“VERTICAL” IN THE SPOTLIGHT: HARDCORE RESTRICTIONS GENERAL

WHAT?

Vertical agreements often contain a vast number of provisions, regulating different aspects of a vertical relationship. However, the EU competition rules determine that certain provisions cannot be included in distribution agreements since they impede competition to an extent that cannot be permitted. These are the so-called “**hardcore restrictions**”. Hardcore restrictions can be imposed both directly and indirectly, in which case the assessment is more complex, but the outcome is the same.

Including a hardcore restriction in a vertical agreement has as a consequence that the **block exemption is no longer applicable to that agreement as a whole**. In this case, the agreement might still benefit from an individual exemption under Article 101(3) TFEU but, for hardcore restrictions, there is a rebuttable presumption that they do not meet the conditions set out in this article. Consequently, obtaining an individual exemption is particularly challenging and only occurs in exceptional circumstances. It is therefore extremely important for practitioners to have a clear understanding of what these hardcore restrictions are, so that they can avoid them when drafting vertical agreements.

NOW?

Under the current VBER regime, five types of restrictions are considered hardcore restrictions that render the block exemption inapplicable. They are listed in Article 4 of the current VBER.

Firstly, Article 4(a) VBER prohibits the restriction of the buyer’s ability to determine its own sale price, so-called “**resale price maintenance**” (“**RPM**”). This entails both the imposition of a fixed or minimum resale price and upholding a fixed or minimum margin.

Secondly, Article 4(b) VBER prohibits **territorial or customer restrictions** (with certain exceptions). Because the internet allows a distributor to reach a greater number and variety of customers than through the more traditional sales methods, the European Commission considers a number of restrictions on the use of the internet sales restrictions, and in certain cases even hardcore restrictions (see, paragraph 52 Vertical Guidelines). One example of such a hardcore restriction is **dual pricing**, an agreement that the distributor shall pay a higher price for products intended to be resold online compared to products intended to be resold offline.

Thirdly, Article 4(c) VBER prohibits the restriction of **active or passive sales to end users** by members of a selective distribution system. Again, with regard to internet sales, the European Commission has stated (see, paragraph 56 Vertical Guidelines) that any obligation which dissuades members of a selective distribution system from using the internet by imposing criteria for online sales which are not overall **equivalent** to the criteria imposed for offline sales are hardcore restrictions.

Fourthly, Article 4(d) VBER prohibits the restriction of **cross-supplies between distributors** within a selective distribution system.

Lastly, Article 4(e) VBER prohibits the restriction of the supplier's ability to sell **components as spare parts** to end-users or repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

THE FUTURE AS OF 1 JUNE 2022?

First and foremost, the current proposals for the new VBER and Vertical Guidelines contain certain changes to the regime, but from a general perspective the list of hardcore restrictions in Article 4 remains **largely unchanged**.

Article 4(a) draft VBER is maintained. Thus, the **basic rules on RPM will continue to apply**. Nevertheless, the proposals for the new Vertical Guidelines do introduce changes with regard to price monitoring, fulfillment contracts and minimum advertised price policies. Make sure to read DLC countdown no. 9 if you want to know what will likely change under the new VBER regime.

With online sales becoming increasingly important, the European Commission continues to pay attention to the online environment and is making certain changes to the current regime to render this distribution channel even more accessible. The current proposals for the new Vertical Guidelines provide an **interesting change in approach with respect to dual pricing**, as the European Commission states that dual pricing arrangements may **benefit from the safe harbour** of the VBER in certain circumstances. Do not miss DLC countdown no. 10 if you want to know more. Also with regard to the equivalence principle, the European Commission seems to be moving in a new direction by focusing on the actual restriction of the use of the internet. In the current proposals for the Vertical Guidelines, **the equivalence test for hybrid distribution scenarios is abandoned**. DLC countdown no. 11 will discuss this topic in more detail.

The **conditions for the imposition of territorial or customer restrictions in an exclusive distribution agreement** (see, Article 4(b)(i) draft VBER) **underwent an upgrade** to make this exception more appealing and easier to apply in practice. The changes entail the possibility of shared exclusivity, the possible abolition of the parallel imposition requirement and the ability to pass on the active sales restrictions on the customers of the buyer. All of this is very technical and the exact changes will be outlined in DLC countdowns no. 12, 13 and 14. Have a look at these DLC countdowns if the topic is of interest to you.

In practice?

A clear split can be made between two sets of topics, notably those where the existing regime will remain largely in place and those where the new rules are likely to bring changes.

The most important topics included in the first category are RPM and selective distribution.

The second category includes the regime applicable to online sales and the protection of exclusive distributors against active selling.

Assessment?

The degree of legal certainty created by the proposed new rules is not so clear. This is in part attributable to the fact that the description of certain hardcore restrictions in the draft Regulation is not always fully consistent with the language of the draft Guidelines. As you will see, the devil is often in the detail. DLC countdowns no. 9 – 14 will discuss the practical consequences of the likely changes in more detail and outline the areas of uncertainty.

The final revised VBER is planned to enter into force on 1 June 2022.

Want to know more? Stay tuned…

Counting down towards 1 June 2022, we aim to provide you with regular updates and the necessary legal knowhow in order to fully prepare your business for the future. Please also check out the Distribution Law Center platform (www.distributionlawcenter.com) and our LinkedIn page for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.