The new EU Competition rules for supply and distribution agreements: no revolution, but an evolution of the effects-based approach

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1. Introduction

In May 2022, the Commission adopted its new competition rules for supply and distribution agreements. In the jargon of competition lawyers and enforcers, this is referred to as the competition rules for vertical agreements. This is so because the rules apply to agreements for the sale and purchase of goods and services between firms operating at different levels of the production and distribution chain. The new rules consist of Commission Regulation 2022/720,[1] the so-called Vertical Block Exemption Regulation (VBER), and the accompanying Commission Notice—Guidelines on vertical restraints[2] (VRGL).

The new VBER and VRGL are, for the most part, a continuation of the previous VBER and VRGL from 2010,[3] which themselves resembled to a large extent the VBER and VRGL from 1999/2000.[4] For most active in the area, this continuance of policy will not have come as a surprise. It is certainly, in our view, positive from the perspective of legal certainty and also justified from an economic point of view.

In this article, we analyse and assess the new rules. To do this properly, in section 2 we first describe the change of policy towards an effects-based approach that took place at the turn of the century. Section 3 then provides an outline of the new rules and describes what has remained the same since the shift to the effects-based approach. Subsequently, section 4 focuses on the parts of the new rules that have changed compared to the rules of 2010.[5] Most of these changes concern the Commission taking a position vis-à-vis new developments in the market, such as the rise of online platforms and retail parity obligations, but a few seem to reflect a sliding back towards a more form-based approach.

2. The shift to the effects-based approach

The history of European Union (EU) competition policy is the story of a gradual shift in focus from restrictions of the freedom of action of market participants, aimed at protecting the competitive process as such, towards a focus on the effects of practices on the market, linked to a recognition that the goal should be the protection of consumer welfare. This shift from the form-based and more legalistic approach, applied from the 1970s to the 1990s, to an effects-based and more economic approach, took place around the turn of the century, first in the new area of merger control and the application of art.101 to supply and distribution agreements.[6]

The development towards an effects-based approach was both necessary and good for a number of reasons. The form-based approach casts the net of art.101(1) too widely. Many agreements between undertakings go beyond simple one-off transactions and include clauses that limit the freedom of action of one or both of the parties, for instance by stipulating a certain minimum volume or duration for their transactions, by requiring a degree of exclusivity, or by placing limits on how the

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1 Commission Regulation No 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 (VBER) [2022] OJ L134/4, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN*, pp.4–13.

2 Commission Notice—Guidelines on vertical restraints (VRGL) [2022] OJ C248/1, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01)&from=EN*, pp.1–85.

3 Commission Regulation No 330/2010 of 20 April 2010 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 (VBER 2010) [2010] OJ L102/1, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=EN*, pp.1–7; Commission Notice—Guidelines on vertical restraints (VRGL 2010) [2010] OJ C130/1, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519(04)&from=EN*, pp.1–46.

4 Commission Regulation 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 (VBER 1999/2000) [1999] OJ L336/21, available at: *https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:L:1999:336:TOC*; Commission Notice—Guidelines on Vertical Restraints (VRGL 1999/2000) [2000] OJ C291/1, available at: *https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=OJ:C:2000:291:TOC*, p.1.

5 For a general overview of the new regime in Q&A format, see Frank Wijckmans and Karolien Francken, Vertical Block Exemption Regulation—Toolbook for Practitioners (LeA Publishers, 2022), pp.1–35.

6 This section is in good part based on Luc Peeperkorn, "The effects-based approach: still just as necessary for an effective and coherent EU competition policy", in Adina Claici, Assimakis Komninos and Denis Waelbroeck (eds), *The Transformation of EU Competition Law—Next Generation Issues* (Wolters Kluwer, 2023, forthcoming).

parties may use the results of their co-operation. This meant that agreements were easily considered to be anti-competitive, regardless of whether the parties were large or small, or held any market power.

Combined with the notification system introduced by Council Regulation No 17 of 1962,[7] this led to a mass problem for the Commission. The Commission's competition report for 1971 (§48) mentioned a total of 30,000 notifications for exclusive dealing agreements alone. This meant that enforcers spent their time analysing and rubber-stamping harmless agreements, thereby undermining their capacity to focus on truly anti-competitive agreements and problematic markets.

The Commission's response was to adopt Block Exemption Regulations (BERs). However, the BERs of the 1970s, 1980s and early 1990s were also form-based: certain restrictions and combinations of restrictions were deemed to be legal regardless of the market position of the parties, while all other restrictions were excluded from the safe harbour (the so-called white-list approach). While these BERs did free up some enforcement resources by reducing the need to assess large numbers of notifications of individual agreements, they also introduced a degree of under-enforcement, by creating safe harbours, at least for certain restrictions, potentially up to 100% market share.

Moreover, because these BERs only covered certain categories of agreements, many agreements were effectively excluded from the safe harbours. These other agreements were considered to be suspect, and were generally assumed to restrict competition, not only because it was easy to show that they restricted the freedom of action ("Handlungsfreiheit") of one or the other party, but also because they fell outside the safe harbours provided by the BERs. A notable example in the area of vertical agreements was selective distribution. Except for the automotive sector and in the context of franchise agreements, selective distribution was excluded from any of the BERs that were then in force.

This context led to a high level of legal uncertainty, as well as high compliance costs for firms. First, legal uncertainty in particular for agreements not covered by any of the BERs, because of the wide net cast by the form-based approach. Secondly, high compliance costs because the form-based BERs created a straitjacket: firms wishing to avoid legal uncertainty by ensuring that their agreements fell within one of the BERs were unnecessarily hindered from adapting their agreements and their business model to economic reality, often to the detriment of both the firm and its customers.

Given the drawbacks of the form-based approach described above, it is no surprise that the call for reform came first from areas with a high number of agreements: mergers and vertical agreements.

Merger control by its nature requires an effects-based approach. Most mergers are beneficial or at least will not produce anti-competitive effects, and it is only in a limited number of cases that one would wish to intervene. The reasons for intervening will be linked to the market situation in which the merger takes place and the likely collusive or exclusionary effects that can be expected. This was recognised and put into practice by the Commission from the moment it obtained the power to vet mergers with an EU dimension in 1989 and was subsequently expressed in in its horizontal and non-horizontal merger guidelines of 2004 and 2008 respectively.[8]

In essence, the review carried out in the second half of the 1990s of the art.101 enforcement policy towards vertical restraints was based on the same underlying idea. There are hundreds of thousands or even millions of supply and distribution agreements in the EU—as practically every firm needs to purchase inputs and/or find buyers and distributors for its output—and most of these agreements are beneficial, or at least unobjectionable, from a competition policy perspective. A policy that considered any restriction of the freedom of action of one of the parties as a potential restriction of competition was extending the reach of art.101(1) far too wide, resulting in too many agreements being seen as potentially infringing art.101.

With the Vertical Block Exemption Regulation of 1999[9] and the Vertical Restraints Guidelines of 2000,[10] the Commission for the first time adopted effects-based rules for the application of art.101. Once this approach had been successfully introduced for supply and distribution agreements, it did not take long for the Commission to also apply it to the other areas of EU antitrust law, in particular horizontal agreements, technology transfer agreements and finally the assessment of abuses of dominance.

The main components of the effects-based approach can be grouped around three central features: (1) casting the net of EU competition law less wide, in particular for art.101 and to a lesser extent for art.102, by limiting their application to situations where anti-competitive effects can be expected, (2) providing guidance for a structured effects-based assessment in individual cases, and (3) bringing coherence to the assessment of different types of agreements and conduct, both within and between arts 101 and 102.

[7] Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31962R0017&from=en*.

[8] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN*, pp.5–18; Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6, available at: *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC1018%2803%29*, pp.6–25.

[9] VBER 1999/2000 [1999] OJ L336/21.

[10] VRGL 1999/2000 [2000] OJ C291/1.

As regards casting the net of art.101 less wide, the main components are:

- A new De Minimis Notice, adopted in 2001 and revised in 2014, containing higher market share thresholds—10% aggregate market share for agreements between competitors and 15% individual market share for agreements between non-competitors—below which it is assumed that agreements not containing by object restrictions will not have restrictive effects and will thus not infringe art.101.[11]
- The introduction of wide umbrella BERs, each with its coverage capped by a market share threshold and a limited hardcore list, the so-called blacklist approach instead of the whitelist approach of the form-based BERs.[12]
- The clear recognition in the various art.101 Guidelines adopted by the Commission since 2000, accompanying the wide umbrella BERs, that there is no presumption of illegality for agreements that fall outside the safe harbour of a BER simply because the market share threshold is exceeded.[13]
- Last but not least, a narrower definition of by object restrictions, achieved by providing a clear list of hardcore restrictions in each BER.[14] The crux of these hardcore lists is that they only contain types of restrictions which either cannot be expected to create efficiencies or which are not indispensable to realise efficiencies. That is why the various art.101 Guidelines not only indicate that these hardcore restrictions cannot benefit from the respective BER and are assumed to fall within art.101(1), but also that they are generally unlikely to fulfil the conditions of the art.101(3) exception.[15]

As regards the provision of guidance for structured effects-based assessments, the main components are:

- The art.101 Guidelines adopted by the Commission since 2000 for the assessment of various types of agreements (vertical, horizontal, technology transfer, etc.), providing not only explanations for the application of the BERs but also a structured effects-based framework for assessing agreements in cases where the market share thresholds are exceeded or which are not covered by a specific BER.
- The art.102 Guidance adopted by the Commission in 2008, in which it developed a full-blown effects-based approach for exclusionary conduct by dominant firms, including an efficiency defence in line with art.101(3), and the extensive confirmation of this approach by the Court of Justice (CoJ) in its seminal *Post Danmark I* and *Intel* judgments.[16]
- The practice of formulating a theory of harm and collecting the necessary evidence to test that theory in individual cases.

The detailed explanations of the—essentially identical—effects-based approach in the various art.101 Guidelines and the art.102 Guidance, together with the uniform safe harbours introduced by the various BERs, have been important for promoting coherent enforcement of arts 101 and 102. Without these policy instruments, it would be much harder to co-ordinate the application of arts 101 and 102 within the European Competition Network (ECN).

The VBER and VRGL, since 1999/2000 providing the effects-based rules for the assessment of supply and distribution agreements, have been especially vital to support coherent enforcement as the enforcement of art.101 towards vertical restraints quickly decentralised from 2004. Since the adoption of the modernisation package most art.101 cases concerning supply and distribution agreements are dealt with at the national level. What also helped and continues to help promote coherent enforcement, is that the architecture and the effects-based approach put in place in 1999/2000 was maintained in

[11] Communication from the Commission—Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2014:291:TOC*, pp.1–4.

[12] The BERs and accompanying Guidelines, which are regularly revised and updated, can be found at: *https://competition-policy.ec.europa.eu/antitrust/legislation/block-exemption-regulations_en*.

[13] See, for instance, §275 VRGL.

[14] The form-based approach is in essence the same as a very wide definition of by object restrictions: it leads to easy presumptions that restrictions fall within art.101(1).

[15] For more background on the distinction between restrictions by object and by effect, see Luc Peeperkorn, "Defining restrictions 'by object'", Concurrences No. 3-2015, pp.40–50.

[16] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7; Judgment of the European Court of Justice (Grand Chamber) of 27 March 2012 *Post Danmark A/S v Konkurrencerådet* (C-209/10) EU:C:2012:172; [2012] 4 C.M.L.R. 23; Judgment of the European Court of Justice (Grand Chamber) of 6 September 2017, *Intel Corp Inc v Commission* (C-413/14 P) EU:C:2017:632; [2017] 5 C.M.L.R. 18.

the VBER and VRGL of 2010 and have also been retained in the currently applicable VBER and VRGL adopted in 2022.

While the vertical rules are therefore characterised by a large measure of continuity, every generation of the vertical rules contains some novelties and clarifications. In 2010 the rules were adapted and updated in light of, in particular, an increased attention for possible anti-competitive effects of buyers' market power and an increase in online sales.[17] In 2022, the rules were updated in view of, in particular, the rise in prominence of online platforms and retail parity obligations.

In the next section, we provide an outline of the currently applicable rules, by describing the structure and main elements of the current VBER and VRGL that have stayed the same compared to the 2010 rules. The following section 4 analyses the changes and novelties of the new rules compared to the rules of 2010.

3. The new VBER and VRGL: what has been retained

The 2022 VBER, like its predecessors, is a wide umbrella BER for vertical agreements for the sale, purchase and resale of intermediate and final products.[18] It thus applies to many agreements in practically all sectors of the economy.[19] The pervasiveness of these agreements in the economy makes these rules very important in practice.

The VBER continues to cover agreements between non-competitors and excludes, as a general rule, vertical agreements between actual or potential competitors (art.2 VBER). What also has not changed, as an exception to the exclusion of vertical agreements between competitors, is that the VBER covers under certain conditions agreements entered into by associations of retailers (art.2(2) VBER)[20] and dual distribution agreements (art.2(4) and (5) VBER). However, the conditions for coverage in case of dual distribution agreements have changed (see section 4.1 below). What is new is that vertical agreements for the provision of online intermediation services by hybrid online platforms are also excluded (art.2(6) VBER, see section 4.2 below).

The VBER creates a safe harbour for vertical agreements containing one or more vertical restraints, i.e. restrictions of competition in a vertical agreement falling within the scope of art.101(1).[21] This safe harbour is capped by a market share threshold of 30%, specified in art.3 VBER. In order to benefit from the safe harbour, the market share held by the supplier must not exceed 30% of the relevant market in which it sells the contract goods or services, and the market share of the buyer must not exceed 30% of the relevant market in which it purchases the contract goods or services.[22] Also the rules in art.8 VBER on how the market shares shall be calculated, for instance that they should in principle be based on market sales value data of the preceding calendar year, have remained the same.

An agreement falling within the safe harbour is regarded, in case the agreement would fall within art.101(1) for having actual or likely anti-competitive effects, to fulfil the conditions for exemption under art.101(3). This means that national courts can no longer prohibit (parts of) the agreement under art.101. The Commission and National Competition Authorities (NCAs) also cannot prohibit the agreement, at least not for the past. The Commission can however withdraw the exemption, but only for the future and on condition that it shows that the agreement in question has effects that are incompatible with art.101(3). An NCA can do the same, but only if the agreement has incompatible effects in a distinct geographic market within its territory (see art.6 VBER). This possibility to withdraw the benefit of the VBER for the future has been part of the rules since the 1999 VBER, but has seldom been used. Furthermore, the Commission may by regulation declare in certain instances that the VBER shall not apply to vertical agreements containing specific restraints (see art.7 VBER).

As explained in the VRGL, the 30% market share threshold, while providing a safe harbour for agreements of firms not exceeding that threshold, does not imply a presumption that agreements not covered by the VBER because the market share threshold is exceeded, do fall within art.101(1) or are less likely to fulfil the conditions for individual exemption under art.101(3).[23] In the case of an individual examination, it is first for the authority to show that the agreement restricts competition, before the parties to the agreement are asked to substantiate

[17] For an in-depth analysis of the VBER and VRGL of 2010, see Andrei Gurin and Luc Peeperkorn, "Vertical Agreements" in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition*, 3rd edn (Oxford: Oxford University Press, 2014) and Frank Wijckmans and Filip Tuytschaever, *Vertical Agreements in EU Competition Law*, 3rd edn (Oxford: Oxford University Press, 2018). For an in-depth analysis of the VBER and VRGL of 1999/2000, see Mario Filipponi, Luc Peeperkorn and Donncadh Woods, "Vertical Agreements" in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition*, 2nd edn (Oxford: Oxford University Press, 2007) and Frank Wijckmans and Filip Tuytschaever, *Vertical Agreement in EU Competition Law*, 1st edn (Oxford: Oxford University Press, 2006).

[18] The reference to "products" may be taken to encompass also "services" (unless the context dictates otherwise).

[19] For several decades there have been sector-specific block exemptions applicable to the motor vehicle sector. In certain cases (see Regulation 123/85: Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements) they were more liberal than the general regime applicable at the time to vertical agreements and in other cases they provided for a stricter regime (see Regulation 461/2010: Commission Regulation (EU) No 461/2010 of 27 May 2010 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 in the motor vehicle sector). The current regime adopts the generally applicable principles regarding vertical agreements for the distribution of motor vehicles, but contains additional hardcore restrictions when it comes to the after-market (i.e. the sale of spare parts and the provision of repair and maintenance services). For a description of the sector-specific motor vehicle regime, see Wijckmans and Tuytschaever, *Vertical Agreements in EU Competition Law*, 3rd edn (2018), Ch.11.

[20] Vertical agreements entered into between an association and an individual member or between the association and an individual supplier can only be covered if all the members of the association are retailers of goods and if no individual member has a total annual turnover exceeding EUR 50 million.

[21] See art.1 VBER for the definitions of "vertical agreement", "vertical restraint" and other relevant concepts.

[22] For agreements of more than two parties, for instance in case of a three-party vertical agreement, the market share of the firm "in the middle" must respect the market share threshold both as a buyer on the upstream market and as a supplier on the downstream market. See art.3(2) VBER.

[23] See s.8 of the VRGL, in particular §§275–276, containing the same approach and wording found in §96 of the 2010 VRGL.

efficiency claims and show that the conditions for individual exemption are fulfilled (see art.2 Regulation 1/2003 and §276 VRGL).

The approach is, however, different for agreements containing one or more of the hardcore restrictions defined in art.4 of the VBER. This article, which reflects the blacklist approach on which also the previous VBERs were based is, arguably, the most important part of the VBER. Hardcore restrictions are "serious restrictions of competition which should in most cases be prohibited because of the harm that they cause to consumers".[24] Hardcore restrictions are in principle by object restrictions.[25] Because these restrictions have such a high potential for negative effects on competition, it is not considered necessary for the purposes of applying art.101(1) to demonstrate any actual or likely effects on the market. Moreover, the conditions of art.101(3) are considered unlikely to be fulfilled in the case of hardcore restrictions. When an agreement contains one or more of these hardcore restrictions, it follows from art.4 of the VBER that the agreement as a whole cannot benefit from the block exemption. Hence, for the purposes of the VBER hardcore restrictions cannot be severed from the rest of the agreement. In the context of an individual assessment, the Commission considers that hardcore restrictions will only in exceptional circumstances fulfil the four conditions of art.101(3).[26]

Over the years, the list of hardcore restrictions has remained in good part the same. Article 4(a) VBER makes clear that resale price maintenance (RPM), i.e. establishing in the agreement between supplier and buyer for the latter a fixed or minimum (re)sale price, is a hardcore restriction. While nothing has changed in this respect, the VRGL contain a number of useful clarifications, in particular as regards minimum advertised prices (see section 4.4.1 below). Article 4(b)–(e) VBER makes it clear that restricting the buyer as to where (territorial restriction) or to whom it can sell (customer restriction) is in principle a hardcore restriction, unless necessary to operate and protect a selective or exclusive distribution system. While similar hardcore restrictions and exceptions were also found in the previous VBERs, the current VBER and VRGL contain a number of changes and clarifications (see sections 4.4.2–5 below). Finally, the hardcore list in art.4(f) contains a slightly modified hardcore restriction specifically targeted at aftermarkets (see section 4.4.6 below for the modification). This latter hardcore restriction reflects the importance given by the Commission to protecting the possibility for consumers to make use of the repair and maintenance services of independent repairers.

Finally, the VBER contains in art.5 a limited list of excluded restrictions. Excluded restrictions are not block exempted but, unlike hardcore restrictions, the inclusion in an agreement of any of these restrictions does not prevent the application of the block exemption to the rest of the agreement. Logically, as per the previous VRGLs, it should have been made clear in the VRGL that only the individual restriction is not block exempted and requires individual exemption while the rest of the agreement remains block exempted. However, new language in the VRGL has introduced some doubt about the coverage of the rest of the agreement (see section 4.5.1). What has certainly remained the same and is not in doubt is that, unlike the hardcore restrictions, there are no negative presumptions under art.101(1) and (3) against the excluded restrictions when individually assessed.[27]

Over the years the list of excluded restrictions has remained in the most part the same but contains this time an important addition. What has remained the same is that non-compete obligations are excluded when their duration exceeds five years, with a small modification for the exclusion of tacitly renewable non-compete obligations (see section 4.5.2 below). What also has remained the same is that post-term non-compete obligations are excluded unless certain strict conditions are fulfilled (limited to the products which compete with the contract products, limited to the point of sale, not exceeding one year and indispensable to protect know-how provided by the supplier to the buyer), and that certain non-compete obligations imposed on members of a selective distribution system are excluded to prevent (indirect) collective boycotts of one or more specific competing suppliers. There is however a new kid on the block of excluded restrictions: across-platform retail parity obligations, also called wide retail parity obligations, are now also excluded. This reflects the experience of the Commission and NCAs in a number of formal and informal cases (see section 4.5.3 below).

The VRGL continue to provide guidance on single branding,[28] exclusive supply,[29] upfront access payments,[30] category management services[31] and tying.[32] New are sections on restrictions on the use of online marketplaces (see section 4.6 below), on restrictions on the use of price comparison services (see section 4.7 below) and on parity obligations (see section 4.5.3 below).

[24] §177 VRGL.
[25] The fine distinction is that hardcore restrictions are a category of restrictions defined in the VBER, while a by object restriction can only be established upon individual examination of the agreement in question. For instance, limiting a buyer to lower its sales price is a hardcore restriction. It is also in principle a by object restriction, unless it can be shown in the case under investigation that, in the exceptional circumstances of the case, such a restriction is indispensable for reasons, for instance, of safety or public health.
[26] §§177–180 VRGL.
[27] See §246 VRGL.
[28] §298 and following VRGL.
[29] §321 and following VRGL.
[30] §379 and following VRGL.
[31] §385 and following VRGL.
[32] §389 and following VRGL.

4. The new VBER and VRGL: what has changed

4.1 Changes to the coverage of dual distribution

Like its predecessors, the current VBER generally does not apply to vertical agreements between competing undertakings. And as before, the current VBER also makes an exception under certain conditions for vertical agreements between competitors in a scenario of dual distribution. Dual distribution is the situation where a supplier of goods or services is also active at the downstream level, thereby competing with its independent distributors.

The new VBER introduces some changes as to the conditions under which dual distribution agreements can be covered by the block exemption and keeps certain other conditions intact. One condition that has not changed is that the block exemption can only apply to non-reciprocal vertical agreements and that, more generally, the buyer should not also be a competitor at the upstream level. What also has not changed is that, in case the agreement concerns the supply of services, the buyer must operate at the retail level, limiting coverage of dual distribution concerning services to the last level of the distribution chain.[33]

However, two changes have been made as to the conditions under which dual distribution agreements can be covered, both changes affecting the scope of the block exemption. The first change, which is dealt with next, concerns dual distribution for the supply of goods and expands the scope of the block exemption. The second change, dealt with subsequently, concerns coverage of exchanges of information in the context of a dual distribution scenario and reduces the scope of the block exemption.

Under the previous regime the supplier had to be a manufacturer of the contract goods. This requirement is abandoned. It no longer matters whether the supplier is a manufacturer, an importer or a wholesaler of the relevant goods. In each of these cases, the block exemption may apply (even) if the supplier enters into competition with its buyers one level down the distribution chain. This is the case, for instance, where the supplier is active as an importer and a retailer of the goods (thus engaging in so-called direct selling) and the buyer of the goods is only active as a retailer.

This modification expands the scope of the block exemption quite considerably. It is a welcome change as it avoids complex scenarios of coverage and non-coverage. Imagine a case where a manufacturer of goods sells them both via wholly-owned retail outlets and to independent retailers in market A. The distribution agreements between the manufacturer and the independent distributors are covered by the current VBER and were also covered by the previous VBERs. However, if in market B the manufacturer supplies the goods to an independent importer or wholesaler, which in turn sells the goods both via its own retail outlets and to independent retailers, the vertical agreements between the importer/wholesaler and the independent retailers were not covered under the previous VBERs. This difference in treatment no longer applies under the new VBER and the vertical agreements entered into by the independent importer/wholesaler with its network of independent retailers can now also benefit from the block exemption.

The second change to the conditions under which dual distribution agreements can be covered by the block exemption concerns coverage of exchanges of information in the context of a dual distribution scenario. This change has the capacity of reducing the scope of the block exemption.

Under the previous VBERs exchanges of information in the context of a dual distribution scenario were in principle also covered by the block exemption. That position has changed with the new VBER. Article 2(5) of the new VBER stipulates that the block exemption does not apply to such information exchanges unless the exchange is directly related to the implementation of the vertical agreement, and is necessary to improve the production or distribution of the contract goods. While the formulation of the test is somewhat complicated (double negative), the general view is that the conditions are cumulative.

While the first condition of the test ("directly related to the implementation of the vertical agreement") makes perfect sense, the second condition ("necessary to improve the production or distribution of the contract goods or services") is somewhat surprising. By requiring that the parties prove that the information exchange is necessary to improve the production or distribution of the goods, in essence an individual assessment based on art.101(3) criteria (i.e. the efficiency and indispensability requirements) is imposed. This approach does not sit well with the concept of a block exemption which is essentially aimed at ensuring compliance without taking the hurdles of an individual self-assessment.

Furthermore, if the information exchange is not meeting the second condition, the practice amounts to information sharing between competitors that could, in certain cases, even be qualified as a horizontal by object restriction. This risk may apply in particular with regard to the communication of recommended or obligatory maximum prices. In order to avoid this becoming a trap for the unwary, a sufficiently realistic and pragmatic approach towards the necessity condition that is included in the second condition is called for.

In order to address the uncertainty created by art.2(5), the VRGL contain non-exhaustive lists of examples of types of information that are generally likely (§99) respectively unlikely (§100) to meet the test. An important

[33] For instance, in case a franchisor of a barber shop concept provides this concept, training and other services to its franchisees, the franchise agreements can benefit from the safe harbour provided by the VBER, also when the franchisor operates itself one or more barber shops in competition with its franchisees.

example of information that is likely to meet the test are communications relating to the supplier's recommended or maximum resale prices. Information on future downstream sales prices does however fall in the other category and is generally unlikely to meet the test. The subsequent caution in §101 VRGL that "[…] the inclusion of a particular type of information in paragraph (99) does not imply that the exchange of such information will fulfil the two conditions set out in Article 2(5) […] in all cases […]" is regrettable as it does not really help to reduce the uncertainty.

Another positive feature that may somewhat compensate for the legal uncertainty thus created is that, if the test is not met, the inapplicability of the block exemption is confined to the information exchange and does not affect its application to the rest of the agreement. While the draft of the new regime was ambiguous in that respect, the new VRGL (§102) expressly confirm the continued application of the block exemption to the remainder of the vertical agreement, provided of course that the agreement otherwise complies with the conditions set out in the VBER.

4.2 Exclusion of vertical agreements for the provision of online intermediation services by hybrid online platforms

Article 2(6) of the new VBER introduces a novel limitation to the coverage of dual distribution agreements. The block exemption does not apply to vertical agreements relating to the provision of online intermediation services[34] where the provider of such services is a competing undertaking on the relevant market for the sale of the intermediated goods or services. The critical issue is whether the provider of the online intermediation services is an actual or potential competitor with regard to the distribution of the intermediated goods or services, irrespective of the source from which the hybrid platform obtains the relevant products.

This exclusion is limited to agreements relating to the provision of the online intermediation services and does not extend to any other vertical agreements the provider of the online intermediation services may have entered into, for instance agreements to distribute itself the intermediated goods or services (see §65 VRGL). The wording "agreements relating to the provision of online intermediation services" in art.2(6) is carefully chosen, indicating that the Commission's aim is to exclude from coverage by the VBER only those clauses, of a possibly wider contract, that deal with the provision of the online intermediation services.

The VRGL (§104) specify that the exclusion, however, does apply irrespective of whether the vertical agreement covering the supply of online intermediation services concerns the provision of these services to the party to the agreement itself or to third parties. The reference to third parties is most likely included in the text to address situations of so-called "brand-gating", where a manufacturer and hybrid platform agree, possibly as part of an agreement to supply goods for resale by the hybrid platform, that the platform will be restricted in supplying its intermediation services to other (competing) manufacturers. The part of the agreement restricting the supply of these services would then be considered to form a separate "agreement relating to the provision of intermediation services" and would be excluded from coverage by the VBER. The reference to third parties however also implies that other, possibly more innocent, agreements are excluded from coverage. For instance, if a manufacturer agrees with the hybrid platform the conditions under which the latter will provide online intermediation services to the manufacturer's authorised distributors and/or that the platform will not provide these services to unauthorised distributors. As a result, agreements whereby manufacturers operating a selective distribution system try to prevent so-called "grey" sales by unauthorised resellers taking place on platforms, which are quite common in practice and which may effectively not restrict competition, are excluded from coverage by the VBER in case the platform is a hybrid platform.

Another unfortunate exclusion from coverage by the VBER results from the definition of online intermediation services in art.1(1)(e) VBER as information society services facilitating the initiating of direct transactions between suppliers and buyers of goods and services. This definition covers not only online intermediation services provided by online platforms like Amazon, but also such services provided by a manufacturer opening its own website to its distributors for the reselling of the manufacturer's own products only. It is positive that the Commission in §109 VRGL makes clear that agreements to provide online intermediation services in the latter scenario will not be an enforcement priority, which makes economic sense as restrictions on the use of a manufacturer's own website for its own products will normally at most affect intra-brand competition. This unfortunate exclusion puts extra responsibility on the authorities to ensure that the distinction between "agreements relating to the provision of online intermediation services" and other vertical agreements is upheld. Otherwise, the risk exists in a situation—where a manufacturer allows its distributors to sell its products on the manufacturer's online platform—that not only the provision of the online intermediation services is excluded from coverage, but that the whole distribution agreement between manufacturer and distributor becomes excluded from coverage by the VBER.

[34] Somewhat surprisingly, fn.72 VRGL expressly reminds that this applies only where the vertical agreement for the provision of online intermediation services does not qualify as an agency agreement falling outside art.101(1) Treaty on the Functioning of the European Union (TFEU). The cross-references in the footnotes to §46 and §63 do indicate however that this escape route will generally not be available.

4.3 Changes and updates to the rules on agency

Agency is a relatively complex topic within the VBER environment. Prior to addressing the changes and updates that are essentially included in the VRGL, it may be helpful to sketch the general landscape.

The agency concept in EU competition law does not coincide with the concept as it is applied in commercial law.[35] The fact that an agent may acquire temporarily and for a brief period the ownership of the relevant goods and therefore performs a resale function does not undermine the agency qualification under competition law.[36] From a competition law perspective there are two (other) distinctions meriting attention.

The first distinction is that between the agent acting in relation to the contracts concluded or negotiated on behalf of the principal and the agent performing agency services. The distinction is important because, in the first case, there may be instances where the agent will not be deemed an undertaking that is separate from the principal. In the second case, however, the agent will always be deemed to act as a separate undertaking. The relevance of this issue resides in the fact that two separate undertakings are needed in order to bring art.101 TFEU into play so that in the first case the applicability of art.101 may be excluded on account of the lack of involvement of two separate undertakings.

The second distinction concerns the conditions under which agency activity in relation to the contracts concluded or negotiated on behalf of the principal may fall outside art.101(1). In order to determine whether, in relation to the contracts concluded or negotiated on behalf of the principal, the agent is deemed a separate undertaking, it is necessary to distinguish between so-called "genuine" and "non-genuine" agents. A genuine agent will be deemed part of the undertaking of the principal and hence not qualify as a separate undertaking. Hence, the arrangements entered into between the principal and the agent with regard to such contracts will not attract the application of art.101. This implies, for instance, that the principal is entitled to prescribe the exact price at which the agent must offer the products or services to customers. Since art.101 does not apply in this respect, there is no vertical price fixing risk.

In order to qualify as a genuine agent, the agent should not bear any or only insignificant financial or commercial risks in relation to the contracts concluded or negotiated for the principal.[37] Similarly to the previous VRGLs, the VRGL identify three types of risks that are relevant in this context, notably contract-specific risks, risks related to market-specific investments and risks related to other activities undertaken on the same product market.[38]

A novelty is that the VRGL specify that the significance of the risks must generally be assessed by reference to the remuneration earned by the agent for providing the agency services (typically the commissions received), rather than the revenues generated by the sale of the goods or services covered by the agency agreement.[39] This is a helpful and logical clarification of the Commission, in line with its general policy to interpret narrowly the agency exception of falling outside the scope of art.101(1).[40]

While the clarification leaves no doubt in situations where the agent derives all or most of its income from the agency services at issue, it leaves open how to assess the (in)significance where the income generated by these services is only a part of the agent's income and the agent obtains additional income from other activities, such as agency services supplied to other principals. It may seem logical to also assess in the latter case the significance of the risk of the agency activity undertaken for each principal against the remuneration derived from the agency activity for that particular principal. However, an argument can also be made that in that case the assessment of the significance of the risks should take into account the overall income of the agent. This boils down to the question (that is not resolved explicitly in the VRGL) of whether the level of the risk must be measured at the level of the undertaking of the agent in its entirety or only in relation to the particular agency concerned.

Another helpful clarification is that the VRGL offer guidance on the manner in which a principal can reduce the risk level of its agents by covering certain costs.[41] The message is that the parties have considerable flexibility in this respect, for instance by covering costs through lump sum payments, by a fixed percentage of revenues, or by reimbursing costs declared by the agent. However, to effectively reduce the risk of the agent, the covering of the costs may not be made dependent on the agent's commercial success or its remuneration. In short, it is essential that the exposure of the agent is effectively reduced to a de minimis level and that, irrespective of the agent's commercial success, the totality of its costs is reduced to such a level.

Another novelty in the VRGL is the attention given to scenarios where an agent acts in addition as an independent distributor for the same supplier.[42] Two immediate concerns are expressed in the VRGL (§37) in

[35] §§30 and 63 VRGL.
[36] §33a VRGL.
[37] See Judgment of the Court of First Instance (Fifth Chamber) of 15 September 2005, *DaimlerChrysler AG v Commission* (T-325/01) EU:T:2005:322; [2007] 4 C.M.L.R. 15; Judgment of the European Court of Justice (Third Chamber) of 14 December 2006, *Confederación Espanola de Empresarios de Estaciones de Servicio v Compania Espanola de Petroleos (CEPSA)* (C-217/05) EU:C:2006:784; [2007] 4 C.M.L.R. 5; and Judgment of the European Court of Justice (Third Chamber) of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* (C-279/06) EU:C:2008:485; [2008] 5 C.M.L.R. 19. See also VRGL, in particular §§30–34.
[38] §31 VRGL.
[39] §32 VRGL.
[40] §30 VRGL.
[41] §35 VRGL.
[42] §36 and following VRGL.

respect of such hybrid scenarios: (i) there is a risk that the agency activity will influence the incentives of the agent and limit its decision-making independence when selling products in its independent capacity as a distributor, and (ii) there may be difficulties in distinguishing between the costs relating to the agency and those concerning the independent distributorship.

In line with the general policy to interpret the agency exception narrowly, these concerns have resulted in a strict application of the "genuine agency" test for these hybrid agency/distributor situations. In order to determine the market-specific investments to be borne or reimbursed by the principal, the hypothetical situation of an agent that is not yet active in the relevant market must be taken.[43] Therefore, all market specific investments should be covered by the principal except the costs which the agent makes exclusively for the distribution of products as an independent distributor outside the agency agreement. The test is strict because it requires that costs that cover both activities must be reimbursed entirely in order to rescue the "genuine" character of the agency part of the relationship.

It would have been possible to adopt a different approach and to rely on a counterfactual where the agency is removed from the hybrid relationship and the costs that disappear as a result are those that must be reimbursed. In this counterfactual, the common costs (that apply both to the agency and the independent distributorship) would not have to be covered by the principal. The example included in the VRGL leaves no doubt however that it is the more strict approach (requiring also the common costs to be covered by the principal) that has been adopted.[44]

The chosen approach underscores the general reluctance of the Commission to accept genuine agency in such hybrid scenarios. This position is clearly reflected in the VRGL which call for a strict assessment of the requirements to qualify as a genuine agent and express the fear of misuse of the agency model.[45]

In the same spirit, the VRGL add that undertakings active in the online platform economy generally do not meet the conditions of "genuine agency".[46] Reference is made in this respect to the fact that such undertakings serve in most cases a large number of sellers, determine themselves the conditions and commercial strategy under which products are sold on their platform and make significant market specific investments, all factors which prevent them from effectively becoming part of the undertaking of the seller.

4.4 Changes and clarifications to the hardcore list

While the overall approach towards hardcore restrictions has been maintained, certain changes and clarifications with respect to the hardcore list have been made. A first element of continuity is that the list covers, with one limited exception, only restrictions imposed on the buyer and no restrictions assumed by the supplier. Furthermore, the relevant restrictions continue to consist of vertical price fixing, territorial restrictions ("where to sell") and customer restrictions ("to whom to sell"). Restrictions falling outside these categories are not covered by the hardcore list.

A question that has not received a clear answer in the new texts is whether a restriction that is listed in art.4 of the VBER, but in the specific circumstances of a particular case does not fall within the prohibition of art.101(1), does still qualify as hardcore restriction and hence renders the block exemption inapplicable to that vertical agreement as a whole. A classic example is a customer restriction regarding dangerous substances or firearms, prohibiting the buyer to resell such products to customers below a certain age. Such a customer restriction may very well be objectively justified on account of the nature of the products and therefore escape the prohibition of art.101(1). The issue is, however, whether the restriction will nevertheless be deemed hardcore.

While a business-friendly approach towards the block exemption pleads in favour of keeping such restrictions out of the hardcore list, there are indications (but no explicit confirmation) that the Commission may have a different approach in mind. The VRGL[47] make a distinction between restrictions by object and hardcore restrictions. The former require an individual assessment of the vertical agreement, while the latter are a category of restrictions that are generally presumed to result in net harm to competition. The VRGL[48] then continue by stating that "hardcore restrictions do not necessarily fall within the scope of art.101 (1) of the Treaty". This explanation may be taken to suggest that it is not a pre-condition, in an individual case, for a restriction to fall within the prohibition of art.101(1) in order to place it within the hardcore list of art.4 VBER. As soon as a restriction falls within the category of restrictions included in that provision, it seems to be considered a hardcore restriction and therefore trigger the negative consequences linked to such qualification. In that sense, the hardcore list may be deemed form-based.

[43] §39 VRGL.
[44] §40 VRGL.
[45] §45 VRGL.
[46] §46 VRGL.
[47] §179 VRGL. See also fn.26 above.
[48] §180 VRGL.

4.4.1 Clarifications on RPM, in particular as regards minimum advertised prices

The existing regime governing vertical price fixing is maintained in the VBER.[49] In short, the imposition on the buyer of fixed or minimum resale prices is hardcore, and the imposition of maximum resale prices and the communication of recommended resale prices fall outside the blacklist of art.4 VBER. While leaving this known "summa divisio" intact, there are three additions or clarifications contained in the VRGL that are worth mentioning.

The first concerns the treatment of so-called minimum advertised prices (MAPs). MAPs prevent the buyer from advertising prices below a level determined by the supplier. Hardly surprising and fully consistent with the overall approach towards vertical price fixing, MAPs are considered vertical price fixing and therefore are covered by the hardcore list of art.4 VBER.[50]

The second addition concerns the feature of so-called fulfilment contracts. A fulfilment contract is defined as "a vertical agreement with a buyer for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer".[51] The VRGL provide that, where the supplier selects the undertaking that will provide the fulfilment services, the imposition of a resale price on such undertaking does not amount to vertical price fixing. The logic is that there is no restriction of competition as long as the customer is not able to select the undertaking that fulfils the contract. In such a scenario there is no room for price competition or competition on fulfilment services at the distribution level and this constitutes the rationale for the exception to the blacklist.

From a purely legal perspective it is not so clear how this fulfilment exception fits within the overall mechanics of the VBER. If the hardcore restrictions reflect a category of restrictions that apply in a form-based manner, the exception would ordinarily be deemed to fall within the blacklist. Given the stringent requirements that apply to genuine agency, it seems difficult to argue that the conditions stated in §193 VRGL are sufficient to remove from the fulfiller the qualification of an undertaking that is separate from the supplier.

A proper understanding of the exact requirements that must be complied with is not facilitated by the (only) example provided in §193 VRGL. Reference is made to a fulfilment scenario 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. While the example attracts multiple questions, the most striking point is that it seems to be left up to the independent retailers to decide who will eventually fulfil the contract. This brings a horizontal dimension to the example that complicates matters. The Commission, clearly aware of the additional complexity, has added a warning in respect of the horizontal aspects of the example.[52]

The practical significance of the addition to the VRGL addressing RPM in a fulfilment contract context should presumably not be overstated. Similar fulfilment scenarios, and in particular where the customer is entitled to select its buyer (fulfiller) of choice, were in the past typically handled via imposed maximum resale prices. This may remain the safer route to follow where the application of the conditions underpinning §193 VRGL creates doubts.

A third novelty is the expansion of the list of examples where RPM may lead to efficiencies and therefore qualify for an individual exemption. The new example, which has been picked up by many practitioners, concerns the imposition of a minimum resale price or MAP in cases where the distributor uses a product as a loss leader and regularly sells below the wholesale price.[53] Use of a product as a loss leader may, as remarked in the VRGL, undermine the incentives of the product's supplier to invest in quality and brand image. To this it could be added that pricing by retailers below the actual wholesale price, that is pricing below variable cost, is not tenable and is not a form of healthy competition which is likely to benefit consumers in the longer run.

However, this example must be treated with caution. First, such cases continue to fall within the hardcore category and hence render the block exemption inapplicable to the vertical agreement as a whole. The fact that the case generates efficiencies and may qualify for an individual exemption does not alter the position in this respect. Secondly, the introductory language of §197 VRGL emphasises that it does not suffice that such vertical price fixing generates efficiencies, also the other three conditions of art.101(3) (and, most importantly, the indispensability criterion) must be met. The fulfilment of the four conditions of art.101(3) must be substantiated with concrete evidence. Careful use and possibly even avoidance of the examples listed in §197 VRGL may therefore be wise.

4.4.2 Clarification to the system of (re)sales hardcore restrictions by dividing it by type of distribution

A striking change is how the sections of art.4 VBER dealing with territorial and customer restrictions are divided into three parts on the basis of the type of distribution system to which the vertical agreement belongs. A distinction is made between exclusive distribution, selective distribution and free distribution.

[49] Article 4(a) VBER.
[50] §§187 and 189 VRGL.
[51] §193 VRGL.
[52] Fn.109 VRGL.
[53] §197c VRGL.

The main reason for this three-way split is probably that the Commission wanted to make the list easier to understand, by eliminating the double negatives and exceptions to exceptions that plagued the text of the resale hardcore restrictions in the previous VBERs. While that is very commendable, that goal could have been achieved more effectively and concisely with a simpler two-way split between selective and non-selective agreements. A selective agreement is that which meets all of the conditions stated in art.1(1)(g) VBER. A non-selective agreement is one which fails to meet one or more of the conditions reflected in that provision.

This two-way split would have sufficed because of two specific requirements in the VBER for selective distribution. First, selective agreements must include a particular customer restriction (notably a prohibition on resale to unauthorised distributors) which is blacklisted in any non-selective scenario. Secondly, selective distribution requires the permission of cross-supplies within the selective network, where such cross-supplies can be blocked in non-selective scenarios by imposing exclusive purchasing or other quantity forcing obligations.

Once these issues have been addressed (with reference to the split between selective and non-selective distribution), it has no further relevance, from the perspective of the list of hardcore restrictions, to which distribution system the vertical agreement belongs that contains a territorial or customer restriction. With regard to any such territorial or customer restrictions, the characteristics of the target territory or the targeted customer group, i.e. the territory or customer group that is protected by the restriction contained in the vertical agreement, is of decisive importance. Whether the undertaking on which the restriction is imposed qualifies as an exclusive, a selective or a free distributor does not matter in this respect. It is whether the target territory or targeted customer group is exclusively allocated or is part of a selective system that is decisive.

This explains why the list of hardcore restrictions included in art.4 VBER is identical for exclusive distribution and free distribution. The identical nature of this list underscores that the newly introduced distinction between exclusive distribution and free distribution is, in fact, not relevant and potentially raising some confusion. This distinction is superfluous because it focuses on the vertical agreement containing the territorial or customer restriction, while whether and to what extent such restrictions are hardcore or covered by the VBER depends on the target territory or customer group.

4.4.3 Changes to the coverage of exclusive distribution

During the consultation phase practitioners alerted the Commission to the fact that the conditions for imposing active sales restrictions to protect exclusive distributors were very strict under the previous block exemption regimes (both Regulations 2970/99 and 330/2010) and, in fact, discouraged businesses from making use of this possibility.[54] The disincentive to use active sales restrictions may explain, at least in part, the increased use of selective distribution.

In order to appreciate the changes made in the new VBER and VRGL, it is appropriate to recall the cumulative conditions that had to be met in order to allow an active sales restriction to benefit from an automatic exemption under the previous VBER:

(i) the active sales restriction had to be targeted at a territory or a customer group either reserved by the supplier for itself, or allocated to a single exclusive distributor;

(ii) the active sales restriction protecting such an exclusively allocated territory or customer group had to be imposed on all of the other buyers of the supplier throughout the whole of the European Economic Area (EEA) (parallel imposition requirement); and

(iii) the supplier was not entitled to require its buyers to pass on the active sales restriction to the next level (i.e. the customers of the buyer) of the distribution chain.

With regard to each of these three conditions the VBER and the VRGL are making changes:

(i) The active sales restriction can now be imposed for territories and customer groups that are allocated to a maximum of five exclusive distributors.[55] Hence, the possibility to work with active sales restrictions is no longer reserved for single exclusive distributors, but extends to scenarios of shared exclusivity provided that the exclusive rights are granted to no more than five distributors. There is no particular magic to the chosen number of five distributors.[56] Given the negative reactions to the "preservation of investments efforts" test in the draft of the new VBER,[57] the Commission has opted for a straight number, allowing firms to easily assess whether the active sales

[54] F. Wijckmans and S. Jaques, "Expert report on the review of the Vertical Block Exemption Regulation—Active sales restrictions in different distribution models and combinations of distribution models" (2021), available at: *https://competition-policy.ec.europa.eu/system/files/2021-06/kd0821131enn_VBER_active_sales.pdf*, p.35.

[55] See the definition of "exclusive distribution system" included in art.1(1)(h) VBER.

[56] The explanation provided in the final sentence of para.121 VRGL is not particularly convincing as the size of the territory or the composition of the customer group are probably more relevant when assessing the risk of freeriding on someone else's investments.

[57] European Commission, "Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010" (2021), available at: *https://competition-policy.ec.europa.eu/system/files/2021-11/contributions_summary_draft_revised_VBER_and_VGL.pdf*, p.6.

restrictions contained in their vertical agreements are compatible with the VBER. This is definitely a good choice.[58] Block exemptions lose much of their benefits if compliance with the list of hardcore restrictions becomes too much a matter of interpretation and self-assessment based on a flexible standard.

The VBER and the VRGL continue to grant considerable flexibility to the parties when defining the territories or customer groups that benefit from protection against active selling. In this respect, it is clarified that, depending on the criteria used, a customer group may consist of a single customer.[59] Also with respect to the size and definition of the reserved or exclusively allocated territories, the parties enjoy complete discretion.

(ii) The parallel imposition requirement has by and large been maintained, even though practitioners pointed out that this was often the most difficult of the cumulative conditions.[60] The condition has been somewhat relaxed by accepting that there may be gaps for a temporary period due to practical reasons and not with the object of preventing parallel trade.[61] The example provided is that where the distribution network is modified and the supplier needs time to renegotiate the active sales restrictions with certain buyers.[62]

(iii) An important change with regard to the third condition is that a supplier is entitled to require its buyers to pass on the active sales restriction to the customers of the buyer. Put differently, the supplier can impose a roll-over requirement on its buyers, provided that it is limited to one further level in the distribution chain.[63]

It remains to be seen whether the increased flexibility that is offered by the VBER and the VRGL will enhance the popularity of active sales restrictions included in exclusive distribution scenarios. It is fair to state that the conditions remain more cumbersome than those applicable to the setting up of a selective system (where, admittedly, the protection offered is of a different nature and does not amount to the imposition of active sales restrictions). This could have been avoided by simply block exempting, outside selective distribution systems, all active sales restrictions and keeping only passive sales restrictions in the hardcore list for exclusive and free distribution. This more radical change would have done away with the artificial limit of five exclusive distributors per territory and would have also avoided the parallel imposition issue. It is unfortunate that the Commission has not yet dared to take this step.

The VRGL offer some further clarifications that may assist companies in complying with the VBER regime regarding active sales restrictions:

- If a supplier wishes to reserve a territory or customer group to itself and protect it against active sales from the network, it must inform all of its distributors accordingly.[64] Similarly to the previous regimes, there is however no need for the supplier to become active itself in the reserved territory or with regard to the reserved customer group.
- Participation in public or private tenders are a form of passive selling. Hence, such participation cannot be prevented by means of an active sales restriction.[65]

4.4.4 Improvement of the possibilities to protect hybrid distribution systems

One of the complex areas of the previous block exemption regimes was the treatment of hybrid scenarios where the supplier was operating a selective system in certain territories and a non-selective system in other territories. The central issue is the extent to which each system can be protected against interference coming from territories where the other system is applied.

In the previous regimes, this issue was addressed in a one-sided manner. If in certain territories exclusive distribution was applied and the exclusive distributor was given protection against active sales, the previous Vertical Guidelines (§56) accepted that selective distributors located in other territories could be prevented from engaging in active sales into the territory of the exclusive distributors. While in principle selective distributors could not be imposed active sales restrictions, such a scenario served as an exception provided that it was targeted at a

[58] It is striking that the UK has chosen in its "own" block exemption regime (Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022/516)) to stick to the draft language of the VBER and hence to operate a standard that offers substantially less legal certainty and can give rise to debate.
[59] §123 VRGL. See also Wijckmans and Jaques, "Expert report on the review of the Vertical Block Exemption Regulation—Active sales restrictions in different distribution models and combinations of distribution models" (2021), p.24.
[60] Wijckmans and Jaques, "Expert report on the review of the Vertical Block Exemption Regulation—Active sales restrictions in different distribution models and combinations of distribution models" (2021), p.37. See also European Commission, "Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010" (2021), p.7.
[61] The link between a gap in terms of the parallel imposition of active sales restrictions and the limitation of parallel trade is not very clear. The impact on parallel trade in cases where the parallel imposition requirement is complied with in full seems to be greater than where gaps are left. The real concern of the Commission is probably to avoid situations where sales restrictions are only or selectively imposed on buyers most likely to engage in parallel trading and not to provide a general protection against free riding on investments of the exclusive distributor(s).
[62] §122 VRGL.
[63] §220 VRGL.
[64] §124 VRGL.
[65] §215 VRGL.

territory exclusively allocated to a single distributor or reserved to the supplier outside the context of a selective system.

A major improvement is that this possibility is now explicitly included in the VBER[66] and no longer just mentioned in the VRGL. This change contributes to legal certainty and gives appropriate prominence to this possibility.

The previous regimes did not however offer protection in the opposite direction. Non-selective distributors (exclusive or not) could not be prevented from selling to unauthorised distributors located or active in selective territories. It was pointed out to the Commission that this position undermined the coherence of any selective system and, in fact, resulted in the adoption of selective distribution (albeit in its simplest and most straightforward form) in territories where such a system was not needed from a business perspective.[67]

The VBER remedies the situation and exempts the restriction of active and passive sales by a non-selective distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services.[68] The VRGL extend this possibility to territories which the supplier has reserved for the operation of a selective system.[69] They likewise clarify that the supplier may require that this restriction is passed on down the distribution chain.[70] Unlike the third condition that applies to the imposition of active sales restrictions towards exclusive or reserved territories, such rolling-over may be imposed down the distribution chain without limitation. This implies that the selective system can be given full protection against supplies to unauthorised distributors coming from sources situated in non-selective territories.

The protection of selective systems in this manner is a welcome addition to the VBER and assists in safeguarding the overall coherence of selective networks. Thanks to this addition, the need to switch to selective distribution even in territories where there is no particular business rationale for doing so is removed.

4.4.5 The incoherent and superfluous new hardcore restriction in article 4(e)

The new hardcore restriction in art.4(e) VBER reads as follows:

> "4) … vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
>
> …
>
> (e) the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d), without prejudice to the possibility of imposing on the buyer:
>
> (i) other restrictions of online sales; or
>
> (ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel".

This hardcore restriction is, for a number of reasons that are explained below, either superfluous or potentially incoherent with the rest of the effects-based policy towards vertical agreements.

The hardcore restrictions defined in art.4(b), (c) and (d) all concern sales restrictions as to where or to whom the buyer can sell the contract goods or services. This is directly clear from the text of art.4(b), (c) and (d), which provides "… the restriction of the territory into which, or of the customers to whom, the exclusive distributor/members of the selective distribution system/buyer may actively or passively sell the contract goods or service". This reflects the objective of qualifying the relevant practices as hardcore restrictions: limiting the possibilities for suppliers to support price discrimination by having in the agreement (re)sale restrictions imposed on the buyer as to where or to whom the latter can sell. This also means that other (re)sale restrictions, in particular restrictions as to how to sell, are not falling within this hardcore list.[71]

This is not new; the same wording and intention can be found in the 1999 VBER and the 2010 VBER. This was also recognised by the CoJ in its *Coty* judgment.[72]

[66] Article 4(c)(i)(1) VBER.
[67] Wijckmans and Jaques, "Expert report on the review of the Vertical Block Exemption Regulation—Active sales restrictions in different distribution models and combinations of distribution models" (2021), p.49.
[68] Article 4(b)(ii) and 4(d)(ii) VBER.
[69] §§276, 223 and 241 VRGL. There is however a tension with art.4(b)(ii) and (d)(ii), which state that active or passive sales by the exclusive distributor/buyer and its customers can be restricted to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services, but which make no mention of a territory which is only reserved for such purpose for a future introduction of a selective distribution system. The extension in §223 and §241 ("in the territory where the supplier already operates a selective distribution system *or which it has reserved for the operation of such a system*") is not necessarily consistent with the wording of art.4 and hence may give rise to a legal debate.
[70] §223 VRGL, in fine.
[71] The VRGL make it abundantly clear that the requirements in art.4(c)(ii) and (iii) not to restrict cross supplies between the members of a selective distribution system and not to restrict the retail members of such a system in their selling to end users, are there to ensure that selective distribution cannot be combined with exclusive distribution and hence serve to create room for parallel trade. See paras 234 and 236–237 VRGL.
[72] Judgment of the Court (First Chamber) of 6 December 2017, *Coty Germany GmbH v Parfumerie Akzente GmbH* (C-230/16) EU:C:2017:941; [2018] 4 C.M.L.R. 9, in particular at [63]–[64] and [68]–[69].

The background to the distinction between restrictions on "where" and "to whom" to sell versus restrictions on "how" to sell is the concern of EU competition law and the Commission with restrictions that hinder parallel trade. If a supplier charges different prices to its buyers, the resulting price discrimination will in most cases incentivise parallel trade.[73] As long as the buyers are free to resell where and to whom they want, this will allow the buyers that obtained the lower price to sell, directly or indirectly through other distributors, into the high price areas or to customer groups that are being charged a higher price. While the incentive to parallel trade may differ between products, the freedom to sell where and to whom the buyer wants, will in general reduce the possibility for suppliers to use vertical agreements to uphold different prices within the internal market.

In short, the hardcore restrictions in art.4(b), (c) and (d) are concerned with avoiding price discrimination and supporting market integration, not with avoiding a reduction or softening of price competition within markets.[74] As in the previous VBERs, and also in the new VBER, it is art.4(a), banning RPM, which is concerned with the direct restriction of price competition.

This does not mean that only RPM can reduce price competition in a market. It is well understood and reflected in the VRGL that many types of restrictions can limit or soften price competition. For instance, the use of non-compete obligations may reduce price competition between incumbent suppliers by foreclosing new suppliers and by eliminating in-store inter-brand competition. Similarly, restrictions as to how to sell products may help to segment markets by strengthening brand image, which in turn may soften (price) competition. However, there are good reasons why all these types of restrictions do not figure in the hardcore list: they are known to be used, or at least have the potential to be used, to create efficiencies and there is thus no justification to treat them as by object restrictions.[75]

At first sight art.4(e) seems to reflect the *Pierre Fabre* judgment of the CoJ.[76] In that judgment, the CoJ ruled that a total prohibition to sell online was rightly equated with a hardcore restriction as to where and to whom to sell under art.4 of the 1999 VBER. The CoJ agreed with what had already been stated in the 2000 VRGL, that a total prohibition could be assumed to have as its object to restrict distributors to sell beyond their physical trading area/offline sales area.[77] The same is reflected in the part of art.4(e) that reads "as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points (b), (c) or (d)". This all seems to indicate that this hardcore restriction is effectively not more than an example or a sub-set of what is already declared hardcore in art.4(b), (c) and (d). If that is indeed all there is to this hardcore included in art.4(e), then it is in a sense a superfluous addition. Examples should be provided in the VRGL or figure in the recitals of the VBER, but should not be included in the provisions of the VBER. The risk is otherwise that users of the new legal framework will not necessarily perceive the provision as a mere example or application of the known principles and interpret it beyond the known parameters as a new hardcore restriction.

However, art.4(e) goes beyond the *Pierre Fabre* judgment. It does not simply declare a total prohibition to use online sales to be hardcore, but defines *the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services* as hardcore. This raises the question what "prevention of the effective use of the internet" entails beyond a total prohibition to use the internet?

In §203 VRGL it is stated that agreements having the object to significantly diminish the aggregate volume of online sales, are having as their object to prevent the effective use of the internet to sell to particular territories or customers. This seems to shift the question from what is "preventing the effective use of the internet" to what is "significantly diminishing the aggregate volume of online sales". Does aggregate volume refer to the overall market volume, opening up the possibility that the same restriction is hardcore for a major player in the market and not for a minor player, as only the first may have a significant influence on the market volume? That would be an unwelcome development, mixing up by object with by effect. Conversely, if the relevant volume is that of the individual buyers, consistency with *Coty* would seem to require that the sales volume is reduced by the vertical agreement to such an extent that, in practice, the use of the internet by the buyer concerned is prevented.[78]

The reference to significantly diminishing the aggregate volume raises in addition a question of consistency with what is explained in §209 VRGL on the treatment of dual pricing, i.e. where a distributor is

[73] To what extent a certain price discrimination will provoke parallel trade will depend in part on whether the product is easily tradeable or is more difficult to trade, for instance because of its weight or limited shelf life. Such factors in combination with the level of the price differences will influence the extent to which parallel trade is likely to occur.

[74] In this context it is also positive that the Commission in §235 of the VRGL has clarified the so-called equivalence principle: "a supplier operating a selective distribution system may impose on its authorised distributors criteria for online sales that are not equivalent to those imposed for sales in brick and mortar shops, *provided that the requirements imposed for online sales do not indirectly 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*". In the 2010 VRGL (at §56) the impression was given that more onerous conditions on online sales could rather easily be considered a hardcore restriction.

[75] The hardcore list in art.4(b), (c) and (d) acknowledges the same, by making exceptions to the hardcore restriction as to where and to whom to sell for re(sale) restrictions that are deemed necessary to create an exclusive or selective distribution system. These exceptions are made because of the efficiencies that may result from implementing these restrictions and implementing these distribution systems.

[76] Judgment of the Court (Third Chamber) of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS v President de l'Autorite de la Concurrence* (C-439/09) EU:C:2011:649; [2011] 5 C.M.L.R. 31.

[77] *Pierre Fabre Dermo-Cosmétique* [2011] 5 C.M.L.R. 31 at [54].

[78] In §203 VRGL the Commission applies the same reasoning regarding agreements which have the object of significantly diminishing the possibility for end users to buy the contract goods or services online. The comments that can be made in this regard are very similar to the comments made in the main text regarding agreements having the object to significantly diminish the aggregate volume of online sales.

required to pay a higher purchase price for products the distributor (re)sells online than for products it (re)sells) offline. Dual pricing is covered by the VBER and not hardcore as long as the price difference does not make "selling online unprofitable or financially unsustainable".[79] However, where with a uniform purchase price the costs of selling online are significantly lower than selling offline and high online sales volumes can thus be expected, dual pricing, by increasing the costs specifically for online sales, will reduce the online cost advantage and may therewith significantly reduce the (expected) online sales. So how will this be treated? When is this supposed to be so significant that it can be concluded that the difference in wholesale price has the object of restricting sales to particular territories or customers? The reference in the VRGL to making sales "unprofitable or financially unsustainable" seems to imply a high standard which boils down to the elimination in practice of online selling due to the price gap.

As said before, if the intention of art.4(e) is to merely explain that online restrictions are hardcore if they have the object to support price discrimination by restricting the buyer as to where and to whom it can sell, the provision is superfluous and, moreover, creates confusion. It would be welcome if the Commission could take away the confusion and clear up, possibly in a future decision, that indeed art.4(e) is not creating a new hardcore but is merely an example of what is found in art.4(b)–(d).

Without such clarification, the impression may arise that art.4(e) defines a new hardcore restriction, incoherent with the rest of the policy because it mixes up the object of the agreement to support price discrimination and restrict where and to whom to sell with other objectives and with the effect of the agreement, in particular with the effect to limit price competition within the market. In order to ensure consistency with *Coty* and the link with "where" and "to whom" restrictions, it seems appropriate to interpret the "effective use" language as referring to direct and indirect ways of achieving the total online prohibition condemned in *Coty*, but to go no further than that, at the risk of otherwise undermining the overall coherence in approach that is underpinning art.4 VBER.

This fear that the overall coherence is put at risk, comes in particular from the second indent of art.4(e): "(ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel".

What is done here is to declare it hardcore if a supplier agrees with its buyers that the latter cannot make use of a particular online advertising channel. This raises first the question of what defines a particular online advertising channel. If different forms of online advertising compete, does this mean that they are not separate online advertising channels? For instance, a ban to make use of online price comparison services, is that also a hardcore restriction if it is shown that these services compete with other ways to advertise? But secondly, and more worrying, what is declared hardcore here is not necessarily anymore related to restricting the buyer as to where or to whom it can sell. In case a particular advertising channel is not open to a distributor, there may still be plenty of other channels to reach all the territories and customer groups it wants. Hence, we seem to be moving from "where" and "to whom" restrictions towards encompassing also "how" restrictions.

What we see here is a hardcore restriction that seems mainly concerned with preventing a possible reduction of (price) competition within markets. That is not surprising in view of the likely background to this indent of art.4(e): possibly a misguided attempt to incorporate in the hardcore list the restriction prohibited by the Bundeskartellamt (BKA) in 2015 in its *Asics* case.[80] The BKA found that restricting distributors generally in the use of price comparison services qualifies as a hardcore restriction because such a ban restricts distributors in selling their products to consumers online. The BKA argued that price comparison services are an effective way to reach customers online because these services enable consumers to easily obtain information about a specific product. Prohibiting their use reduces the outreach that the internet provides, which leads to lower online sales. According to the BKA's view, the intensification of competition that is in principle possible through online sales was thus limited.[81] The BKA also found that prohibiting the use of price comparison services limited the price pressure on producers.[82] Neither the protection of the brand image, nor a supposed prestige character of the products or the argument of free riding was accepted as a justification for the restrictions imposed on retailers by Asics. The German Federal Supreme Court ultimately confirmed the BKA's assessment. The German Federal Supreme Court found that a general prohibition on the use of price comparison services infringes art.101(1) and cannot be exempted as it qualifies as a hardcore restriction pursuant to art.4(c) VBER 2010. The judgment is based on the argument that the ban of price comparison services constitutes a restriction of passive sales to end customers.[83]

[79] §209 VRGL. The treatment of dual pricing itself is also unfortunate. In §209 it is indicated that dual pricing is not a hardcore restriction "where 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". However, this test may be difficult to establish in practice. It is our understanding that this language does not require complex accounting assessments but must be understood more generally as preventing the use of investments as an excuse to apply different wholesale prices in order to render online sales financially unsustainable. Understood in this manner, the position seems to be consistent with *Pierre Fabre*. The test also lacks economic logic, as there is generally no reason to allow a supplier to make online resales less attractive simply because it is lower in cost: if online distribution is lower in cost, this should normally be allowed to lead to lower end prices.

[80] German Federal Cartel Office (Bundeskartellamt) decision dated 26 August 2015, B2-98/11. Confirmed by German Federal Supreme Court (Bundesgerichtshof) judgment dated 12 December 2017, KVZ 41/17.

[81] German Federal Cartel Office (Bundeskartellamt) decision dated 26 August 2015, B2-98/11 at [32].

[82] German Federal Cartel Office (Bundeskartellamt) decision dated 26 August 2015, B2-98/11 at [400].

[83] German Federal Supreme Court (Bundesgerichtshof) judgment dated 12 December 2017, KVZ 41/17 at [23].

The BKA's *Asics* case and the confirmation by the German Federal Supreme Court seem to disregard the point that a ban on the use of a particular advertising channel may very well have as its object to restrict "how" the distributors can sell the contract products and not "where" and "to whom" they can sell these products. A ban on the use of a particular online advertising channel should not be a hardcore restriction, like it is not hardcore and often perfectly acceptable and considered efficiency enhancing in the offline world for, for instance, producers of luxury products to prohibit their distributors to advertise in free newspapers or with unaddressed mailings and to restrict their advertising to glossy magazines. The *Asics* case was concerned with a loss of price competition within the German market. Such a reduction of price competition was not a hardcore restriction under art.4 of the previous VBERs and is that neither under art.4(b)–(d) of the current VBER. However, the impression given is that such a reduction may be captured under art.4(e), which is incoherent with the general policy as it does not fit the "where" or "to whom" versus "how" to sell dichotomy and, more importantly, is not justified because of the possible efficiencies that are linked to restrictions on "how" to sell.

It would be welcome if the Commission also clarifies, in one of its future decisions, that this particular indent of art.4(e), which seems to declare as hardcore any ban of a particular advertising channel, has to be interpreted narrowly as only excluding from the VBER such restrictions where it can be shown that they have as their object to restrict "where" or "to whom" to sell. One way of doing this (in a manner that is completely compatible with the text of the VBER and, in our view, reflects a correct application of the relevant provision) is by stating that art.4(e)(ii) places cases where no entire online advertising channel is excluded in any event outside the hardcore restriction, while leaving intact the introductory part of art.4(e) requiring that a "where" or "to whom" restriction (and not just a "how") restriction must be established. In doing so, the overall coherence of the hardcore list would be safeguarded and consistency between the approach in the offline and the online world would be secured.

4.4.6 Change to article 4(f): addition of "wholesalers"

There is only one hardcore restriction that concerns restrictions imposed on a supplier. It is included in art.4(f) VBER. It is blacklisted, in an agreement between a supplier of components and a buyer that incorporates the components into an intermediate or final product, to restrict the supplier's ability to sell these components as spare parts to end users or to repairers, wholesalers or other service providers that are not entrusted by the buyer with the repair or servicing of its goods. Conversely, the buyer of the components is entitled to prevent the supplier from selling the spare parts to the authorised after-sales network of the buyer.[84]

The modification to this provision in the VBER is the addition of wholesalers to the list of undertakings to which the supplier should be free to supply spare parts. This is an interesting addition because it concerns undertakings that are not (necessarily) engaged in repair or servicing, but purely in reselling. The policy consideration underlying this addition is most likely that many component producers do not supply directly to independent repairers or service providers and that the addition of wholesalers was deemed necessary to facilitate the supply of aftermarkets, i.e. to make the hardcore restriction work in practice. The addition implies that the supplier of spare parts may turn to independent wholesalers in order to get the spare parts delivered to the independent repairers and service providers.

In order to avoid that wholesalers start to supply spare parts also to the authorised network of the buyer, the VRGL point at the possibility for the buyer to impose in its agreements with its authorised network certain purchasing restrictions.[85] In a non-selective context, such restrictions can go so far as an obligation of the network member to purchase the spare parts only from the buyer of the components or a source designated by the buyer for that purpose. In a selective system, the classic cross-supply provision can be used to attain that objective. The VRGL do not suggest that the buyer of the components may require its supplier to include appropriate restrictions in the agreements with its wholesalers. From the perspective of the VBER, it is not entirely clear whether such a contractual set-up would work. The inclusion of such a customer restriction in the vertical agreement entered into by the supplier of the components/spare parts and its wholesalers, pursuant to a requirement to that effect included in the supply agreement concluded between the supplier and the buyer of components, qualifies most likely as a black-listed customer restriction. Hence and as indicated in §245 VRGL, the safer approach is that the buyer of the components imposes contractual purchasing limitations on its authorised network.

Similarly to the regime known for the automotive sector, it is spelled out in the VRGL that the hardcore restriction includes indirect measures, for instance if the manufacturer of the spare parts is restricted in supplying technical information and special equipment that is needed in order to use the relevant spare parts.[86] It is interesting to note that the VRGL refer in this context only to the use of the spare parts by end users, independent repairers and service providers. This seems to imply that the

[84] This approach differs from that of Regulation 461/2010 (the sector-specific block exemption applicable to the motor vehicle sector) where a supplier of components cannot be prevented from supplying spare parts to the authorised network of the buyer (see, art.5(b) of Commission Regulation (EU) No 461/2010 of 27 May 2010 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 in the motor vehicle sector [2010] OJ L129/277).
[85] §245 VRGL.
[86] §245 VRGL.

wholesalers are not entitled to claim access to more information or special equipment than is needed by their customers.

4.5 Changes and clarifications to the list of excluded restrictions

In most respects the approach towards excluded restrictions remains unchanged (see section 3). There are however a number of novelties requiring attention.

4.5.1 The unfortunate linking of coverage by the block exemption to severability

The first and most important conceptual change concerns the impact of the inclusion of an excluded restriction for the applicability of the VBER to the remainder of the vertical agreement. The previous VRGLs made it clear that while excluded restrictions are not block exempted, the inclusion in an agreement of any of these restrictions does not prevent the application of the block exemption to the rest of the agreement. In other words, only the individual restriction is not block exempted and requires individual exemption while the rest of the agreement remains block exempted (as long as the market share threshold is respected and the other conditions for the application of the VBER are met). The summary text included in §48 of the new VRGL still seems to reflect this position.

However, other text in the new VRGL, in particular in §7 and §246, seems to alter or at least nuance this position. §7 VRGL provides that "the vertical agreement is covered by the safe harbour established by the Regulation, provided that the agreement does not contain […] any excluded restriction within the meaning of Article 5 of the Regulation that cannot be severed from the rest of the agreement". §246 VRGL provides in a similar manner:

> "Moreover, unlike Article 4 of Regulation 2022/720, the exclusion of an obligation from the block exemption pursuant to Article 5 of the Regulation is limited to the specific obligation, provided that the obligation in question can be severed from the rest of the vertical agreement".

The Commission is linking here the severability of an excluded restriction, which must be assessed on the basis of the law applicable to the agreement, i.e. normally national contract law, with the application of the block exemption under EU competition law. There is at least a double problem with this addition of a severability issue in relation to the excluded restrictions:

- The issue does not match with the formulation of art.2(1) and the introductory sentences of arts 4 and 5 VBER. While art.4 refers to the non-application of the block exemption to the whole agreement, art.5 refers only to the non-application of the block exemption to the relevant obligation.
- The VRGL interfere with a matter that should in principle be governed by the national law applicable to the contract and inject the issue of severability at the wrong stage of the analysis and from an inaccurate perspective. If an excluded restriction is included in a vertical agreement, nothing can be automatically derived as to the restriction's (or the agreement's) compatibility with art.101. To that end a self-assessment is needed. If that self-assessment concludes that the excluded restriction either escapes the prohibition of art.101(1) or is exempted by virtue of art.101(3), there is no reason to conclude that the block exemption is inapplicable to the rest of the agreement due to the lack of severability (as a matter of contract law) of the excluded restriction from the rest of the agreement. Conversely, if the excluded restriction is caught by the prohibition of art.101 and therefore is null and void pursuant to art.101(2), the impact of such nullity on the rest of the vertical agreement must be assessed as a matter of contract law under the applicable rules of national law. There is no reason why the VRGL should interfere with this analysis. This analysis should be governed by national contract law.

In short, the linking of the severability issue with the coverage under the VBER is both unfortunate and unnecessary. That being so, and until the Commission makes a clear statement that §7 and §246 should be understood differently, parties are well-advised to include in their vertical agreements a standard severability provision in order to eliminate any possible discussion on the availability of the block exemption for the other parts of the vertical agreement. In the absence of such a severability provision, the addition of a severability issue to the treatment of excluded restrictions under the VBER lends itself to (unnecessary) debates on the extent of the application of the block exemption.

4.5.2 Coverage of tacitly renewable non-compete obligations

Article 5(1)(a) VBER determines that non-compete obligations with an indefinite duration or a duration exceeding five years are excluded from coverage by the block exemption. This is not novel, and neither is the broad definition of non-compete obligations, covering both single branding and +80% purchase obligations (see, art.1(1)(f) VBER).

However, the application of art.5(1)(a) VBER has changed in one respect. Whereas the previous VBERs both declared that a non-compete obligation which is tacitly renewable beyond a period of five years was deemed to have been concluded for an indefinite duration and thus not covered, the new VBER no longer contains this text. Instead the VRGL (§248) now make it clear that tacitly renewable non-compete obligations can benefit from coverage by the VBER under certain conditions:

> "Non-compete obligations that are tacitly renewable beyond a period of five years can benefit from the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable period of notice and at a reasonable cost, thus allowing the buyer to switch its supplier after the expiry of the 5-year period".

The VRGL (§248) then provide two examples (regarding loans and non-relationship specific equipment) where the reasonable cost requirement may prove practically relevant.

This is a welcome change and extension of the coverage of the VBER. It avoids parties having to sit down every five years and renew their contract even if they may not wish to make any material change. However, the precise implications of §248 VRGL are not entirely clear. Is the additional flexibility truly confined to contracts with a fixed term or does it extend also to contracts of indefinite duration? Under the national legal systems with which the authors are familiar, contracts of indefinite duration can in principle always be terminated by providing a reasonable notice period. In that situation there is no reason not to extend the flexibility offered by §248 also to contracts of indefinite duration. The language used in §248 is however ambiguous in this respect. By referring to "tacitly renewable", it refers by definition to fixed term contracts as contracts of indefinite duration are not "renewed". If the intention of the Commission when choosing this language was effectively to limit the additional flexibility to contracts with a fixed term, such choice is unfortunate. There is for present purposes no sensible distinction between a contract of indefinite duration that can be terminated with a reasonable notice period and at a reasonable cost and a fixed term agreement that is tacitly renewable and can be terminated under the same conditions. One way of solving this problem is by accepting that contracts of indefinite duration (provided that they can be terminated with a reasonable notice period and at a reasonable cost) are also considered tacitly renewable beyond five years so that the same regime applies to both scenarios.

4.5.3 The new excluded restriction of across-platform retail parity obligations

The new VBER contains in art.5(1)(d) a new excluded restriction: across-platform retail parity obligations are no longer covered by the block exemption. This concerns obligations agreed between a platform offering intermediation services and a buyer of these platform services, causing the latter not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services.

This new excluded restriction reflects the experience of the Commission and NCAs in a number of formal and informal cases, amongst others concerning the online hotel booking sector, that this type of restriction tends to create little or no efficiencies, while its use, often by different suppliers in the same market (cumulative effect scenario), raises serious competition risks.

The VRGL (§§253–254) provide a clear description of the excluded across-platform retail parity obligations and in addition make it clear that all other types of parity obligations can benefit from the block exemption. This is helpful and in addition a good policy choice of the Commission, not to also exclude other types of parity obligations, which generally have more potential to create efficiencies. For instance, so-called narrow retail parity obligations, where the buyer of the platform services is not allowed to sell its goods and services at better conditions on its own sales channels, have a clear capacity to prevent free riding by the buyer. The latter could otherwise be tempted to make use of the platform to attract customers but avoid having to pay for the platform services by concluding the transaction on its direct sales channel. Another example is across-platform parity obligations that are applicable in a B2B context where the goods and services are offered to undertakings that are not end users, which are also not characterised as excluded restrictions within the meaning of art.5 VBER.

In §§356–378 the VRGL usefully provide the framework of analysis for the different types of parity obligations. This framework describes not only the possible negative and positive effects, but also the factors to be taken into account in an individual assessment in case a particular agreement falls outside the block exemption, for instance where the market share cap is exceeded.

4.6 New section on restrictions on the use of online marketplaces

Like the previous VRGLs, the new VRGL contain not only a general framework for the assessment of vertical agreements (section 8.1), but also an analysis, including examples, of specific vertical restraints (section 8.2). And as before in previous VRGLs, this section covers single branding, exclusive supply, upfront access payments, category management agreements and tying.

New is guidance for the assessment of restrictions on the use of online marketplaces (section 8.2.3). This new section usefully incorporates the ruling of the CoJ in *Coty*.[87] It makes clear that such restrictions, including a total ban on the use of online marketplaces, can benefit from the block exemption because they concern the manner in which ("how") the distributor may sell online and do not restrict sales to a particular territory or

[87] *Coty Germany GmbH* [2018] 4 C.M.L.R. 9.

customer group (§336). However, in contradiction with this message it is also stated that the block exemption does not apply in case the agreement concerning the use of online marketplaces has "… 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" (§335). This additional language may leave (unnecessary) room for debate and create legal uncertainty.

The guidance for the assessment of restrictions on the use of online marketplaces, for cases where the market share thresholds are exceeded, explains that a restriction or ban may be necessary, in particular where the supplier is unable to verify that the online marketplaces meet the conditions it normally requires for the resale of its products. This also implies that such a need and the linked efficiencies are unlikely in case the supplier itself uses these marketplaces for the sale of its products.

4.7 New section on restrictions on the use of price comparison websites

Irrespective of the comments above in section 4.4.5, it is welcomed that the VRGL contain a new section (section 8.2.4) on the assessment of restrictions on the use of price comparison websites not leading to a complete ban of these websites. This new section mentions on the one hand the potential importance of such websites for distributors to reach possible customers and that restrictions on their use may increase consumer search costs and soften price competition. On the other hand, it is acknowledged that restrictions on the use of these websites may be necessary to protect the brand image of products and to reduce opportunities for counterfeiting. For the assessment of these efficiencies the new text indicates that in general sales transactions are not concluded on price comparison websites but in the distributors' online stores, suggesting that this may allow the manufacturers and distributors to already keep sufficient control over the conditions of sale to protect the brand image.

4.8 Sliding back to a form-based approach towards selective distribution?

Finally, there seems to be an unfortunate message hidden in parts of the text within the new VRGL as regards the assessment of selective distribution. §§147–148 in combination with §151 of the VRGL could be read as a return to the old and outdated idea that selective distribution agreements, if not fulfilling the so-called *Metro* criteria, are automatically presumed to restrict competition and fall within art.101(1).[88] The impression is given that once the *Metro* conditions are not fulfilled, a selective distribution system automatically restricts competition, only leaving open the escape route of art.101(3). If that is the intended message, it is wrong, because also in case the *Metro* conditions are not fulfilled, it still needs to be shown that the selective distribution system restricts competition appreciably. For instance, the De Minimis Notice also applies to selective distribution agreements below a 15% market share. The point that the application of art.101(1) cannot be presumed as soon as the *Metro* conditions are not fulfilled is also indirectly acknowledged by §§153–161 of the VRGL, where the factors relevant for that assessment are dealt with.

The discussion about the importance of the *Metro* conditions, which apparently still continues inside parts of the Commission, is linked to the distinction, found in older case law, between purely qualitative selective distribution and quantitative selective distribution. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold and the like.[89] The application of such criteria does not put a direct limit on the number of dealers. Purely qualitative selective distribution is in general considered to fall outside art.101(1) for lack of anti-competitive effects, provided that the three *Metro* conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary.[90] Quantitative selective distribution adds further criteria for selection which more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.

This distinction between purely qualitative selective distribution and less pure qualitative or quantitative selective distribution is not very useful in practice, as purely qualitative selective distribution which fulfils the three *Metro* conditions is seldom, if ever, found in real commerce. The second condition, that resellers must be chosen only on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and are not applied in a discriminatory manner, is unlikely to be fulfilled in practice. In general, manufacturers often limit, directly or indirectly, the number of authorised distributors, thus excluding potential distributors that could fulfil the purely qualitative criteria. For instance,

[88] Judgment of the Court of 25 October 1977, *Metro SB-Grossmarkte GmbH & Co KG v Commission* (26/76) EU:C:1977:167; [1978] 2 C.M.L.R. 1 at [20] and [21].
[89] See, e.g., the judgment of the General Court of 12 December 1996, *Groupement d'achat Édouard Leclerc v Commission* (T-88/92) EU:T:1996:192.
[90] See judgments of the Court of 11 December 1980, *L'Oréal NV v De Nieuwe AMCK PVBA* (31/80) EU:C:1980:289; [1981] 2 C.M.L.R. 235 at [15] and [16]; *Metro v Commission* [1978] 2 C.M.L.R. 1 at [20] and [21]; *AEG Telefunken AG v Commission* (107/82) EU:C:1983:293; [1984] 3 C.M.L.R. 325 at [35]; and *Societe d'Hygiene Dermatologique de Vichy v Commission* (T-19/91) EU:T:1992:28 at [65].

in *Givenchy*, the authorised retailers were required to achieve a minimum yearly purchase figure, set periodically by Givenchy.[91] This also implies that the third condition, that the selection criteria do not go beyond that what is necessary to preserve the quality of the product and to ensure its proper use, may in practice very often not be respected.

While purely qualitative selective distribution falls outside art.101(1), irrespective of the position of the parties on the market, it is more interesting to see what the likely assessment is of selective distribution outside that narrow category, in particular the assessment of quantitative selective distribution. The VRGL remind us that both qualitative and quantitative selective distribution are covered by the VBER as long as the market shares of both supplier and buyer do not exceed 30 per cent, even if combined with other non-hardcore vertical restraints such as non-compete obligations. To make it absolutely clear that (quantitative) selective distribution is covered by the VBER, the VRGL state that the VBER exempts selective distribution "regardless of the nature of the product concerned and the nature of the selection criteria".[92]

This coverage by a block exemption and treatment of selective distribution agreements not containing hardcore restrictions as practices that are (at most) anti-competitive *by effect*, was a major shift in policy initiated at the time of the adoption of the 1999 VBER. Under the Commission policy of the 1980s and 1990s, quantitative selective distribution was considered a *by object* restriction of competition. It was considered to restrict competition by its nature and thus automatically to fall within art.101(1). This was based on case law from that period, in particular on the Court of Justice's ruling in *AEG-Telefunken*.[93]

After the Commission changed its policy and in contradiction with this policy change, the CoJ in its *Pierre Fabre* judgment, a preliminary ruling, still suggested, referring to its old ruling in *AEG-Telefunken*, that selective distribution agreements necessarily restrict competition and are to be considered, in the absence of objective justification, as restrictions by object.[94] This statement, although only made in an obiter dictum, is worrying from the perspective of the Commission's policy change since 1999 towards selective distribution. The court seemed to fall back on its old position that selective distribution agreements, unless satisfying the conditions of purely qualitative selective distribution, are anti-competitive by object. At the same time, the court also accepted in the *Pierre Fabre* judgment that selective distribution agreements, if not containing one or more hardcore restrictions, can be, and are effectively, covered by block exemption Regulations, such as the VBER.

This, possibly unwillingly, gave the impression that there may be a category of practices, which although anti-competitive by object, can benefit from a block exemption Regulation. However, this would not correspond to the current understanding and policy towards restrictions by object as hardcore restrictions, not being covered by block exemptions and unlikely to fulfil the conditions of art.101(3) under an individual assessment. It also does not correspond to the current enforcement practice to treat selective distribution agreements not containing hardcore restrictions as practices that are anti-competitive *by effect*, where the Commission has to show why a particular selective distribution system has an actual or likely anti-competitive effect under art.101(1) (instead of assuming its negative effects) before requiring the parties to substantiate actual or likely efficiency gains under art.101(3).

It was therefore comforting to see that the Court of Justice in its later *Auto 24* and *Coty* judgments, both also preliminary rulings, did not refer back to its ruling in *AEG-Telefunken* and did not make a statement as in the obiter dictum in its *Pierre Fabre* judgment.[95] These judgments in addition support that both qualitative and quantitative selective distribution can be covered by a block exemption Regulation, thereby underlining the *by effect* treatment of selective distribution. In view of the importance of selective distribution for the EU economy it would be welcome if the Commission, in one of its future decisions, would confirm that the language in the VRGL is intended to be consistent with the normal effects-based approach that applies fully also to (quantitative) selective distribution.

Conclusion

The VBER and VRGL mark an evolution and not a revolution compared to previous practice. This large measure of continuity is both positive from the perspective of legal certainty and justified from an economic point of view. It is also good practice that the rules have been adapted and updated in light of new developments, in particular the rise in prominence of online platforms and retail parity obligations.

Most of the resulting changes in the rules concern the Commission taking position vis-à-vis these new developments in the market. In addition, many of the changes, such as the extended coverage of dual distribution scenarios and the improved possibilities for different distribution systems to be used in parallel without interference coming from territories where the other system is operated, are improvements to the rules and make the rules ready for its new period of validity.

[91] 92/428/EEC: Commission Decision in Case IV/33.542—Parfums Givenchy system of selective distribution [1992] OJ L236/11.
[92] §151 VRGL.
[93] *AEG* [1984] 3 C.M.L.R. 325.
[94] See *Pierre Fabre Dermo-Cosmétique* [2011] 5 C.M.L.R. 31 at [39]–[41].
[95] Judgment of the Court of 14 June 2012, *Auto 24 Sarl v Jaguar Land Rover France SAS* (C-158/11) EU:C:2012:351; [2012] 5 C.M.L.R. 3; *Coty Germany GmbH* [2018] 4 C.M.L.R. 9.

However, some of the changes (particularly those included in the VRGL) may trigger new interpretation issues, such as the principles governing information exchange in dual distribution scenarios. Other changes seem to reflect a sliding back towards a more form-based approach. It would be good if, particularly with regard to the hardcore list, such issues will be resolved in a manner that respects the overall coherence and consistency of the approach that is underpinning the VBER and VRGL. It would be particularly welcome if the Commission clarifies, in one of its future decisions, that art.4(e), which seems to declare hardcore any ban of a particular advertising channel, has to be interpreted narrowly as only excluding from the VBER such restrictions where it can be shown that they have as their object to restrict "where" or "to whom" to sell.