

EC Seeks Comments on Draft Revised Distribution Rules

July 22, 2021

The European Commission (“EC”), on July 9, 2021,¹ published its long-anticipated proposed update of the Vertical Block Exemption Regulation² (“VBER”) and the corresponding draft Vertical Restraints Guidelines (“Vertical Guidelines”)³ for public consultation and comment by September 17, 2021.⁴ This is an important milestone in the EC’s VBER evaluation process that commenced in October 2018 and is set to conclude by May 31, 2022, when the current VBER expires. While the EC may still make adjustments to the existing drafts to reflect public comments, we anticipate most of the proposed changes will be incorporated in the final regulation and guidelines.

The draft updated VBER and Vertical Guidelines make a number of important adjustments to the existing rules, in part to reflect the significant growth in online sales by manufacturers directly and through online intermediation services. This Alert Memorandum provides an overview of the proposed changes and their potential impact, with the key adjustments summarized in the following table:

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¹ See EC Press Release, “[Commission invites interested parties to provide comments on draft revised Vertical Block Exemption Regulation and Vertical Guidelines](#),” July 9, 2021 (“EC Press Release”).

² See [Draft Revised VBER](#).

³ See [Draft Revised Vertical Guidelines](#).

⁴ The EC invites contributions from citizens, organizations, and public authorities, to be submitted electronically via its website. See [Public consultation on the draft revised Regulation on vertical agreements and vertical guidelines](#).



Area of Exemption	Current VBER	Draft Revised VBER
Sales Restrictions	Block exemption covers: <ul style="list-style-type: none"> • Restriction on active sales to a territory or customer group reserved to the supplier or a single exclusive distributor; • Restriction on selective distributors' sales to unauthorized distributors within a selective distribution system; • Restriction on wholesalers' sales to end-users; and • Restriction on buyers' sales of components to customers who would use them to manufacture the same type of goods as those produced by the supplier if such components are supplied to buyers for incorporation. 	In addition, block exemption also applicable to: <ul style="list-style-type: none"> • Restriction on active sales to a territory or customer group reserved to a limited number of semi-exclusive distributors (<i>i.e.</i>, to more than one exclusive distributor); • Passing-on of an active sales restriction to downstream distributors; and • Restriction on exclusive and free distributors' active and passive sales to unauthorized distributors within a selective distribution system.
Online Sales Restrictions (e.g., dual pricing)	No exemption.	Block exemption applies where restriction or dual pricing system is reasonably necessary to incentivize investments and reasonably relates to the costs incurred for each distribution channel.
Dual Distribution (supplier competing with distributor downstream)	Not specifically addressed.	Qualifies for block exemption, <i>except</i> in relation to: <ul style="list-style-type: none"> • Reciprocal vertical agreements; • Online intermediation services; • Information exchanges between parties with a combined retail share >10%; and • Vertical agreements that have the object of restricting competition between a competing supplier and buyer.
Parity/Most Favored Nation clauses	Not specifically addressed.	Qualifies for block exemption, <i>except</i> wide retail MFNs.

Background and Context

From their entry into force in 2010, the [current Vertical Block Exemption Regulation](#) and [Vertical Guidelines](#) have been essential points of reference for businesses to self-assess whether vertical arrangements (including resale and distribution agreements) are compatible with the prohibition on anticompetitive restraints under Article 101 TFEU (“**Treaty on the Functioning of the European Union**”). Their analytical framework is based on two main pillars:

- Vertical agreements are likely to be pro-competitive and should thus be shielded from the

application of Article 101 TFEU provided the parties' relevant market shares do not exceed 30% and the agreements do not contain any “hardcore” restrictions, particularly resale price maintenance and territorial or customer resale restrictions, or long-term non-compete clauses; and

- Vertical agreements that do not meet these cumulative conditions are not presumed illegal, but require an individual assessment under Article 101 TFEU.

Notwithstanding their importance as a reference point, technological, market, and enforcement

developments over the past decade have made the existing vertical rules ripe for revision. For example, the EC's 2017 [Final Report on the e-commerce sector inquiry](#)⁵ (“E-Commerce Report”) noted the dramatic increase in share of retail sales made on the internet since 2010, and the pervasiveness of online marketing tools such as virtual marketplaces, price comparison websites, and online advertising. The E-Commerce Report highlighted several issues that it concluded were insufficiently addressed in the current VBER, including in relation to retail price maintenance, dual pricing, and territorial restrictions.

In preparation for the expiry of existing rules in 2022 and also precipitated by a number of enforcement actions,⁶ the EC launched an extensive public “evaluation and fitness check” of the VBER in October 2018.⁷ The results of the evaluation (which included input from market participants, national competition authorities, and other stakeholders) were summarized in a September 2020 report outlining the VBER's strengths and weaknesses and making a number of recommendations for improvements.⁸ The EC has now sought to address that report's recommendations in the current draft revised VBER and Vertical Guidelines, with three particular objectives at the forefront:⁹

- The need to adapt the “safe harbor” (or block exemption) to account for dual distribution, parity obligations, broader active sales restrictions, and online sales restrictions;
- The need to adapt the vertical rules to reflect technological and market developments, notably the increase in online sales and emergence of

new sales platforms, and difficulties brick-and-mortar outlets face in competing with online platforms; and

- Simplifying and clarifying the analytical framework for vertical rules to reduce compliance costs.

Limited Fundamental Changes to the Vertical Analytical Framework

Very much in line with the current Vertical Block Exemption Regulation, the EC's proposed draft documents continue to provide for a safe harbor (or block exemption) for all vertical arrangements that: (i) do not contain what are referred to as “hard-core” restrictions; and (ii) do not fall within the scope of any other block exemption regulation; on condition that (iii) the relevant market shares of each of the buyer and the seller do not exceed 30%.

Subject to the revisions and exemptions discussed below, the draft revised VBER continues to mention a number of “hard-core” restrictions that deprive an agreement from the protection of the block exemption:

- Resale price maintenance;¹⁰
- Passive (and in certain cases also active) resale restrictions that, directly or indirectly, have the object of restricting the territory into which, or of the customer groups to whom, the buyer (*i.e.*, distributor) may sell products or services (subject to the exceptions listed at the end of this memorandum);¹¹

⁵ The Report is accompanied by an [EC Staff Working Document, Accompanying the document Report from the EC to the Council and the European Parliament Final report on the E-commerce Sector Inquiry](#), May 5, 2017, COM(2017) 229 final.

⁶ See, e.g., Case AT.40428 *Guess*, where the EC fined clothing company Guess €40 million for the practice of “geo-blocking,” *i.e.*, restricting retailers from online advertising and cross-border sales to consumers in other Member States. See also Case AT.40023 *Crossborder access to Pay-TV*; Cases AT.40465 *Asus*, AT. 40469 *Denon & Marantz*, AT.40181 *Philips*, AT.40182 *Pioneer (retail price agreements)*; Case AT.40528 *Meliá (holiday pricing)*; and Cases AT.40413 *Focus Home*, AT.40414 *Koch Media*,

AT.40420 *ZeniMax*, AT.40422 *Bandai Namco*, and AT.40424 *Capcom (video games)*.

⁷ [EC Press Release](#).

⁸ [EC Staff Working Document, Evaluation of the Vertical Block Exemption Regulation](#), September 8, 2020, SWD(2020) 173 final.

⁹ [EC Press Release](#).

¹⁰ See also [Draft Revised Vertical Guidelines](#), paras. 170, 176, and 178.

¹¹ Subject to permissible dual pricing and online sales restrictions. See below section on ‘Dual Pricing and Other Protections of Brick-and-Mortar Sales’.

- Restrictions on a component supplier’s ability to sell components as spare parts to end-users or to repairers or other service providers not entrusted by the component buyer with the repair or servicing of its goods.

The draft revised VBER also maintains a list of “excluded restrictions” that do not benefit from the block exemption: (i) any non-compete obligation that is indefinite or exceeds five years; (ii) any post-termination restriction on manufacture, purchase, sale or resale of goods or services; (iii) any ban on members of a selective distribution system selling brands of particular competing suppliers; and (iv) broad MFN clauses (prohibiting sellers from offering more favorable conditions on competing platforms).

The draft revised VBER continues to differentiate between three distribution models to which the safe harbors may apply: (i) exclusive distribution;¹² (ii) selective distribution;¹³ and (iii) other distribution systems (referred to as “free distribution”).¹⁴

As described below, the primary changes to the existing rules relate to **dual distribution, Most-Favored-Nation (“MFN” or pricing parity) clauses, dual pricing and other protections of brick-and-mortar sales, online customer and territorial resale restrictions, online intermediation services and agency, and broader**

exemption for resale restrictions in exclusive and selective distribution models.

Dual Distribution

The current VBER allows for the block exemption to apply even where a manufacturer directly sells its product to end-customers in competition with its distributors downstream (also known as “dual distribution”).¹⁵

Manufacturers are increasingly competing directly in the retail space using their own online shops or online marketplaces. Large hybrid platforms (such as Amazon) have begun selling not only their own products but also those of third parties.¹⁶ These developments have increased the instances of horizontal competition between manufacturers and their distributors, and made the retention of the dual distribution exemption a contentious issue during the consultation procedure. The EC indeed noted that “*the current exception for dual distribution is likely to exempt vertical agreements [from scrutiny] where possible horizontal concerns are no longer negligible.*”¹⁷

To account for this concern, the draft revised VBER introduces a number of changes in relation to vertical agreements between companies who are also competitors:

¹² Article 1(g) of the [Draft Revised VBER](#) for the first time introduces a definition of an exclusive distribution system as “*a distribution system where the supplier allocates a territory or customer group exclusively to itself or to one or a limited number of buyers, determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts, and restricts other buyers from actively selling into the exclusive territory or to the exclusive customer group.*”

¹³ A selective distribution system is already a defined term in the current VBER. Under a selective distribution system, a supplier agrees to supply only distributors selected on the basis of specified qualitative and/or quantitative criteria. Purely qualitative selective distribution is generally considered to fall outside Article 101(1) TFEU if it meets the three conditions set out by the Court in Case 26/76 *Metro v Commission* EU:C:1877:100). First, the

nature of products or services require a selective distribution system (e.g., for high-technology, high-quality, or luxury goods). Second, resellers are chosen on the basis of objective criteria of a qualitative nature, applied in a uniform and non-discriminatory manner. Third, the criteria must be limited to what is necessary to operate the distribution system.

¹⁴ A detailed assessment for each distribution model is provided in paras. 203–224 of the [Draft Revised Vertical Guidelines](#).

¹⁵ Or in case of services, where the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services. See [Draft Revised VBER](#), Article 4(b).

¹⁶ [Explanatory Note](#), page 2.

¹⁷ [Explanatory Note](#), page 2.

- It eliminates the safe harbor for agreements between sellers and online platforms (providers of online intermediation services¹⁸) that sell goods or services in competition with the sellers relying on the platform.¹⁹ With regard to online intermediation services in particular, the EC is also expected to supplement the draft revised Vertical Guidelines with “*specific rules and guidance relating to the platform economy.*”²⁰
- In other non-reciprocal dual distribution scenarios, a full exemption applies where the parties’ combined market share at the retail level is below 10%. This is consistent with the general *de minimis* threshold that the EC applies to horizontal cooperation agreements,²¹ but inconsistent with the 15% threshold applied to commercialization agreements between competitors.²² Above the 10% ceiling, provisions on “*any information exchanges*” are excluded from the block exemption of dual distribution agreements (including in particular exchanges by a manufacturer and distributor concerning downstream customers, sales prices or volumes, or marketing strategies).²³ Applying this rule may prove difficult in practice as some level of information exchanges are likely to be inevitable in a distribution arrangement. The EC may, however, provide further guidance on horizontal and vertical information exchanges in situations of dual distribution in its upcoming

draft revised horizontal guidelines, which are currently under review (and are expected to be released later this year).

- The draft revised VBER extends the dual distribution exemption beyond manufacturers to also cover wholesalers and importers, but *only* to the extent the buyer does not compete with the supplier at the manufacturing, wholesale, or import level.²⁴ Unfortunately, the EC’s proposal, at least at this stage, does not define “wholesaler” or “importer” and does not clarify the difference between a wholesaler and a distributor in this context.

MFN Clauses

MFN clauses (referred to as parity obligations in the draft revised Vertical Guidelines) require a party to offer the same or better conditions to its counterparty than those it offers in any other sales or marketing channel (*e.g.*, other platforms) or via the party’s direct sales channel (*e.g.*, its own website).²⁵ The EC lays out three types of MFNs:²⁶

- **Retail MFNs** – imposed by suppliers of online intermediation services (such as marketplaces or price comparison tools), requiring sellers to offer the same or better conditions on the intermediation service’s platform for goods or services sold to end users (final consumers or

¹⁸ As defined in the Platform-to-Business Regulation ([Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services](#)).

¹⁹ [Draft Revised VBER](#), Article 2(7).

²⁰ See [EC Press Release](#).

²¹ See [EC Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD\(2014\) 198 final](#), para. 8(a), according to which, agreements between actual or potential competitors with an aggregate market share below 10% in any of the affected markets are considered not to appreciably restrict competition within the meaning of Article 101(1) TFEU.

²² See [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements](#), para. 240.

²³ [Draft Revised VBER](#), Articles 2(4) and 2(5).

²⁴ [Draft Revised VBER](#), Article 2(4).

²⁵ See [Draft Revised Vertical Guidelines](#), paras. 238 and 333; [Explanatory Note](#), p. 3. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The MFN obligation may be express, or it may be applied by other direct or indirect means, including the use of differential pricing or other incentives or measures whose application depends on the conditions under which the buyer of the online intermediation services offers goods or services to end-users using competing suppliers of online intermediation services.

²⁶ See [Draft Revised Vertical Guidelines](#), paras. 239 and 334.

other end-users) as the seller offers directly or in other channels.

- **Non-Retail MFNs** – imposed by suppliers of online intermediation services, requiring sellers to offer the same or better conditions on the intermediation service’s platform for goods or services sold to companies that are not end users (such as retailers) as the seller offers directly or in other channels.
- **Input MFNs** – imposed by manufacturers, wholesalers or retailers on their suppliers, requiring the suppliers to provide inputs at the same or better conditions as those offered to other manufacturers, wholesalers or retailers.

In addition, MFNs may also be categorized by sales channel:²⁷

- **Narrow MFNs** – relate to direct sales channels (*i.e.*, an obligation on a supplier/reseller to offer the same (best) terms it offers on its direct sales channel).
- **Wide MFNs** – relate to both direct and indirect sales channels (*i.e.*, an obligation on a supplier/reseller to offer the same (best) terms it offers to all other buyers regardless of the sales channel).

All MFNs qualify for exemption under the existing VBER provided each of the parties’ relevant market share does not exceed 30% and the other criteria for exemption are met. This application of the block

exemption to MFNs has become contentious. That is the case in particular with regard to wide retail MFNs, which have faced intense scrutiny over the past decade both by the EC and national competition authorities, in particular in Germany, UK, and France (focusing primarily on e-commerce and price comparison tools and online booking platforms).²⁸ Most notably, a series of national antitrust cases were brought against Booking.com’s wide retail MFN clauses preventing hotels from posting lower prices on rival hotel booking portals.²⁹ The primary concern with these clauses has been that wide MFNs discourage suppliers from discounting on any channels for fear they will need to apply the same discount in all channels.

Reflecting this concern, the draft revised VBER adjusts the safe-harbor by removing *wide retail MFNs* from the benefit of the block exemption:³⁰

*“The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements: [...] (d) any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services.”*³¹

Consequently, wide retail MFN clauses will need to be assessed individually under Article 101 TFEU. The draft revised Vertical Guidelines provide a framework to assist parties in making this

²⁷ See [Draft Revised Vertical Guidelines](#), para. 335.

²⁸ *HRS-Hotel Reservation Service Robert Ragge GmbH*, Decision B.9 – 66/10, Bundeskartellamt Decision of 20 December 2013; *E-books*, Case COMP/AT.39847, EC Decision of 12 December 2012; *Amazon Marketplace*, Decision B6 – 46/12, Bundeskartellamt Decision of 26 November 2013; *Amazon Marketplace*, Case CE/9692/12; *Private motor insurance market investigation*, CMA Final Report of 24 September 2014; *Hotel online booking*, CE/9320/10, OFT Decision of 16 September 2015; *E-book MFNs and related matters (Amazon)*, Case COMP/AT.40153, EC Decision of 4 May 2017; and *ComparetheMarket Ltd*, Case 50505, CMA Decision of 19 November 2020.

²⁹ In April 2015, the French, Italian and Swedish NCAs (coordinated by the EC) found Booking.com’s wide MFN clauses to be anticompetitive. The three NCAs accepted commitments from Booking.com to replace

wide with narrow MFNs (*see Booking.com and Expedia*, Decision 15-D-06, Autorité de la concurrence, Decision of 21 April 2015; *Booking.com*, Autorità Garante della Concorrenza e del Mercato Decision of 21 April 2015; *Booking.com*, Decision 596/2013, Konkurrensvetket Decision of 15 April 2015). Booking.com subsequently extended these commitments to the German FCO as well. However, the FCO nevertheless continued its proceedings against Booking.com and ultimately prohibited the use of narrow MFNs, as upheld by the Federal Court of Justice on May 18, 2021.

³⁰ The wide retail MFNs were added to the list of “excluded restrictions” in Article 5 [Draft Revised VBER](#) that do not benefit from the block exemption.

³¹ See Article 5.1(d) of the [Draft Revised VBER](#).

assessment in paragraphs 337 to 345. In particular, the Vertical Guidelines call on businesses to consider two primary types of harm that may be caused by wide retail MFNs:³² (i) softening competition and/or facilitation of collusion between suppliers of online intermediation services;³³ and (ii) foreclosing entry to or expansion of new or smaller suppliers of online intermediation services, by restricting their ability to offer buyers and end-users differentiated price-service combinations. These concerns “*will generally be most severe where [the wide retail MFNs] are used by one or more leading suppliers of online intermediation services.*”³⁴

Conversely, narrow retail MFNs, non-retail MFNs, and input MFNs may continue to benefit from the block exemption under the draft revised VBER as long as the market shares of the supplier and buyer do not exceed 30%.³⁵ If at least one of the parties has a market share above 30%, these MFN clauses will also need to be assessed individually under Article 101 TFEU, reflecting the analytical framework now provided in paragraphs 346 to 350 of the draft revised Vertical Guidelines. The most common pro-competitive justification for MFNs generally is that they help businesses overcome a “free-rider” problem, *i.e.*, online or other intermediation services being discouraged from investing in the development of their platform, pre-

sales services or demand-enhancing promotions, if these investments benefit competing platforms or direct sales channels offering more favorable conditions. Other pro-competitive justifications could include the pooling of suppliers’ promotional expenditures, and increased price transparency or reduced transaction costs.³⁶

The draft revised Vertical Guidelines highlight that narrow retail MFNs are more likely to be defensible on these grounds than wide retail MFNs.³⁷ The key factors in that assessment are: (i) whether the investments by the supplier of online intermediation services provide objective benefits by adding value for consumers; (ii) whether the risk of free-riding is real and substantial; and (iii) whether the particular type and scope of the MFN obligation is indispensable to achieve the objective benefits.³⁸

While the draft revised Vertical Guidelines generally allow narrow retail MFNs, even narrow MFNs may face some continued scrutiny. A recent judgment by the Federal Court of Justice in Germany (“**FCJ**”) found that narrow retail MFNs used by Booking.com were anticompetitive and unjustifiable.³⁹ The FCJ saw them as unnecessary ancillary restraints, *i.e.*, restrictions not directly related and necessary to achieve the objectives of the brokerage agreement

³² See [Draft Revised Vertical Guidelines](#), para. 337. Wide retail MFNs are referred to as “*across platform retail parity obligations.*”

³³ It is more likely that a supplier which imposes this type of MFN obligation will be able to raise the price or reduce the quality of its intermediation services without losing market share. Irrespective of the price or quality of its services, sellers of goods or services which choose to use its platform are obliged to offer conditions on the platform that are at least as good as the conditions they offer on competing platforms.

³⁴ See [Draft Revised Vertical Guidelines](#), para. 341. The antitrust assessment of wide retail MFNs depends on the following key factors: (i) the share of buyers of the online intermediation services that are covered by the MFN obligation; (ii) how many intermediary platforms are used by buyers of the online intermediation services and end-users; (iii) the market position of the supplier that imposes the MFN obligation and of its competitors; (iv) the existence of

barriers to entry to the relevant market for online intermediation services; and (v) the impact of direct sales by buyers of online intermediation services (see [Draft Revised Vertical Guidelines](#), paras. 338–345).

³⁵ See Article 3 of the [Draft Revised VBER](#).

³⁶ See [Draft Revised Vertical Guidelines](#), para. 352.

³⁷ See [Draft Revised Vertical Guidelines](#), para. 353. This is primarily because the restrictive effects of narrow retail MFNs are generally less severe than those of wide retail MFNs, and therefore more likely to be outweighed by efficiencies, and the risk of free riding by suppliers of goods or services via their direct sales channels may be higher as these suppliers generally earn a higher per unit margin on sales in their direct channel than on indirect sales.

³⁸ See [Draft Revised Vertical Guidelines](#), para. 352

³⁹ See [FCJ Press Release of May 18, 2021](#) (in German).

between Booking.com and hotels.⁴⁰ Similarly, the FCJ refrained from individually exempting the parties under Article 101(3) TFEU as the clauses at issue did not lead to an overall efficiency advantage (by improving the production or distribution of goods or promoting technical or economic progress) that would outweigh their anticompetitive effects.

On the other hand, non-retail and input MFNs may be better-positioned to withstand scrutiny under the new framework. This is also suggested by the Commission’s decision (one week after the publication of the revised draft vertical rules) to drop its investigation into non-retail MFNs used by airline ticket distribution systems Amadeus and Sabre.⁴¹

Dual Pricing and Other Protections of Brick-and-Mortar Sales

The current Vertical Block Exemption Regulation was motivated in part by a desire to protect online sales, including by an aspiration to achieve price convergence across online and brick-and-mortar channels in the EU single market. Online sales have since grown exponentially, however, and authorities have become less concerned about restrictions on online sales. Instead, competition authorities have become more preoccupied with preserving efficiencies generated by more investment-intensive offline sales and protecting manufacturers and their brand value, particularly in the face of large online marketplaces.

Against this background, the EC now proposes that dual pricing, which consists of “*charging the same distributor a higher wholesale price for products intended to be sold online than for products to be sold offline,*” would no longer be qualified as a

hardcore restriction under Article 4 of the draft revised VBER.⁴² Similarly, the Explanatory Note states that, in the context of a selective distribution system, the criteria imposed by suppliers in relation to online sales need no longer equate to the criteria imposed on brick-and-mortar shops (the equivalence principle), “*given that both channels are inherently different in nature.*”⁴³

Unfortunately, however, neither of these changes are explicitly established in the VBER itself. Article 4 remains unchanged in substance. Subject to certain exceptions, it continues to deny the block exemption to restrictions “*of the customer group to whom, a buyer may actively or passively sell the contract goods or services.*”⁴⁴

Instead, the VBER only makes a general reference to online sales restrictions benefiting from the block exemption in preamble 13 to the VBER: “*online sales restrictions benefit from the block exemption established by this Regulation, provided that they do not have as their object to, directly or indirectly, prevent the effective use of the internet by the buyers or their customers for the purposes of selling their goods or services online, for instance because it is capable of significantly diminishing the overall amount of online sales in the market.*”⁴⁵ The EC has announced that application of the draft VBER and the draft Vertical Guidelines to online sales and advertising restrictions “*will be clarified further and specific rules and guidance relating to the platform economy will be included.*”⁴⁶

⁴⁰ The FCO’s investigation revealed that Booking.com was able to further strengthen its market position in Germany—in respect of turnover, market share, booking volumes, number of hotel partners and number of hotel locations—even after Booking.com removed the narrow MFN clause from its contracts.

⁴¹ See https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_3785.

⁴² [Explanatory Note](#), page 4. The Explanatory Note also explains that the Draft Revised VBER will allow suppliers “*to set different wholesale prices for online*

and offline sales by the same distributor, in so far as this is intended to incentivise or reward an appropriate level of investments and relates to the costs incurred for each channel.”

⁴³ [Explanatory Note](#), page 5. See also [Draft Revised Vertical Guidelines](#), para. 221.

⁴⁴ [Draft Revised VBER](#), Article 4(d). See also Articles 4(b) and 4(c).

⁴⁵ See also [Draft Revised Vertical Guidelines](#), para. 195.

⁴⁶ [EC Press Release](#).

At least in part, these changes reflect the Court of Justice's rulings in the last 10 years in *Pierre Fabre*⁴⁷ and *Coty*,⁴⁸ in which the Court recognized that a manufacturer may restrict distributors in a selective distribution system from selling luxury products on online marketplaces if the ban is proportionate and primarily designed to "preserve the luxury image" of the products. The EC's proposed change extends this approach beyond luxury products to all industries provided that the conditions in paragraph 13 of the preamble are met.

Online (Customer and Territorial) Resale Restrictions

As discussed, subject to specifically enumerated exceptions, territorial and customer resale restrictions will remain hardcore restrictions. The draft revised VBER specifies how these restrictions will be assessed in relation to online sales. In particular, a restriction will be classified as hardcore and will not benefit from the exemption if it "*directly or indirectly, in isolation or combination with other factors, has as its object to prevent the buyers or their customers from effectively using the Internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels.*"⁴⁹

In addition to an outright prohibition on selling online, the EC lists the following examples of restraints that would be considered hard-core online sales restrictions:

- Requiring the distributor to prevent customers located in another territory from viewing its website or to automatically re-route its customers to the manufacturer's or other distributors' websites;
- Requiring the distributor to terminate consumers' online transactions once their credit card data reveal an address that is not within the distributor's territory;
- Requiring the distributor to seek the supplier's prior authorization for selling online;
- Requiring the distributor not to use the supplier's trademarks or brand names on its website;
- Directly or indirectly prohibiting the distributor to use a specific online advertising channel, such as price comparison tools or advertising on search engines, including by imposing an obligation on the distributor not to use the suppliers' trademarks or brand names in keyword bidding, or restricting the sharing of price data with price comparison tools.⁵⁰

⁴⁷ Case C-439/09 *Pierre Fabre Dermo-Cosmétique* EU:C:2011:649.

⁴⁸ Case C-230/16 *Coty Germany* EU:C:2017:603.

⁴⁹ [Draft Revised VBER](#), Article 1(n). The current VBER does not define active or passive sales, though the distinction has been the subject of significant EC decisional practice and Court jurisprudence. This will change with the draft revised VBER, which introduces these definitions and also tailors them to online sales. Active sales are defined as "*all forms of selling other than passive sales, including actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison tools or advertising on search engines targeting customers in specific territories or customer groups; offering on a website language options different than the ones commonly used on the territory in which the distributor is established is normally active selling; similarly, offering a website with a domain name corresponding*

to a territory other than the one in which the distributor is established constitutes active selling." Passive sales are defined as "*sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without having initiated the sale through advertising actively targeting the particular customer group or territory, and participating in public procurement*" ([Draft Revised VBER](#), Article 1(m)).

⁵⁰ While prohibiting the use of one specific price comparison tool or search engine would typically not be viewed as preventing the effective use of online sales, a ban on the use of all most widely used advertising services in the respective online advertising channel could prevent a distributor from raising awareness of distributor's online sales activities and therefore could be considered a hardcore restriction, if the remaining price comparison tools or search engines are *de facto* not capable to attract customers to the distributor's online store. *See also* [Draft Revised Vertical Guidelines](#), paras. 192–196.

The draft revised VBER also clarifies that in an online environment, active sales will include the use of targeted advertising, offering foreign-language options on websites (except English, which is widely used), and the use of territory-specific domain names (e.g., .fr and .de) where these activities do not correspond to the target audience, language, or domain names typically used in the territory where the distributor is established (because in that instance they show that the distributor is purposefully targeting certain demographics or locales).

Agency and Online Intermediation Services

Under the current Vertical Guidelines, an agency agreement whereby the agent bears no, or only insignificant, financial or commercial risks generally falls outside of Article 101, thus allowing a principal to set the resale price of its agent.⁵¹ While generally confirming that definition of agency, the draft revised Vertical Guidelines suggest that online intermediation service providers can no longer qualify as agents of sellers who use the platforms, because the platforms are categorized as “suppliers” in the VBER⁵² and should be seen as independent economic operators who are not “*part of the undertakings of the sellers to which they provide services.*”⁵³

The draft revised Vertical Guidelines do not adequately explain why sellers cannot (or should not be allowed to) appoint online platforms as their agents. As such, the draft revised Vertical Guidelines are likely to clash with the Court’s case law on agency.⁵⁴ The consideration that platforms are “suppliers” should not on its own be a valid

distinguishing factor, because they supply platform intermediation services just like agents supply intermediation services. This new treatment in the Guidelines begs the question whether and how sellers, which in the EC’s view already have limited bargaining power *vis-à-vis* online platforms, can still set the price on online intermediation service platforms without running afoul of the resale price maintenance rules (unless they sell directly via the platform as a “marketplace”).

In the context of the EC looking to curb the power of online intermediation services, it is curious that the EC would be looking to either take pricing power from sellers in favor of online platforms, or that the EC would look to prevent small sellers from having the online intermediary act as an agent when that would allow them to retain the ability to set the resale price (rather than the platform provider).

Separate from the finding that online intermediation services cannot qualify as agents, the revised draft Vertical Guidelines also make two additional clarifications with regard to the concept of agency:

- The draft Guidelines helpfully state that an agent may, for a brief period of time, acquire the property of the supplier’s goods without incurring risk and thus losing the benefits of genuine agency (so-called “flash sales”).⁵⁵
- The draft Guidelines address hybrid circumstances where a supplier uses the same party as an agent for some products (for example in relation to products of higher quality or presenting novel features) and as an independent distributor for other products (so-called “dual role” agents).⁵⁶ For those dual-role agents, the

scrutiny of online platforms that increasingly compete with manufacturers and other resellers.

⁵¹ See [Draft Revised Vertical Guidelines](#), paras. 27–38.

⁵² Although the current VBER makes frequent reference to “suppliers,” the term is left undefined. The draft revised VBER now defines the term “supplier,” extending it to “online intermediation services,” meaning “*services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users.*” This definition is consistent with the definition used in Article 2(2) of the Platform-to-Business Regulation and reflects the heightened

⁵³ See [Draft Revised Vertical Guidelines](#), paras. 238.

⁵⁴ See, e.g., judgments in Cases T-325/01 *Daimler Chrysler v Commission* EU:T:2005:322; C-217/05 *Confederación Espanola de Empresarios de Estaciones de Servicio v CEPSA* EU:C:2006:784; and C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* EU:C:2008:485.

⁵⁵ [Draft Revised Vertical Guidelines](#), para. 31(a).

⁵⁶ See also the EC’s working paper ‘Distributors that also act as agents for certain products for the same

EC notes that a supplier must reimburse the agent for all its costs and risks not only with regard to the products sold via the agency model, but also for all of the party's costs associated with the products sold in the same market via the distributor model.⁵⁷ In effect, that means that, at least with regard to the products sold via the distributor model, the manufacturer bears all the costs and risks of an agency model without the ability to determine at what price the dual role agent may resell its products. This is inconsistent.

Broader Exemption for Resale Restrictions in Exclusive and Selective Distribution

The revised draft VBER extends a safe harbor to restrictions that suppliers may impose on exclusive and free distributors in relation to active sales to unauthorized distributors in another territory where the supplier operates a selective distribution model.⁵⁸ The rationale for this change is to allow for the protection of a selective distribution model from outside sellers if the model is implemented only in a subset of EU countries. Currently, a supplier is incentivized to implement a selective distribution model across the EEA.

The draft revised VBER also introduces “shared exclusivity” and exempts obligations to pass active sales restrictions onto indirect customers.

- **Shared exclusivity.** The safe harbor for active sales restrictions will apply even where suppliers appoint more than one exclusive distributor for a particular territory or customer group as long as it is justified by the efficiency of the exclusive distribution system to ensure that it does not lead to a fragmentation of the EU single market.

supplier’, February 2021, available at https://ec.europa.eu/competition/consultations/2018_vber/working_paper_on_dual_role_agents.pdf (“Dual Role Agent Working Paper”).

⁵⁷ [Draft Revised Vertical Guidelines](#), paras. 33–34. See also [Dual Role Agent Working Paper](#), para. 20 (“where genuine agency agreements are entered into with existing independent distributors, it is DG Competition’s current position that the fact that some of the market specific investments may already have

Exclusive distribution models often have procompetitive effects in that they encourage client-specific investments (e.g., in product promotions or brick-and-mortar stores) by insulating distributors making such investments from active sales—and therefore free-riding—by other distributors who have not made the same investments. The current VBER countenances only one exclusive distributor per territory or customer group. While the introduction of shared exclusivity (and thus more distributors) may now help enhance inter-brand competition (while still maintaining sufficient protections from free-riding), the “proportionality” test embedded in the definition of shared exclusivity will likely lead to uncertainty in practice.

- **Restriction pass-on.** The safe harbor for active sales restrictions will apply to active sales restrictions imposed not only by the upstream supplier itself but also by its intermediate distributors that “*have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier.*”⁵⁹ The change aims to enhance “*the protection of the investment incentives of exclusive distributors,*”⁶⁰ and is a welcome improvement.

In sum, a block exemption would now apply to the following resale restrictions imposed by a seller on a buyer (distributor):⁶¹

- Active sales to territories or customers allocated to the supplier or to one or a limited number of exclusive distributors;
- Active and passive sales to unauthorized distributors located in the territory where the supplier operates a selective distribution system;

been incurred by the agent when acting as an independent distributor does not mean they do not have to be covered by the principal”).

⁵⁸ See [Draft Revised VBER](#), Articles 4(b)(ii), 4(c)(i) (second indent), and 4(d)(ii).

⁵⁹ [Draft Revised VBER](#), Article 4(b)(i).

⁶⁰ [Explanatory Note](#), page 4.

⁶¹ See [Draft Revised VBER](#), Articles 4(b) to (d).

- Restriction of a distributor's place of establishment, regardless of whether the distributor is selective, exclusive, or free;
- Active or passive sales to end-users by a distributor operating at the wholesale level of trade, regardless of whether the wholesale distributor is selective, exclusive, or free;
- Active and passive sales by a distributor of components, supplied for the purposes of incorporation to a product, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

As a practical matter, the flexibility introduced in the exclusive distribution system could make an exclusive distribution model more attractive than in the past. Like selective distribution, an exclusive distribution model now allows appointing multiple distributors for a given territory. The key differences between the two models relate to conditions for selecting distributors and to permissible passive sales restrictions:

- A distribution system will qualify as selective if a supplier sells products or services only to distributors selected on the basis of specified qualified and/or quantified criteria and these distributors undertake not to resell to unauthorized distributors within the territory that is subject to such distribution system. In an *exclusive* distribution model, a supplier may appoint one or, if it preserves the exclusive distributors' investment efforts and doing so does not lead to a fragmentation of the EU single market, multiple exclusive distributors for a particular territory or customer group.
- A restriction on passive sales to non-authorized distributors in the territory subject to the selective distribution model benefits from a block exemption (assuming the 30% market share thresholds are not exceeded), leaving only authorized distributors and final customers as possible buyers. No block exemption applies to restriction on passive sales to a territory or a customer group reserved to the supplier or authorized distributors in exclusive distribution.

Next Steps

The public consultation process will run until mid-September 2021. The EC will then finalize the new vertical rules by May 2022. The ongoing consultation process may lead to additional changes, although we expect these to be clarifications rather than fundamental shifts from the current draft proposals. Companies will likely have to re-assess their distribution arrangements after adoption of the new block exemption.

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