Art. 13.

III. JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS IN THE FIRST DECADE OF ENFORCEMENT OF THE AML

The framework for the analysis of vertical price restraints developed by the courts is not dissimilar to that employed by enforcers, and yet at times they have reached largely divergent conclusions. The first time the judiciary comprehensively addressed the application of the AML to minimum RPM was in 2013, in the *Johnson & Johnson* case.[10] Overturning the judgment of the Shanghai Intermediate People's Court in the first instance,[11] the Shanghai Higher People's Court awarded Rainbow, the plaintiff, damages of RMB 530,000.[12] The appeal focused on the effects of the minimum RPM imposed by Johnson & Johnson. The company was found to possess significant market power, with a market share in excess of 20 percent.[13] The court saw evident harm, including the reduction of both of intrabrand and interbrand competition, the exclusion of efficient dealers from the system, the limitation of the dealers' autonomy to set resale prices, and negative consequences for consumers. According to the court, there were no obvious countervailing efficiencies, and there would be little need to protect distributors from free riders since buyers were widely familiar with the products.

The plaintiff may have won in *Johnson & Johnson*, but the court nonetheless acknowledged potential valid justifications for minimum RPM, such as the need to protect product quality or market entry. In fact, the analytical framework laid down by the Shanghai Higher People's Court has led other courts to dismiss similar cases on the basis of lack of actual harm. In *Gree*,[14] the plaintiff distributor alleged that their contract termination was a form of punishment for not adhering to the minimum prices imposed by the seller. The court found no anticompetitive object or effect, and no market power. Moreover, since distributors could compete on aspects other than prices, competition would not have been completely eliminated. On the basis of these findings, the court found in favor of the defendant, and saw no breach of Article 14 of the AML.

China's anti-monopoly enforcement authorities ("AMEAs") have been somewhat quicker to find vertical price fixing and minimum RPM illegal. In the 2013 decision against *Maotai*,[15] the Guizhou Price Bureau imposed a fine of RMB 247 million on the state-owned liquor producer after establishing that it had fixed resale prices for third party distributors, which restricted competition in the market in the detriment of consumer welfare. There was reference to the market power of the company, but the relevant market was not defined.[16] On the same day, the Sichuan Development and Reform Commission slapped a fine of RMB 2020 million on *Wuliangye*,[17] another state-owned liquor company, for engaging in minimum RPM. It monitored its distributors' prices and punished those not respecting its requirements. The enforcer focused on Wuliangye's "strong market position,"[18] and found restrictions of both intrabrand and interbrand competition, and consumer harm.[19] It is worth noting that the combined market share of Maotai and Wuliangye in the market for high-priced white spirits was around 75 percent.[20] The fines amounted to 1 percent of the companies' 2012 sales revenues.[21]

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10 Margaret Wang, *China's Current Approach to Vertical Agreements Under the Anti-Monopoly Law*, COMPETITION POLICY INTERNATIONAL: ASIA ANTITRUST COLUMN 1, 5-7 (2012), https://www.competitionpolicyinternational.com/assets/Free/cpiasiawang.pdf.

11 *Ruibang Yonghe Technology & Trade Co., Ltd. (Rainbow Medical Equipment and Supplies Co.) v. Johnson & Johnson Medical (China) Ltd.*, Shanghai No. 1 Intermediate People's Court, (May 18,2012).

12 *Ruibang Yonghe Technology & Trade Co, Ltd. (Rainbow Medical Equipment and Supplies Co.) v. Johnson & Johnson Medical (China) Ltd.*, Shanghai Higher People's Court No. 63 (Aug. 1, 2013).

13 Qingxiu Bu, *Can Suppliers Fix Final Prices? The Contribution of China to the Debate on Resale Price Maintenance* 6 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 110, 116 (2015).

14 *Dongguan Hengli Guochang Electrical Appliance Store v. Dongguan Shengshi Xinxing Gree Trading Co., Ltd. and Dongguan Heshi Electrical Appliance Co., Ltd.*, (2015) Yue Zhi Fa Shang Min Chu Zi No. 33 (2015) (粤知法商民初字第33号)

15 Guizhou Price Bureau, *Kweichow Maotai* [2013] No. 1, (Feb. 22, 2013). See also *The Guizhou Price Bureau announces a fine of RMB 247 million on Maotai*, China News (Feb. 22, 2013) http://www.chinanews.com/cj/2013/02-22/4588648.shtml (in Chinese).

16 See Xiaoye Wang and Adrian Emch, Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges' 1 JOURNAL OF ANTITRUST ENFORCEMENT 247 (2013).

17 Sichuan Development and Reform Commission, *Fine of RMB 202 million imposed on Wuliangye for price monopoly* (Feb.22, 2013).

18 *Ibid.*

19 *Ibid.*

20 Jingmen Cai, *Public Antitrust Enforcement of Resale Price Maintenance in China: A Crusade or Discrimination?*, 42 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1, 14 (2016).

21 *Ibid.* at 17.

Subsequent administrative cases were decided along similar lines. In the *Infant Formula* case of August 2013,[22] multinational formula manufacturers were fined a total of RMB 668 million vertical price fixing and minimum RPM. The National Development and Reform Commission (NDRC) found the practices harmed both competition and consumers.[23] That same year, eyeglasses producers were fined for implementing minimum RPM,[24] but only those with large market shares were investigated and punished. Between 2014 and 2015, a string of penalties was imposed on various car manufacturers for minimum RPM arrangements.[25] In 2016, US medical device manufacturer Medtronic was similarly punished for its agreements with various distributors to restrict prices.[26] There is analysis of effects, referring to harm to competition, consumer harm, market power, high entry barriers. Aggravated by territorial restrictions. Set resale prices, fixed profit margins.[27] Overall, the pre-2018 enforcement decisions appear to suggest that while the agencies examined the context and the consequences of the restrictions, effects would not be required for Article 14 to be breached.

IV. THE SUPREME PEOPLE'S COURT TAKE: YUTAI (2018)

In 2018, the Supreme People's Court had the chance to rule on the compatibility of vertical price restrictions with the AML in *Yutai*.[28] The case arose from an appeal to a penalty imposed in 2015 on the Chinese fish food producer by the Hainan Price Bureau. According to Yutai's agreements with its distributors, the latter would have to abide by the former's pricing guidance, and risked losing beneficial rebates if they did not comply. In the first instance, the court found in favor of Yutai, since it was a small company with little market power, the price restrictions did not have anticompetitive effects.[29] The Hainan Price Bureau appealed, and won both in the Hainan Higher People's Court[30] and in the Supreme People's Court.[31]

The litigation provided a unique opportunity for the Supreme People's Court. Not only did it touch upon an unsettled matter; it also stemmed from a challenge to an administrative penalty. Appeals of AMEAs' decisions remain "a rarity" in Chinese antitrust enforcement.[32] The Supreme People's Court clarified that, as per Article 13 of the AML, monopoly agreements must aim to eliminate or restrict competition. However, this does not equate to requiring an anticompetitive effect. As a consequence, a monopoly agreement may exist irrespective of whether it has caused actual harm. At the same time, the court attempted to reconcile the position of the courts and the AMEAs by explaining that civil liability does require actual damages, and therefore courts are correct to require plaintiffs to prove how the conduct affected them in the context of civil litigation. Yet when it comes to administrative enforcement, it is sufficient to prove the existence of vertical price fixing or minimum RPM to find that a monopoly agreement contrary to Article 14 exists. Effects need not be shown by the antitrust agencies, but undertakings may provide evidence demonstrating that their conduct either did not bear negative effects on competition or meets the requirements for exemption laid down in Article 15 of the AML.[33] The existence of an Article 14 price restraint thus creates a rebuttable presumption of harm, and the burden of proof will be on the companies wishing to refute the illegality of the practice.

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22 NDRC, *RMB 668.73 million penalty on formula producers for restricting competition* (合生元等乳粉生产企业违反《反垄断法》限制竞争行为共被处罚6.6873亿元) (Aug. 7, 2013).

23 Shan Jiang and D. Daniel Sokol, 'Resale Price Maintenance in China: An Economic Perspective' 3 JOURNAL OF ANTITRUST ENFORCEMENT (Suppl. 1), i132, i140-1 (2015).

24 NDRC, *Penalty on Corrective Lenses Producers' RPM Practices* (部分眼镜镜片生产企业维持 转售价格行为被依法查处) (May 29, 2014).

25 Jiangsu Province Price Bureau, *Price Bureau Of Jiangsu Province imposes administrative penalty on Mercedes-Benz for price monopoly* (江苏省物价局对奔驰公司价格垄 断案作出行政处罚) (May 18, 2015); Hubei Provide Price Bureau, *Penalty on FAW-Volkswagen and Audipart distributors in Hubei for price monopoly* (一汽大众销售有限责任公司部分奥迪经销商 在湖北实施价格垄断被处罚) (Sept. 11, 2014); Shanghai Development and Reform Commission, *Penalty on Chrysler and part distributors in Shanghai for price monopoly* (Sept. 11, 2014) (克莱斯勒及上海地区部分经销商实施价格垄断被依法查处); Guangdong Development and Reform Commission, *Penalty on Dongfeng Nissan for price fixing* (东风日产在广东省实施价格垄断被处罚) (Sept. 10, 2015).

26 NDRC, administrative penalty decision, *Medtronic (Shanghai) Management* (Dec. 7, 2016). See also Ken Dai and Jet Deng, *Managing Distribution and Antitrust Compliance in China: Post Medtronic and* GM, COMPETITION POLICY INTERNATIONAL (Feb. 2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/02/Asia-Column-February-Full-1.pdf.

27 Bu, *supra* note 13, at 120; Britton Davis, *China's Anti-Monopoly Law: Protectionism or a Great Leap Forward?*, 33 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 305, 321 (2010).

28 *Yutai, supra* note 5.

29 *Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau*, (2017) Qiong 01 Xing Chu No. 681.

30 *Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau*, (2017) Qiong Xing Zhong No. 1180

31 *Yutai, supra* note 5.

32 Sandra Marco Colino, *The Incursion of Antitrust into China's Platform Economy*, 67 ANTITRUST BULLETIN 237, 249 (2022).

33 See *supra* section II.

V. YUTAI AFTERMATH: AML REFORM AND RECENT DECISIONS

Consistent with the ruling of the Supreme People's Court in *Yutai*,[34] it is now understood that minimum RPM can be considered unlawful by enforcers without the need to prove anticompetitive effects. However, according to the changes introduced in the AML reform that entered into force in August 2022, these practices will not be prohibited in the event that "the undertaking can prove that [the conduct] does not have the effect of eliminating or restricting competition."[35] Moreover, the AML revision opens the door for a safe harbor for vertical agreements when the market share of the parties does not exceed certain thresholds, to be determined by the competition authorities.[36]

Since *Yutai*, administrative decisions appear to follow the Supreme People's Court position. In 2021, Yangtze River Pharmaceutical Group was punished for imposing minimum RPM contractually and informally.[37] It monitored online prices and used threats against distributors not complying with its price The State Administration for Market Regulation ("SAMR") delved into the advantages of maintaining high retail prices for Yangtze River, and the dependence of its distributors on the company given its market power. As is common in administrative enforcement, the relevant market was not defined. Despite the detailed analysis, the SAMR rejected Yangtze River's claim that effects would need to be proven, and imposed a RMB 764 million fine. Relying on Yutai, it stated that these practices are prohibited in principle by the AML, and Yangtze River had failed to show the application of any Article 15 exceptions. Moreover, the pharmaceutical company had not demonstrated that its actions a) would not restrict competition in the market, and b) would allow consumers to participate in any potential benefits. The penalty imposed represents 3 percent of the company's revenue.

The above position affirms the uniqueness of Chinese competition law. The rule of reason analysis applied in the United States since the US Supreme Court's *Leegin* judgment has been rejected in the context of administrative enforcement, but may be relevant in civil litigation for the award of damages.[38] The Chinese approach appears to be more consistent with that of the European Union's, which considers vertical price fixing and minimum RPM inherently harmful in the absence of an exception (which would need to be demonstrated by the parties). However, rather than showing that the practice bore no effects, in the EU the undertakings are required to prove that any anticompetitive effects would be justified by the existence of efficiencies, meeting the conditions laid down in Article 101(3) of the Treaty on the Functioning of the European Union ("TFEU").[39]

VI. CONCLUSION

The Supreme People's Court 2018 *Yutai* judgment and the amendment of the AML implemented in 2022 have helpfully clarified the legal framework applicable to vertical price restraints in China. Following these developments, it appears that "prohibition in principle plus exemption" means that vertical price fixing and minimum RPM can be considered unlawful without the need for antitrust agencies to show effects. At the same time, companies have been afforded the opportunity to demonstrate the absence of effects, which could lead to a finding of compatibility with Article 14 of the AML. The kind of evidence that will be accepted as proof of absence of effects is unclear, since no company has to date been successful in reverting the presumption of illegality of these restrictions.

The resulting legal landscape enables enforcers to punish vertical price restraints without the need to enter into complex effects analysis, and eschewing relevant market definition. As a consequence, it should allow the AMEAs to tackle the negative consequences associated with these restrictions. In the context of private litigation however, plaintiffs will still need to prove harm to be awarded damages.

34 *Yutai, supra* note 4.

35 AML reform, *supra* note 4.

36 *Ibid.*

37 SAMR, Administrative Penalty Decision (2021) No. 29, *Yangtze River Pharmaceutical Group.*

38 *Leegin Creative Leather Products Inc. v. P.S.K.S. Inc.* (2007) 127 U.S. 2705, 2719. It should be noted that some US states still treat minimum RPM as being per se illegal.

39 Treaty on the Functioning of the European Union [2012] OJ C326/47.

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

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I. INTRODUCTION

Like many other antitrust authorities worldwide, the Brazilian competition agency ("CADE") has been devoting increasing attention to vertical agreements in digital markets, including, *inter alia*, exclusivity clauses practiced by online platforms.

Antitrust enforcement in digital markets requires a cautious approach to avoid type 1 errors (overenforcement) that could discourage innovation and other benefits to consumers. Such a careful assessment to balance the pro and anticompetitive effects of a given practice in a digital environment may lead to longer fact-finding investigations and a thorough review of market conditions and the parties' activities, business models and incentives. However, the fast-changing nature of digital markets also calls for quick responses, or else antitrust enforcement may be rendered ineffective, leading to type 2 errors (underenforcement), resulting in *market tipping* or other distortions.

As suggested by the OECD,[2] in certain circumstances, interim measures may be interesting enforcement tools to deal with this dilemma, to the extent that they enable some level of intermediate intervention before the conclusion of an antitrust probe. Nonetheless, the design of an interim measure in the context of digital markets may be especially challenging, as it naturally demands that the authority makes relevant decisions without in-depth knowledge on the investigated conduct or even on the market itself.

Under the Brazilian Competition Law, CADE may rely on interim measures to cease potentially anticompetitive conducts while further investigation takes place. By doing so, the authority shall take into account: (i) whether the alleged conduct may possibly be deemed illegal (*fumus boni iuris*); and (ii) whether the perpetuation of the conduct may entail significant competitive harm if no immediate action is taken by CADE (*periculum in mora*). CADE also considers whether the intervention itself may generate irreversible impact to the investigated party or to the market (reverse periculum in mora).

In the last two years, CADE granted its first interim measures in antitrust probes related to digital platforms: one against iFood, a platform for intermediation of online food delivery orders; and another against Gympass, an aggregator of fitness centers. Both cases involve allegedly anticompetitive platform exclusivity agreements and other vertical restrictions, signaling a trend of preliminary antitrust intervention in Brazil in early stages of investigations on vertical agreements involving dominant online platforms.

II. *IFOOD* CASE

iFood is a platform for intermediation of online food delivery orders headquartered in Brazil. Founded in 2011, the company is a pioneer in the online food delivery market in Brazil and a market leader ever since.

In February 2021, CADE launched an antitrust probe against iFood following complaints filed by Abrasel, a Brazilian association of bars and restaurants; and Rappi, a competing platform for intermediation of online food delivery orders.[3] The complainants argued that iFood abused its market power in the Brazilian online food delivery market by imposing exclusivity obligations to a wide range of partner restaurants and engaged in discriminatory practices favoring exclusive over non-exclusive partners. According to the complainants, the practice entailed market foreclosure, increased entry barriers to competing platforms by preventing multihoming and increased switching costs due to large fines for the termination of the exclusivity arrangements.

In light of these alleged anticompetitive practices, the complainants requested the imposition of interim measures determining the immediate suspension of all exclusivity obligations on restaurants in its platform, and that iFood should be prohibited to take any discriminatory action against partner restaurants that were not subject to exclusivity clauses.

In the course of the investigation, CADE's Superintendence-General ("GS") found that iFood enjoyed a dominant position with a significant market share (up to 86 percent, according to data provided by Abrasel). Based on the public case files, only a limited portion of its partner restaurants were subject to exclusivity arrangements, although the exact figures were kept confidential. Nonetheless, the GS considered that the practice potentially entailed market foreclosure, especially given that iFood's exclusive coverage included strategic restaurants and food chains that could increase the attractiveness of rival platforms and potential entrants, should they be able to enlist them on their platforms as well. In

2 OECD, *Interim Measures in Antitrust Investigations* (2021), https://www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations-2022.pdf.

3 Administrative Inquiry No. 08700.004588/2020-47 (Plaintiffs: Associação Nacional de Restaurantes – ABRASEL and Rappi Brasil Intermediação de Negócios Ltda.; Defendant: iFood.com Agência de Restaurantes Online S.A.).

addition to that, the duration of the exclusivity clauses (which was kept confidential), prior notice obligations and the establishment of contractual fines for exclusivity breach increased switching costs that could hinder competitors' growth. According to the GS, such restrictions to competition could be particularly harmful given that iFood, a first mover and dominant player in the Brazilian online food delivery market, was already better positioned to enjoy the rapid expansion of the market than its rivals. In fact, the competing platform Uber Eats exited the market in the course of GS's investigation, despite market growth.

In contrast, iFood argued that the interim measure requested by the plaintiffs would entail unpredictable consequences given the uncertain and fast-changing dynamic of the Brazilian online food delivery market. According to iFood, strategic platform exclusivity provided incentives to invest in the company's partners while avoiding free riding behavior. Without exclusive obligations, iFood argued that it would not have the operational and financial capacity to protect its investments in benefits granted to restaurants, leading to a natural decrease in spendings with partners enlisted in its platform. Competing platforms, in their turn, would be able to employ less efficient commercial conditions to capture exclusive partnerships as a result of the proposed preliminary intervention.

In March 2021, CADE's GS adopted an interim measure partially granting the plaintiffs' requests, by determining that the platform would be allowed to maintain all exclusivity agreements in place (which could be renewed for subsequent periods of up to one year each), but should be prohibited to execute new exclusivity agreements with any other partner restaurants. As such, it restrained the expansion of the practice, freezing new contracts, without interfering in the alleged incentives for iFood's investments in existing contracts. This interim decision was not appealed before CADE´s tribunal and remains in force, as the investigation continues.

III. *GYMPASS* CASE

Gympass is a digital platform that operates as an aggregator of fitness centers, offering subscriptions to corporate customers interested in providing their employees access to partner gyms. Founded in 2012 and headquartered in Brazil, the platform is a pioneer and market leader in the Brazilian market for aggregators of fitness centers.

In September 2020, CADE launched an antitrust probe against Gympass following a complaint filed by TotalPass, a competing aggregator of fitness centers that owns a leading fitness chain in Brazil.[4] TotalPass argued that Gympass distorted competition by (i) imposing exclusivity obligations to all partner fitness centers and to a portion of its corporate customers, inhibiting multihoming in the two sides of its platform; and (ii) establishing most favored nation ("MFN") clauses with some partner gyms, preventing them from charging different prices in other sales channels. As such, TotalPass requested the imposition of an interim measure determining the immediate suspension of all default exclusivity clauses imposed by Gympass to fitness centers and corporate customers, as well as the suspension of all MFN obligations in relation to the prices offered by gyms outside the platform.

Similarly to the *iFood Case*, the GS assessed the extension of market foreclosure imposed by Gympass and the duration and renewal conditions of exclusivity clauses *vis-à-vis* their economic justification. CADE's GS found that Gympass held a dominant position and enlisted up to approx. 80-90 percent of the gyms in Brazil, applying exclusivity obligations by default for indefinite term. In GS's view, this would lead to extensive market foreclosure, as only a small portion (less than 20 percent) of gyms would be available to be enlisted in competing platforms. Considering that the economies of scale of this business model depend on vast cross-sided network effects and the attractiveness of aggregators of fitness centers depend, to some extent, on a broad geographic coverage available on the platform, this could render market entry and competitors' growth unfeasible.

Gympass argued that the economic rationale underlying the exclusivity contracts related to enhancing user experience and avoiding free rider behavior in its investments on gyms. In a preliminary assessment, the GS understood that there was no evidence of direct investments in each partner gym to justify platform exclusivity and that the foreclosure of all gyms enlisted was not justifiable by diffuse investments made by the platform.

In December 2021, the GS partially agreed with the plaintiff's request and granted an interim measure inspired in the iFood Case, pursuant to which Gympass should be allowed to maintain the agreements in place or in final stages of negotiation, but should be prohibited to execute new exclusivity contracts with fitness centers and enforce quarantine obligations. Also, all MFN clauses related to prices outside the platform should be suspended. According to the GS, this was a transitory intervention while negotiations of remedies to settle the case were already in course.

4 Administrative Inquiry No. 08700.004136/2020-65 (Plaintiff: Total Pass Participações Ltda.; Defendant: GPBR Participações Ltda.).

TotalPass appealed this decision to CADE's Tribunal.[5] In February 2021 the Tribunal overruled the GS's decision and, by a majority vote, significantly broadened the interim measure to limit the platform's exclusive coverage to cases in which Gympass injected direct investments in the gym's infrastructure and other capital goods, arguing that the GS's decision would endorse the existing substantial level of market foreclosure indefinitely and there was no legitimate economic reason for imposition of platform exclusivity contracts with all gyms in its portfolio.

IV. RATIONALE OF INTERIM MEASURES AGAINST EACH EXCLUSIVITY ARRANGEMENT BY DIGITAL PLATFORMS

The interim decisions issued by CADE in the *iFood* and *Gympass* cases establish a similar theory of harm, pursuant to which the market foreclosure entailed by exclusivity clauses in one side of the platform was found to potentially harm competition among platforms, increase entry barriers and raise rivals' costs.

On both cases, the preliminary assessment of competitive harm considered specific features of the online platform environment that could aggravate these negative effects. iFood and Gympass were first movers in their respective markets and secured a wide range of business partners (restaurants and gyms, respectively) on one end and consumers on the other, enjoying significant cross-sided network effects in markets that favor market tipping. Should the incumbents be free to expand their exclusive footprint, GS understood that they would substantially limit the scale and attractiveness of competing platforms and potential entrants.

It should be noted, however, that iFood and Gympass presented very different footprints of exclusivity agreements. iFood had a market share above 80 percent in some accounts, but, according to the public case files, only a reduced portion of its portfolio was subject to exclusivity clauses. Gympass, in its turn, held a market share of approx. 80-90 percent and allegedly made use of exclusivity clauses by default in all contracts with gyms and fitness centers.

In addition, different foreclosure concerns arose given specific market characteristics in each investigation. Upon assessing the obstacles imposed on competitors and entrants due to the exclusivity arrangements, CADE found that competing online food delivery platforms needed access to key must-have restaurants and food chains to provide an attractive service to end consumers, whereas this was not the case for aggregators of fitness centers. Rather, the attractiveness of a fitness platform to its corporate consumers (and their employees) is directly related to having a broad geographic coverage of gyms in each city or neighborhood in which it is active. Hence, competing platforms may need access to a larger portion of the market to succeed when compared with online food delivery platforms, which, in their turn, need access to attractive partners that increase interest of users on the other side of the platform, but not necessarily a significant portion of the market.

The *iFood* and *Gympass* cases also entailed distinct considerations on switching costs. According to CADE's GS, iFood imposed prior notice obligations and large fines to partner restaurants for early termination, whereas Gympass did not impose fines on gyms that would exit their portfolio, but subjected them to a quarantine period in which they would be prevented from joining rival platforms. In the context of preliminary intervention, however, the GS found that the two investigated conducts were deemed to artificially increase switching costs to the platforms' partners in a context in which, absent platform exclusivity, multihoming would have been possible and potentially desirable for trading partners and customers.

Despite relevant different features found in the *iFood* and *Gympass* cases, CADE's GS granted rather similar interim measures with respect to platform exclusivity arrangements, allowing the maintenance of all exclusivity agreements in place and prohibiting new agreements of this kind. In practice, the GS froze the expansion of the exclusivity coverage until the final ruling of the matters, averting the aggravation of the potential effects of the alleged infringement.

The fact that GS avoided inflicting significant changes in the business models of the defendants indicates that it may feel compelled to take action in early stages of investigations involving digital markets, but tends to adopt a cautious approach in the context of preliminary antitrust enforcement. It also demonstrates that, to some extent, the GS acknowledged that the exclusivity business models practiced by iFood and Gympass could potentially lead to some procompetitive benefits in the protection of the platforms' investments against free riding effects.

In the *Gympass Case*, while overruling the GS's decision, CADE's Tribunal considered that the conduct was potentially harmful to competition and Gympass's widespread exclusivity partnerships should be prohibited, absent a valid economic rationale for the practice. The interim measure that prevailed conditioned exclusivity clauses to specific investment in the fitness centers, concluding that platform exclusivity could

5 Voluntary Appeal No. 08700.007228/2021-88 (Plaintiff: Total Pass Participações Ltda.; Defendant: GPBR Participações Ltda.).

only be used to protect these investments from free riding behavior and nothing else. By suspending a large part of the practice and requiring justification for any exclusivity clause, CADE's Tribunal indicated that it may be willing to inflict more significant changes to a digital platform's business model than the GS.

Although Gympass made use of broader exclusivity arrangements than iFood, which could justify a stricter restriction, one may argue whether CADE's Tribunal strict approach was really necessary under the terms of an interim measure, as it disrupted a large number of contracts without any detailed analysis and, according to the GS, settlement negotiations were already in course.

Another point that deserves a closer look is the requirement of specific investments in concrete assets to justify exclusivity clauses. This seems to disregard other potential investments (cash investments, publicity etc.) in long term partnerships with gyms and generates incentives towards only a single type of direct investments out of the multiple potential investments that a platform could choose from to promote its ecosystem and/or trading partners. This can be problematic, as the antitrust authority is rarely in a suitable position to decide which investment options of a company are optimal to enhance a procompetitive environment – especially in the context of a preliminary decision, even more so when dealing with digital platform markets.

V. CONCLUSION: TRENDS AND LESSONS FROM THE BRAZILIAN EXPERIENCE

The precedents involving iFood and Gympass show that CADE may be more inclined to enforce interim measures in antitrust probes involving vertical agreements entered into by digital platforms. Even though these are only two decisions, they point to similar concerns about digital markets.

This enforcement trend implies that the authority acknowledges the dynamic nature of digital markets and that quick reactions may be required to preserve competition, especially when concerns with market tipping and consolidation of first mover advantages are on the table. Indeed, interim measures can be important enforcement tools in platform markets with digital features, although the actual scope and intensity of such preliminary intervention on a specific case can be subject to debate. Moreover, the assessment of the suitability of an interim measure also requires additional thought on the use of scarce resources to achieve optimal enforcement levels in an environment of dynamic nature in which uncertainty is ubiquitous.

Given the unpredictability factor in preliminary antitrust intervention in early stages of investigations, there is always some risk of overenforcement. As argued above, the severe restrictions imposed by CADE's Tribunal in the *Gympass Case* may be an example of this, as the interim measure that prevailed narrowed the acceptable protection through platform exclusivity arrangements to only one out of multiple investment options and other potential benefits that could be generated by the aggregator of fitness centers.[6]

With the risk of overenforcement in mind, CADE should be able to monitor the actual effects of the interim measures imposed and amend or adjust its preliminary decisions overtime[7] to ensure that they are specifically tailored to inhibit the occurrence or aggravation of actual or potential competitive harm that may not be restored or that would render the outcome of the investigation ineffective. Otherwise, harsh interim measures may negatively affect the development of new markets and new market players and inhibit innovation and disruption as a whole before a final and reasoned ruling, to the expense of consumers. CADE will likely be incited to address these challenges more often, as well as all other competition agencies worldwide.

6 Gympass settled the case shortly before the publishing of this paper in September 2022. In fact, the restrictions on exclusivity clauses under the settlement agreement entered into by Gympass were quite less strict than under the interim measure adopted by CADE's Tribunal.

7 Filippo Lancieri & Caio Mario S. Pereira Neto, *Design Remedies for Digital Markets: The Interplay Between Antitrust and Regulation*, Journal of Competition Law and Economics (2021) at 30.

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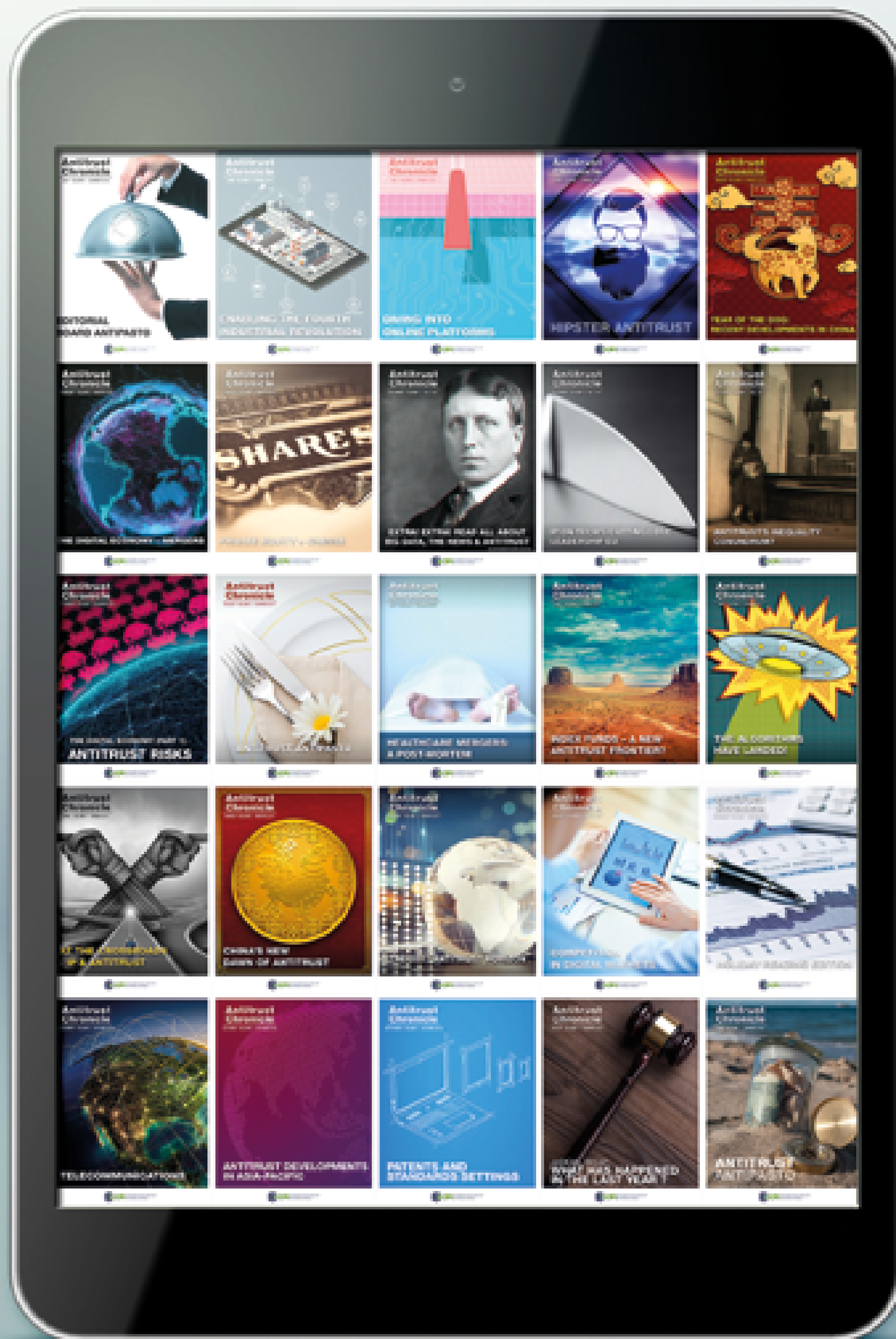

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