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EVALUATION OF THE VERTICAL BLOCK EXEMPTION REGULATION AND GUIDELINES ON VERTICAL RESTRAINTS

Introduction

The procedural framework for competition law enforcement should be proportionate and focus on what is necessary for effective enforcement, without imposing unnecessary burdens for companies. Cooperation between companies is becoming increasingly necessary to generate efficiencies and benefits to society and provide customers with complete solutions.

The Vertical Block Exemption Regulation (VBER) and the Guidelines on Vertical Restraints (Guidelines) provide a valuable guidance for undertakings regarding Article 101 TFEU. Both small and large businesses make frequent use of its regime.

BusinessEurope encourages the Commission to retain the concept of block exemption and renew the VBER and Guidelines upon expiry on 31 May 2022. However, the legal certainty that the VBER and Guidelines provide can be undermined by the often very dynamic reality of the current market and the decision-making practice of authorities or courts. It is therefore a suitable time to clarify provisions, which are unclear or remain in grey zones.

Market shares

Competition authorities have a tendency to adopt narrow definitions of product and geographical markets, which have the effect of unduly excluding certain agreements from the scope of the block exemption. Businesses struggle with relying on a uniform set of market definitions due to multiple national approaches to market definitions with respect to the market share assessment. This is creating uncertainty, and BusinessEurope therefore urges the Commission to provide a concrete guidance concerning market definitions relevant to the assessment of market share thresholds.

It also important to note that narrow market definitions considered by national competition authorities, are not necessarily relevant when assessing increasingly globalised vertical agreements.

'Hardcore' restrictions

BusinessEurope is concerned about the term "hardcore restriction" in Article 4 of the VBER as it implies that it cannot be justified. Yet, conduct falling under Article 4 can be justified when conditions of Article 101 (3) TFEU are fulfilled or Article 101 (1) is not infringed in the first place. This point should be stressed more throughout the VBER.

Resale price maintenance (RPM)



The VBER presumes that RPM automatically restricts competition and is unlikely to meet the conditions of Article 101 (3) TFEU. RPM is considered as a hardcore restriction under Article 4(a).

A per se prohibition of RPM does not appear justified as economics show that if there is sufficient inter-brand competition, there is no need to punish restrictions of intra-brand competition. The United States has also taken a more modern approach towards RPM and they give a greater margin of manoeuvre left to the suppliers. The United States Supreme Court has reversed the case law by replacing the automatic illegality of RPM between manufacturers and distributors with a case-by-case assessment based on the rule of reason.¹

Exclusive distribution

Active customer/territorial sales restrictions are exempted from the VBER if the supplier has allocated the respective customer group/territory to an exclusive distributor or exclusively reserved it to itself. This is impractical. The supplier/manufacturer should be free to determine how many active distributors should be in a territory and still be free to prevent other distributors from actively selling into such territories.

Therefore, exclusive distribution should be removed as a hardcore restriction in cases of a lack of strict allocation/reservation of territories/customer groups. Each seller irrespective of their market position should have access to set up distribution systems without restrictions. It should for instance be possible for a seller to allocate a certain territory or a certain customer group to a single or to multiple resellers. Further, a manufacturer should be allowed freely to choose the go-to-market strategy for a product and to limit the resale possibilities for businesses sourcing the product in question as input products (subject to certain exceptions for spare part sales).

Selective distribution

Following the Coty judgement from the ECJ², certain divergences have arisen amongst national competition authorities regarding the approach towards selective distribution and associated restrictions. While some countries have applied the Coty judgement to non-luxury products others have adopted a more restrictive approach. However, the VBER and Guidelines do not limit selective distribution to certain product categories, but it rather depends on the quality of the products and the services associated with the products. The Commission should provide more clarification in the Guidelines and create greater legal certainty across the EU.

It would also be desirable to make it even clearer that a selective distribution system, which is based on the Metro judgement, is by no means a restriction of competition, as set out in the Pierre Fabre judgment, but that it is always the effects that matter.

Requiring a physical outlet is exempted under the current regime in selective agreements covered by the VBER. This should remain so in the future. From a manufacturer's point of view, even high-quality websites cannot replace the role played by stationary retailers,

¹ Supreme Court of the United States, 28 June 2007, *Leegin Creative Leather Products, Inc v PSKS, Inc*, 75USLW 4643 (US June 28, 2007), n° 06-480, 2007 WL 2335892.

² Case C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, ECJ Judgment of 6 December 2017



in particular as ambassadors for the brand and its image and a place where consumers can actually try out the products and receive personal advice and service directly. Manufacturers who do not directly sell their products on a stationary basis are absolutely dependent on this type of marketing in order to bring these products onto the market. All manufacturers must be free to choose whether they want to include pure online retailers in their selective distribution.

Online sales

The hardcore restriction set out in Article 4(b) of the VBER concerns exclusive distribution, which includes territorial and customer restrictions. There are several exceptions to this rule that are stated in the VBER including the possibility of restriction of active sales. Passive sales may however not be restricted, and this most often includes sales over the internet. Yet, the differentiation between active and passive sales is outdated and the rules should reflect the development of digital markets. It is key for BusinessEurope that competition law remains neutral by refraining from favouring one sales channel over another.

Further clarification would be needed as to whether a prohibition on the use of price search engines constitutes a hardcore restriction. A hardcore restriction under Article 4b Vertical Block Exemption Regulation is unlikely to exist as a result of the Coty Judgement due to the lack of a definable customer group. However, it remains to be seen whether this can be a core restriction under Art. 4 c in the VBER. Here the guidelines should be supplemented by clarifying instructions, also on the classification of the "qualitative criteria", in order to enable manufacturers and dealers to make a legally certain self-assessment.

Non-compete obligation

It is not clear why the inclusion of a non-compete obligation beyond a period of five years should not qualify as an excluded restriction under Article 5 (1) of the VBER and thus be exempted. Depending on the life cycle of the product or service in question, a non-compete clause may be justified for periods exceeding five years, such as in cases where significant investments in the development of additional spare parts are made. For example, if a product requires major servicing only every 5 years the parties should be allowed to agree on an exclusive longer term of supply of service covering at least two or more service cycles. Whether a non-compete obligation leads to foreclosure depends on the circumstances on the market.

Moreover, BusinessEurope suggests that tacitly renewable non-compete obligations should be excluded restrictions under the VBER – and thus be exempted from Article 101(1) TFEU, at least so long as the parties have the possibility to effectively terminate the non-compete obligation at the end of the five-year-period and on a regular basis thereafter (e.g. annual termination right or after an addition five-year term etc.). Another element that should be taken into consideration is whether there is no disincentive to effectively terminate the contract at the end of the five-year period and each renewed period.

Relevance of the VBER and Guidelines

Society has undergone significant changes since 2010, which has impacted commercial relations and will continue to have a substantial impact in the coming years.



BusinessEurope therefore encourages the Commission to take a pragmatic approach responsive to business needs, so that the Guidelines provide more legal certainty for diverse and hybrid situations in which businesses may find themselves in the future.

Businesses are adapting to technological innovations and changing consumer trends, which require flexibility in the organisation of vertical relationships. To stay ahead with the dynamic reality, the Guidelines should be continuously amended or supplemented, when authorities' decision-making practices and case law becomes a source of legal uncertainty. Further, the Commission should set a standard for enforcement against certain practices at national level to avoid fragmentation.

Geo-blocking

Competition law complements the Geo-blocking Regulation of 28 February 2018, which has applied from 3 December 2018. However, the VBER allows geo-blocking in some very limited circumstances, while the Geo-blocking regulation prohibits all passive sales restriction in the situations covered in the regulation, which could appear incompatible. The Commission should therefore clarify the relationship between the VBER and geo-blocking regulation.

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