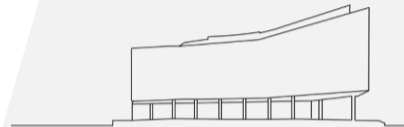


The new Vertical Block Exemption Regulation

An overview – June 2022



The new VBER

Introduction

On 10 May 2022, the European Commission adopted a new Vertical Block Exemption Regulation (VBER) and accompanying Vertical Guidelines.

The revised VBER provides more guidance on the rules for exclusive and selective distribution systems and elaborates on the distinction between active and passive sales. It also clarifies the scope of its safe harbour for dual distribution and parity obligations.

This overview is aimed to assist companies in the (re)assessment of their distribution contracts. It provides an overview of the overall system of the VBER and indicates its main changes with



The new VBER

Introduction

Links to the new VBER and Vertical Guidelines

[Commission Regulation \(EU\) 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](#)

This Regulation entered into force on 1 June 2022. The prohibition laid down in Article 101(1) TFEU shall not apply during the period from 1 June 2022 to 31 May 2023 in respect of agreements already in force on 31 May 2022 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2022, satisfied the conditions for exemption provided for in Regulation (EU) No 330/2010.

[Draft Communication from the Commission, Guidelines on vertical restraints, C\(2022\) 3006 final, 10 May 2022](#)

The Commission has approved the content of the Guidelines on Vertical Restraints in English. Therefore, the Guidelines on Vertical Restraints are only available in English for the time being. The Guidelines on Vertical Restraints will be formally adopted by the Commission later, when all language versions are available. Those versions will be added here when they are available.

Link to the Commission's explanatory note with an overview of the main changes

[Explanatory note on the new VBER and Vertical Guidelines](#)

The VBER's safe harbour

Conditions

For an agreement to fall under the safe harbour of the VBER, the following conditions will need to be fulfilled:

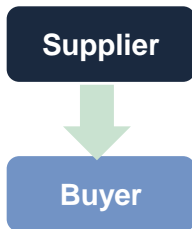
1. **Vertical** – there needs to be a vertical agreement.
2. **Market shares** – the market shares of each party to the vertical agreement does not exceed 30% in the relevant markets.
3. **Hardcore restrictions** – the vertical agreement contains none of the hardcore restrictions listed in Article 4 VBER.
4. **Non-severable excluded restrictions** – the vertical agreement does not contain any excluded restrictions listed in Article 5 VBER that cannot be severed from the rest of the agreement.

Individual assessment – Vertical agreements falling outside these criteria will require an individual assessment under Article 101 TFEU to determine their antitrust compatibility.

The VBER's safe harbour

Vertical agreements

The following vertical agreements fall under the VBER's safe harbour:



1. **Upstream/downstream distribution** – agreements between two or more undertakings, each of which operates at a different level of the production or distribution chain.



Suppliers – providers of OIS, facilitating the initiating of direct transactions between two other parties, qualify as suppliers under the VBER.

Online Intermediation services (OIS) – the VBER defines OIS as *information society services within the meaning of Article 1(1), point (b), of Directive (EU) 2015/1535 of the European Parliament and of the Council (6) which allow undertakings to offer goods or services:*

- to other undertakings, with a view to facilitating the initiating of direct transactions between those undertakings, or*
- to final consumers, with a view to facilitating the initiating of direct transactions between those undertakings and final consumers,*

irrespective of whether and where the transactions are ultimately concluded.

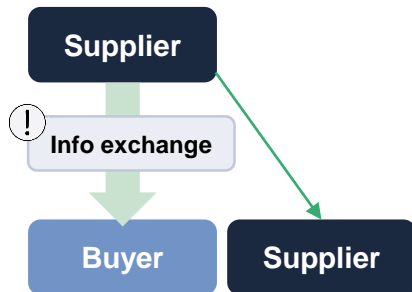
Examples – examples of OIS include e-commerce market places, app stores, price comparison tools and social media services used by undertakings.

The VBER's safe harbour

Vertical agreements

The following vertical agreements fall under the VBER's safe harbour:

2. **Dual distribution** – non-reciprocal agreements between a *supplier* active upstream as a manufacturer, importer, or wholesaler and downstream as an importer, wholesaler or, retailer, **and** a *buyer* who is an importer, wholesaler, or retailer downstream and not a competing undertaking at the upstream level.



N.B. information exchange between the supplier and the buyer in this scenario will only fall under the VBER's safe harbour if it is *either directly related to the implementation of the vertical agreement or is necessary to improve the production or distribution of the contract goods or services*.



- x **Hybrid platforms** – excluded from the VBER's safe harbour are vertical agreements concluded by providers of online intermediation services (OIS) with a hybrid function (i.e., where these providers compete on the relevant markets for the sale of the intermediated goods or services).

Loss of VBER's safe harbour for vertical agreement

Definitions



The VBER provides definitions for “active sales restrictions” and “passive sales restrictions” (Article 1(l) and (m) VBER)

Active sales

Actively targeting customers by

- visits, letters, emails, calls or other means of direct communication
- through targeted advertising and promotion, offline or online (e.g., by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups)
- operating a website with a top-level domain corresponding to particular territories,
- offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established




Passive sales

- Sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender





Loss of VBER's safe harbour for vertical agreement

Hardcore restrictions

Resale price maintenance

- x **Direct RPM** through e.g., contractual provisions or concerted practices
 - x **Indirect RPM** through e.g., fixing resale margins or maximum discount levels, threats, warnings, penalties, supply delay/refusal to make distributor adhere to set price level, imposing minimum advertised prices (MAPs) which prohibit the distributor from advertising prices below a set level.
-   Maximum resale price
 Recommended resale price

Online sales

- 
- x **Direct ban on the use of internet**
 - x **Indirect internet sales ban** through e.g., mandatory re-routing, mandatory termination of online credit card transactions outside buyer's territory, prohibiting use of trade marks or brand names, preventing the use of an entire online advertising channel (such as search engines or price comparison services), use of supplier's brand names and trademarks for paid referencing in search engines
-  Dual pricing
 Differing criteria for online and offline sales
 Prohibiting the use of particular price comparison services or search engines (e.g., ban on the use of online marketplaces)

Loss of VBER's safe harbour for vertical agreement

Hardcore restrictions

NEW

Spare parts sales ban

- ✗ **Direct ban** on components manufacturer to sell components as spare parts to end users or repairers, wholesalers or other service providers
- ✗ **Indirect ban** by restricting manufacturer from supplying technical information and special equipment, which are necessary for the use by end users, independent repairers or service providers
- ✓ Restrictions on the supply of spare parts to repairers or service providers entrusted by buyer with the repair or servicing of its own goods
- ✓ Restrictions on buyer's own repair and service network to buy spare parts from the buyer or from other members of the buyer's selective distribution network, where the buyer operates such a system

Loss of VBER's safe harbour for vertical agreement

Hardcore restrictions

Exclusive Distribution

x Absolute territorial or customer ban



✓ *Active sales ban* into territory or customer group reserved to supplier or exclusively allocated to other exclusive distributors



✓ *Pass-on of active sales ban* by exclusive distributors to their direct customers



✓ *Shared exclusivity* up to a maximum of 5 distributors per exclusive territory or customer group

✓ *Active or passive sales ban* to unauthorised distributors located in a territory where the supplier operates a selective distribution system

✓ Restriction of the exclusive distributor's *place of establishment*

✓ *Active or passive sales ban* to *end users* by exclusive distributor operating at wholesale level

✓ *Active or passive sales ban* on selling *components*, supplied for incorporation purposes, to customers who would use them to produce same type products as supplier's

Loss of VBER's safe harbour for vertical agreement

Hardcore restrictions

Selective Distribution

x **Absolute territorial or customer ban**



- ✓ *Active sales ban* into territory or customer group reserved to supplier or allocated by the supplier exclusively to a maximum of 5 exclusive distributors



- ✓ *Pass-on of active sales ban* by selective distributors to their direct customers
- ✓ *Active or passive sales ban* to unauthorised distributors located within the territory of the selective distribution system
- ✓ Restriction of the selective distributor's *place of establishment*
- ✓ *Active or passive sales ban* to end users by selective distributor operating at wholesale level
- ✓ *Active or passive sales ban* on selling *components*, supplied for incorporation purposes, to customers who would use them to produce same type of products as supplier's

- x **Cross-supplies ban** between selective distributors at same or different levels of trade

- x **Active or passive sales ban** to end users by selective distributors operating at retail level

Loss of VBER's safe harbour for vertical agreement

Hardcore restrictions

Free Distribution

✗ **Absolute territorial or customer ban**

- ✓ *Active sales ban* into territory or customer group reserved to supplier or allocated by the supplier exclusively to a maximum of 5 exclusive distributors
- ✓ *Pass-on of active sales ban* by buyers to their direct customers
- ✓ *Active or passive sales ban* to unauthorised distributors located within the territory of the selective distribution system
- ✓ *Restriction of the buyer's place of establishment*
- ✓ *Active or passive sales ban* to end users by buyer operating at wholesale level
- ✓ *Active or passive sales ban* on selling *components*, supplied for incorporation purposes, to customers who would use them to produce same type of goods as supplier's

Loss of VBER's safe harbour for particular clause

Excluded restrictions

- ✗ **Non-compete obligation**, the duration of which is indefinite or exceeds 5 years



- ✓ tacitly renewable non-compete obligations beyond 5 years (as long as buyer can effectively renegotiate or terminate)

- ✗ **Post-term non-compete obligation**

- ✓ post-term non-compete obligation for maximum of 1 year if (i) indispensable to protect supplier's knowhow and (ii) limited to point of sale buyer operated during contract period

- ✗ **Obligation on selective distributors not to sell brands from one or more specific competing suppliers**



- ✗ **Across-platform retail parity obligations**, restricting a buyer of OIS from offering more favourable conditions to end users via competing OIS

- ✓ All other types of parity obligations, such as
 - Narrow retail parity obligations
 - Parity obligations relating to conditions under which goods or services are offered to undertakings that are not end users
 - Most favoured customer obligations

Questions?

Feel free to reach out



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