

The new EU distribution rules

A game changer or not? The revised Vertical Block Exemption Regulation and its impact on distribution.

Selected legal insight for the sporting goods and consumer goods sector.

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“Will VBER 2022 have the effect of being a real game changer or not?”

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OPINION

A guest article by Jochen Schaefer: As already reported by SGI Europe on July 13, 2021, the EU Commission has published a first draft of the revised EU Vertical Block Exemption Regulation 2022 ("VBER 2022") accompanied by a comprehensive 92-page draft set of guidelines on vertical restraints ("Guidelines 2022"), triggering the final round of public consultation for stakeholders to provide their comments by September 17, 2021. The new VBER 2022 and its guidelines will come into force on June 01, 2022 and will then immediately apply without any need for transformation into the national laws of the EU Member States. The review of the current VBER 2010 started already in 2018 and has now nearly reached the finish line. The new set of EU competition law rules is of relevance for nearly ALL kinds of vertical business relationships between brands, suppliers, intermediaries such as online platforms and their customers, be it at the wholesale or retail level. Yet the question remains: WILL VBER 2022 HAVE THE EFFECT OF BEING A REAL GAME CHANGER OR NOT ? This article intends to provide a first answer without claiming that it represents already an in-depth legal analysis of this subject matter. The reservation has also to be made that the present drafts as published by the EU Commission on July 9, 2021 might still undergo some modifications after the final round of public consultation is finished.

1. General Remarks: It came as no surprise that the VBER 2022 focuses much more than its predecessor, VBER 2010, on online distribution issues. This explains also to a major extent why the sheer volume of the Guidelines 2022 more than doubled as compared to the number of pages of the Guidelines 2010. Markets and marketing within the EU have significantly changed within the last few years and new very powerful, if not dominant players and forces have emerged such as Amazon, eBay, Zalando and Co. New types of distribution and new marketing strategies like selective distribution, omnichannel marketing and a stronger direct-to-consumer (DTC) approach have drastically changed the traditional 'old school' sales strategies. Needless to say that this caught the attention of national and European competition authorities - same as of national and European courts - and caused the Commission to revise VBER 2010 in a much more detailed manner than it had been foreseeable earlier in this decade.

The objective of the revision is to provide an updated rulebook on vertical restraints, which should allow commercial operators to self-assess their agreements whether they are in compliance with such set of rules and regulations or not.

2. Some Highlighted Reform Areas (the following enumeration should not be deemed exhaustive)

2.1 Retail Price Maintenance ("RPM"): Nearly every legal professional being specialized in the area of EU and national competition law knew that RPM clauses and practices in vertical business relationships represented in more than 95% of all cases a hardcore violation of competition law, regardless of the size of the companies involved. An infringement could trigger multi-million fines imposed by the European and national competition authorities. This is e.g. demonstrated by Case 40428, the ruling of the European Commission of March 05, 2019 against the fashion brand Guess. Legal advisors

tended to generally shy away from recommending such practices, even when these could have been considered as procompetitive in certain exceptional single cases. In my own legal practice I only remember two cases in the last 10 years, where I was confident that two truly revolutionary innovative new products in the sporting goods sector offered a fairly solid basis for applying an RPM policy at the wholesale and retail level throughout a limited period of time after their launch. Quite obviously influenced by comments provided by numerous stakeholders, including those of the Federation of the European Sporting Goods and Industry (FESI), made the Commission reconsider and acknowledge that certain RPM clauses may result into efficiencies in cases such as a new product launch or to prevent that a coordinated short-term low-price campaign could be undercut by free riders (No. 182 of the proposed 2022 Guidelines). The new Draft Guidelines do now acknowledge that a minimum guaranteed gross mark up for retailers could reduce free-riding practices and could well provide investments in pre-sale services offered by retailers for the benefit of European consumers. This goes hand-in-hand with several judgments of the European Court of Justice (Cases Budapest Bank and Generics of April 2, 2020, resp. Jan. 30, 2020), where the ECJ clearly stated in its deliberations that any agreements having the object to restrict competition will only constitute a hardcore violation when they clearly reveal a sufficient degree of harm to competition, whereby the nature of the products or services affected and the respective market structure have to be taken into due consideration. The current Draft versions of VBER 2022 and the Guidelines 2022 fail to provide any absolute legal certainty, yet they show a clear tendency now to liberalize an area that seemed to be iron-carved and cemented for decades.

2.2 Dual Distribution This term relates to the fact that manufacturers/brands have increasingly created their own online B2C websites, leading from a competition law point of view to the effect that such upstream suppliers are now directly competing with downstream

wholesalers and/or retailers, which are at the same time their clients. This stirs up multiple complex legal issues, in particular if it comes to information exchanges between the brands and their B2B clients. The information that suppliers might gain from such types of cooperation-sensitive information and the related delivery relationships could create substantial pro- as well as anti-competitive effects. The EC Commission is obviously attempting to deal with such issues to a certain extent by introducing market thresholds: thus, according to Article 2 (5) of VBER 2022 in its present draft version, the information exchange between commercial operators with a combined market share of between 10 and 30% is governed by the stricter EU rules applying for agreements and practices between competitors at the horizontal level. This would lead to the need for commercial operators concerned to clearly define in their contractual B2B arrangements which kinds of information they concretely exchange and which once are withheld.

2.3 Online Sales Restrictions: By focusing strongly (and to some extent even unilaterally) on consumer benefits gained by low prices, the EC Commission has considered online sales as a form of passive sales process, with the consequence that an outright full ban of online sales would constitute in 99% of all cases a hardcore infringement of EU competition laws. Yet, certain vertical restraints - in particular in the area of selective distribution - have been qualified as being compliant with EU competition laws as e.g. evidenced by the ECJ's Coty Judgement of Dec. 06, 2017. Case 230/16. Pursuant to this verdict, stakeholders and lobbyists in different product categories have controversially discussed whether it would be

also of relevance for other categories than just luxury products, foremost in the context of bans or severe restrictions on online marketplaces. Section 8.2.3 (nos. 313-322 of the Guidelines 2022) now stipulates that such vertical restraints can be permissible and provides guidance on how to assess the possible anticompetitive effects of such restrictions. The EC Commission now expressly acknowledges that this type of restraints may even lead to increased efficiency under certain circumstances.

2.4 Incentivizing Brick-and-Mortar Retailers: Under the present VBER 2010, it has been a customary practice - especially among national anti-trust bodies - to widely grant a higher degree of support for physical retail clients by classifying the behavior of pure online players as being anticompetitive and discriminatory. No. 195 of the Guidelines 2022 now sets out that a contractual term can be justified where the same buyer pays a different price for products intended to be resold online than for products due to be resold offline, provided that such a clause has the objective to incentivize or reward the appropriate level of investments made either online or offline. The EU Commission has quite obviously realized that cost and business structures of online retailers may widely differ from those of physical dealers.

2.5 Co-Exclusive Agreements: Another new element of VBER 2022 is that it is now also possible to benefit from the safe harbor environment that this Regulation provides, e.g. if a brand decides to appoint several jointly exclusive distributors in a certain territory.

2.6 Most Favored Nation or Parity Clauses ("MFNs"): MFNs do require a marketing partner to offer certain goods and/or services to its contract partner at the same or even better price that such marketing partner is offering it to third parties. These practices are in most cases viewed as severe violations of European and national competition laws, in particular when applied by online platform operators and other intermediaries. Notably, VBER 2022 foresees in general that online platform operators are now falling within the supplier category, which would change their role and qualification considerably as compared to the present situation, with significant practical consequences for their business models. This is specifically true in those cases where market-strong or even marketdominating online platform operators are at the same time offering retailers to trade on their marketplaces and are selling the very same products or services to consumers directly. In this respect, investigations by several competition authorities are currently pending on the grounds of suspected abuse of a strong or dominant market position. These kinds of scenarios do also relate to do dual distribution relationships in general as outlined above in paragraph 2.2 of this article.

3. Conclusion: My comments do by far not cover the whole scope of VBER 2022 and its accompanying Guidelines 2022, but are just highlighting some of their aspects. Apart from encouraging the readers of this Contribution to submit their individual comments to the Commission or to get in touch with FESI in this context within the deadline provided, once the final version of this new competition law rulebook will be available, commercial operators doing business within the European Union and the European Economic Area are well-advised to review their existing vertical distribution agreements, including agency agreements and other types of contractual arrangements falling within VBER 2022, verifying whether they should be adjusted or even completely revised. VBER 2022 may not be a complete game changer, yet it offers new opportunities and chances - in particular for the manufacturers and suppliers of branded products - to redefine and fine-tune their

relationships with their vertical market partners in Europe. The earlier decision-makers within a company decide to start such a review process, the greater the competitive advantage could be once the new set of rules will come into force from June 2022 onward, and --- as we all know, time flies.....

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