Vertical Block Exemption Regulation

VBER 2022: Guidelines for the new EU-wide distribution law

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

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> *“VBER 2022 is one of the most important regulations for everybody in the trade business.”*

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In this article, we provide you with everything you need to know about the new EU-wide distribution law: Vertical Block Exemption Regulation (VBER). It is one of the most important regulations for everybody in the trade business.

VBER 2022 – what does the acronym stand for? VBER 2022 is the very frequently used abbreviation for the Vertical Block Exemption Regulation, now in its final version of May 10, 2022. It provides guidance for all private commercial operators in the European Union and in the European Economic Area (i.e., not only for the market leaders but also for small to medium-sized enterprises (SMEs) being part of the vertical supply chain what needs to be observed to be compliant with European competition laws. The nature of VBER 2022: VBER 2022 is an EU Regulation that, unlike an EU Directive which must first be transposed into the national law of EU Member States, comes into effect immediately; in this case, this was on June 1, 2022. The regulation has a lifespan of 12 years until it expires on May 31, 2034.

Roadmap of this Substantial Competition Law Reform

Paradigm change: protection of brick-and-mortar retail VBER 2022 reflects in quite a number of aspects a truly remarkable paradigm change in the thinking of the EU Commission: While the Brussels authorities and lawmakers had in 2010 believed that the online distribution channel is a valuable vehicle for in particular smaller to medium-sized retailers to expand their businesses significantly, the notion is now that brick-and-mortar retail must be protected in view of the global major online players such as Google, eBay, Amazon and many others, including social media, which threaten the existence of traditional traders throughout the European Union.

Effects of the revision of competition law Decision-makers at the executive management/ownership level should be aware that EU competition law infringements cannot only be investigated and taken up by the EU Commission and/or national competition law authorities (with the threat of fines up to 10 percent of an annual global turnover of a company in case of hardcore infringements) but also be subject of civil lawsuits between brands and their marketing partners at wholesale and/or retail level or be brought up by consumer protection groups and associations. The EU Commission has most recently started sectoral investigations targeting the fashion industry to determine whether they act in compliance with the respective competition law provisions.

The Safe Harbor principle of VBER 2022 (commission regulation EU 2022 720) As long as commercial operators in the EU act in compliance with the contents of VBER 2022 (and its guidelines), they sail in calm waters and can be pretty sure not to violate any EU competition law provisions (the so-called “Safe Harbor” principle). However, VBER 2022 does not apply for transactions/arrangements/conduct between/of companies where the market share of one of the operators involved exceeds 30 percent. And – based on my practical experience in this area – one should be aware that competition authorities and courts tend to come up with a very narrow definition of the relevant product or service market since the narrower such definition is, the more opportunities it offers to intervene. On the other hand, in cases where the combined/aggregate market shares of the commercial operators involved in the EU do not exceed 15 percent, the restraints of competition may not be noticeable, always provided the respective concrete acts or omissions are not intended to unduly restrict competition within the European Union/the EEA and that they fall outside the scope of EU competition law hardcore violations (such as applying forbidden resale price maintenance practices).

The paradigm shift in how we look at the online distribution channel VBER 2022, in many ways, reflects the changing policies of European authorities regarding online sales. While in the past decade, the Commission (same as the vast majority of national competition authorities and courts) had viewed the online distribution channels – notably marketplaces – as a positive vehicle in particular for smaller brands and retailers to significantly increase their visibility and reach, this is obviously very much different now. The Commission now regards the online sales channel as a mature channel that no longer deserves specific protection from EU lawmakers. On the contrary, it has now been acknowledged that the traditional brickand-mortar trade needs to be considerably strengthened, as its very existence is threatened by dominant, globally active online players and marketplaces.

New terms in VBER 2022 reflecting this paradigm shift

Granting more favorable conditions to brick-and-mortar sellers than to online dealers is now permissible (so-called dual pricing policy);

Quality criteria defined for online and offline sales in a selective distribution system do no more need to be equivalent;

Contractual bans or restrictions on the presence of wholesale or retail customers in third-party marketplaces no longer constitute a hardcore violation of competition law, regardless of the nature of the product or service;

It is now allowed to require a customer to sell a certain defined quantity or value of goods (only) online and the rest at its stationary sales premises;

Market place operators, who do sell products online in their own name and at the same time act through their dealer customers, fall outside of the scope and applicability of VBER 2022;

Contractual ban or restriction of the presence of marketing partners on third-party marketplaces is no more viewed as an EU competition law hardcore infringement;

Platforms and other online operators are no more allowed to prevent their customers from offering and selling products at more favorable prices in other sales channels (socalled wide parity clauses).

Additional new positive elements in VBER 2022 for suppliers and traders of branded goods

A higher standard of protection against gray market import activities within the EU/the EEA is afforded by the Regulation; it can now be intervened against sales into territories by outsiders, where a selective or exclusive distribution system is established by a manufacturer/brand;

The operation of a website by a distributor or retailer in a foreign language other than the language spoken in the respective territory (other than English) and/or the use of a foreign generic top-level domain by a marketing partner can now be (contractually) stopped;

For the first time, it is now permissible to appoint up to 5 co-exclusive marketing partners in a certain geographic territory or to address a certain group of customers;

Non-compete clauses may be under certain circumstances legally valid beyond the maximum period of five years.

Price fixing: Resale price maintenance practices in a vertical supply relationship remain a severe violation of competition law in 98 percent of all cases Exceptions:

in the event of short-term advertising and sales campaigns in the course of the launch of new products or expansions into new markets;

in the event of short-term sales campaigns coordinated between the respective marketing partners covering the period of 2 to 6 weeks, or

if (only) a fixed price enables a marketing partner to provide intensive consultancy services and advice vis-à-vis the buyers of highly complex products.

However, profound legal advice is required before applying any of the above exceptions. What VBER means in case of dual distribution to consumers and retail trade New legal Danger Zone: In those cases where a supplier/brand sells its goods at the same time directly to consumers and the retail trade (so-called dual distribution schemes), the EU Commission has maintained in its final version of VBER 2022 the principle that the communication between the commercial operators (brand and retailers) needs to be restricted since in the view of the Commission they meet each other as intra-brand competitors at the same horizontal level. It remains, however, quite unclear where such communication is still permissible and where it would already constitute a hardcore competition law infringement. An obvious example of competition law infringement would be the exchange of a planned pricing policy of a new collection of products between a brand and a retailer, while the provision of aggregate, anonymous data of already completed sales by a retailer to a brand would be permissible. One-year transition period VBER 2022 grants a one-year transition period starting on June 1, 2022, to comply with the revised set of EU competition rules, but it is advisable to deal with these topics much earlier to gain a competitive advantage in the market over others. CONCLUSION VBER 2022 To make use of the numerous new opportunities and tools VBER 2022 offers, it will be in many cases recommendable to review and subsequently adjust existing contractual arrangements strategically or to present entirely new contracts to vertical marketing partners at wholesale (such as to distributors) or retail level. About the author: Dr. Jochen M. Schaefer is a German practicing attorney based in the Munich area. For numerous years, he has been representing the World Federation of the Sporting Goods Industry (WFSGI) and the European Federation of the Sporting Goods Industry (FESI) as their legal counsel. He is also chairing the WFSGI’s legal committee and co-chairing FESI’S digital working group. At the individual client level, he represents a significant number of well-known brands within and beyond the bicycle/sporting goods sector; he is a specialist in national and international distribution topics, intellectual property (IP) and risk management issues, and the drafting and negotiation of comprehensive contracts at the operational level, in particular in the area of European selective distribution schemes. In case of any questions about this article (and in general), he can be reached at sj@sjlegal.de and on his cell phone at +49-151-16407932.