

All-Clear? - An Evaluation of the Revised VRBE and Guidelines

Executive Summary

This report will provide that the revision of the Vertical Restraints Block Exemption¹ and Guidelines² will be a necessary development which would promote aims of the European Commission in promoting market transparency, integration, and efficiency as well as consumer welfare. To an extent, it will also promote judicial certainty in the judgements of the Court of Justice of the EU (CJEU) in relation to vertical restraints in online sales.

In doing so the report will first lay out the relevant factual and legal backgrounds. It will then carry out an evaluative assessment of the proposed changes in the new draft VRBE and Guidelines. It will conduct an evaluation having regard to the aims of the European Commission and the aspect of judicial certainty in CJEU judgments.

1. The Background

This report will provide the factual background prior to the consultation on the draft revision of the VRBE and Guidelines. It will first lay out the Aims of the European Commissions, followed by the issues in the online sales market, and the plans to revise the VRBE.

1.1. The Competition Law Aims of the European Commission

The aims of the Commission have always been to promote integration of the EU and therefore the promotion and maintenance of the common market³. The existence of the common market depends on competition law which maintains healthy economic competition in the EU⁴. EU law competition law was thus initially concerned with market integration and transparency which is also partly reflected in Art 101 TFEU⁵⁶.

¹ Commission Regulation (EC) No 330 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 [2010] OJ L102 (VRBE)

² European Commission Information (EC) 130 Guidelines on Vertical Restraints (Text with EEA relevance) [2010] OJ L C 130/01 (VGL)

³ European Commission Green Paper (EC) 721 green paper on vertical restraints in ec competition policy [1996]

⁴ Sandra Marco Colino, 'Competition Law of the EU and UK' (8th edn, OUP 2019) ch 9

⁵ Kaczorowska-Ireland A, 'Chapter 28 - Article 101 TFEU' in European Union Law (4th, Routledge, Oxon and New York 2016

⁶ Treaty Article (EC) 101 TFEU [2008] OJ L 115

Additionally, reforms have also set down the objectives of economic efficiency and consumer welfare as further objectives parallel to market integration⁷. While the VBER deals with such objectives such as efficiency and consumer welfare, the hardcore restrictions⁸ balance out its effects to reduce anti-competitive behaviour.

The Competition Law aims of the European Commission are defined as follows:

Market Transparency indicates the commercial information that is freely available.

Market Efficiency is the level to which the prices of goods reflect the available relevant information.

Market Integration is a phenomenon where different markets are equally efficient so as to create a single market.

Consumer Welfare is a dependent variable directly related to market integration, efficiency, and transparency, while inversely related to the dispersion in the price of goods in different areas.

1.2. The Rise of Online Selling

However, the advent of online selling has led to a unique market development where online sellers have a widespread price advantage compared to offline sellers. This has led to a distortion of competition in the common market. The price advantage of online sellers has also given rise to a perceived need by offline sellers to maintain their market share by indirectly attempting to set price restrictions and online sale restrictions within selective distribution systems⁹. These are restrictions which would be through construction or through effect. Some examples of such restrictions are most favoured nation (MFN) clauses, dual pricing requirements, price parity clauses, or offline presence requirements with their object

⁷ Kaczorowska-Ireland A, 'Chapter 27 – introduction to EU Competition Law' in European Union Law (4th, Routledge, Oxon and New York 2016

⁸ VBER, Article 4

⁹ Andreas Themelis, 'After *Pierre Fabre*: the future of online distribution under competition policy', *International Journal of Law and Information Technology*, Volume 20, Issue 4, Winter 2012, Pages 346–369

being the restriction of online sales¹⁰. These could arguably be contrary to the aims of the EC, Art 101 TFEU, and the hardcore restrictions set out in the VRBE.

1.3. The Review of the VRBE and the Vertical Restraints Guidelines

In 2018, the European Commission announced a review of the Vertical Restraints Block Exemption and its Guidelines on Vertical Restraints¹¹. It has since carried out a consultation, and a draft of a revised block exemption is expected shortly. Responses to the consultation suggested that the Block Exemption and Guidelines needed to be revised, to consider the developments in online selling. The Draft Revised VRBE¹² and VGL¹³ were released on July 9th 2021, and are open for public Review¹⁴.

¹⁰ Oxera Consulting LLP, 'Vertical restraints: new evidence from a business survey', 24 March, 2016

¹¹ Evaluation Roadmap (EC) DG Comp - A1 - HT.5455 Evaluation of the Vertical Block Exemption Regulation 2018

¹² European Commission Notice (EC) 5038 ANNEX to the COMMUNICATION FROM THE COMMISSION Approval of the content of a draft for a commission regulation on the Guidelines on vertical restraints [2021] OJ X (Draft VGL)

¹³ European Commission Notice (EC) 5038 ANNEX to the COMMUNICATION FROM THE COMMISSION Approval of the content of a draft for a commission regulation 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 [2021] OJ X (Draft VRBE)

¹⁴ European Commission Notice Explanatory Note (EC) 5038 Revision of the Vertical Block Exemption Regulation [2021] OJ X (Revision Explanatory Note)

2. The Legal Framework

This report will set out the legal framework prior to the consultation on the draft revision of the VRBE and Guidelines. It will first lay out the legislation, followed by the regulations and the judicial treatment.

2.1. Article 101 TFEU

Art 101(1) TFEU¹⁵ promotes competition in the EU by prohibiting agreements which either through their object or effect, prevent, restrict, or distort competitive commercial behaviour. Through Art 101(3) TFEU¹⁶, its scope is excluded from any agreement, decision, or concerted practice “which contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit”.

2.2. Art 103 TFEU and the Vertical Restraints Block Exemption Regulation

Block Exemptions are enacted under the authority of Art 103 TFEU¹⁷ as secondary legislation to reduce the administrative load on the commission in setting out individual exemptions against the ambit of Art 101 TFEU. The Vertical Restraints Block Exemption (VRBE) is one such enactment which works to exempt certain vertical agreements and practices within such agreements which would have a higher public benefit and comparatively low anti-competitive effects.

2.3. Hardcore Restrictions and Exceptions

Hardcore restrictions¹⁸ notwithstanding the exemption in Article 2¹⁹ are laid down in Article 4²⁰ of the VRBE. Articles 4(b), (c) and (d) are of specific concern with regards to the market distortion which has arisen because of online selling.

¹⁵ Treaty Article (EC) 101(1) TFEU [2008] OJ L 115

¹⁶ Treaty Article (EC) 101(3) TFEU [2008] OJ L 115

¹⁷ Treaty Article (EC) 103 TFEU [2016] OJ L C 202

¹⁸ VRBE Article 4

¹⁹ VRBE Article 2

²⁰ VRBE Article 4

2.3.1. Article 4(b) – territorial restrictions

Art 4(b)²¹ prevents the VRBE from permitting any territorial restriction save in four circumstances. These are namely; the restriction of active sales into an exclusive territory or customer group reserved to another buyer, the restriction of sales to end users by a wholesale level trader, the restriction of sales to unauthorized distributors within the reserved territory, the restriction of the buyers ability to sell components to competitors. In such circumstances, the restrictions within vertical agreements are permitted.

2.3.2. Articles 4(c) and 4(d) – Selective Distributive Systems

Also, within a selective distribution system, Art 4(c)²² prevents the restriction of active or passive sales to end users by distributors and Art 4(d)²³ prevents the restriction of cross-supply between distributors.

2.4. The Position of the Guidelines on Vertical Restraints In Relation to Online Selling

Paragraphs 52²⁴ and 53²⁵ of the guidelines lays down certain examples of hardcore restrictions and VRBE-compatible restrictions especially within the sphere of online selling. There is little legislative guidance apart from this with regards to such restrictions and so the examples are treated not only as providing explanation, but also as definitive categories.

2.4.1. Para 52(a),(b) – Online Selling Restrictions Based on Territory

Para 52(a)²⁶ and (b)²⁷ augment the understanding of the prevention of territorial restrictions in Art 4(b) of the VRBE. Para 52 (a) regards as subject to hardcore restrictions, agreements providing that the exclusive distributor would prevent customers located in other exclusive territories from viewing its website or re-route its customers to websites of other distributors in the selective distribution system. Additionally, Para 52 (b) regards restricted agreements which provide that the exclusive distributor shall terminate consumers' transactions over the

²¹ VRBE Article 4(b)

²² VRBE Article 4(c)

²³ VRBE Article 4(d)

²⁴ VGL Para 52

²⁵ VGL Para 53

²⁶ VGL Para 52 (a)

²⁷ VGL Para 52 (b)

internet once their credit card data reveal an address that is not within the distributor's exclusive territory.

2.4.2. Para 52(c),(d) – Online Selling Limits and Dual Pricing

Articles 4(c) and 4(d) are reflected in the examples set out under Para 52(c)²⁸ and Para 52(d)²⁹ respectively. Para 52(c) agreements are restricted which provide that the distributor shall limit its proportion of overall sales made over the Internet. Finally, Para 52(d) restricts agreements providing that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be sold offline.

2.4.3. Para 53 – Internet Restrictions for Active Selling into exclusive territories

Furthermore, Paragraph 53³⁰ provides that a restriction on the use of the internet by distributors that are part to the agreement is compatible with the VBER to the extent that promotion on the internet or use of the internet would lead to active selling into other distributors' exclusive territories or customer groups.

2.5. The Judicial Attitudes

The CJEU judgements have favoured the usage of Dual Distribution, i.e. offline and online shop requirements, and in *Pierre Fabre*³¹ ruled against absolute restrictions of internet sales by suppliers. The case of *Pierre Fabre* also provided an understanding that online sales were to be treated as passive sales and the internet as a mode of distribution. Although the case of *Coty*³² posited that a luxury brand image was a defence which permits specific channel restrictions, the cases of *Generics*³³ and *Budapest Bank*³⁴ further clarify that the defence applies to brand protection in general.

Price Parity Requirements, or Most Favoured Nation (MFN) Clauses that were considered wide had been held as in the *Amazon* case³⁵ to be anti-competitive by object and contrary to Art 101(3) TFEU and VRBE Art 5³⁶. However, the courts take a case-by-case approach and are more permissive of narrow MFN clauses.

²⁸ VGL Para 52 (c)

²⁹ VGL Para 52 (d)

³⁰ VGL Para 53

³¹ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence* [2011] ECR I-09419

³² Case C-580/13 *Coty Germany GmbH v Stadtsparkasse Magdeburg*[2015] ECLI:EU:C:2015:485

³³Case C-307/18 *Generics (UK) Ltd and others v. Competition and Markets Authority*, ECLI:EU:C:2020:52

³⁴ Case C-228/18 – *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others*, ECLI:EU:C:2020:265.

³⁵ Ebook MFNs and related matters (Case AT.40153) European Commission Decision [2017]

³⁶ VRBE Art 5

The CJEU also has given negative treatment to geographical and advertisement restrictions in online sales in the cases of Guess³⁷ and NBCUniversal³⁸. This is in adherence to VBER Article (b) and a subsequent reading of Para 53 of the guidelines.

³⁷ Guess (Case AT.40428) European Commission Decision [2018]

³⁸ NBCUniversal Film merchandise (Case AT. 40433) European Commission Decision [2020]

3. An Evaluation of the Proposed Revisions in the Draft Revised VRBE and Guidelines

The consultation provided suggestions for the revision of the provisions for added flexibility for some provisions and increased rigidity for suppliers in others. The commission seeks to provide more flexibility to suppliers to permit vertical restraints of active sales, resale price maintenance and for dual pricing or equivalence requirements³⁹. The commission also sought to also narrow down or remove dual distribution requirements and MFN obligation protections⁴⁰.

This report will specifically focus on the proposed revisions to provisions on active sales restraints, dual pricing, dual distribution, and MFN clauses. The revisions will be assessed for their necessity with reference to their effect upon the competition law aims of the European Commission and upon the judicial position and processes. It will finally suggest certain additions and adjustments to the VRBE to further judicial certainty as well as the European Commission's Aims.

3.1.1. Effect on European Commissions's Competition Law Aims

The commission has sought to reduce the false positives in relation to dual distribution and parity obligations⁴¹. By this it is meant that it has sought to revoke the exemptions allowed by the VRBE that would on an assessment be contrary to Art 101(3) TFEU. Therefore, the proposals within Art 2(4) to Art 2(7) restrict dual distribution agreements which could give rise to concerns of horizontal collusion in competition. This proposal would promote the aims of the EC by increasing market transparency due to controls surrounding cumulative market shares of the undertakings and therefore reduce the exclusivity of market

³⁹ Fountoukakos K, Rowland P and Geurickx K, "Kyriakos Fountoukakos" (eDecember 18, 2020) <<https://www.concurrences.com/en/bulletin/news-issues/december-2020/the-eu-commission-publishes-consultation-on-vertical-block-exemption-regulation>> accessed July 12, 2021

⁴⁰ Ibid.

⁴¹ Ronzano A, "Alain Ronzano" (Concurrences Review July 9, 2021) <<https://www.concurrences.com/en/review/issues/no-2-2021/alerts/reform-the-european-commission-publishes-its-draft-block-exemption-regulation>> accessed July 12, 2021

information. This would increase market efficiency due to increased competition in prices and thereby increase consumer welfare. Extrapolating this, it would also permit further market integration due to a reduction of horizontal effects from vertical agreements and the increased competitiveness affecting prices of goods in the Member States. It may be the case that these changes would be relatively marginal owing to the previously limited nature of dual distribution clauses.

Clauses with wide-MFN obligations on all platforms are listed within the excluded restrictions under Art 5(d) of the draft VRBE. This proposal would also increase market transparency and also reduce market inefficiencies by reflecting price information accurately. This could lead to an increase in competitive tactics by undertakings such as increasing economies of scale and scope as well as innovating in order to reduce price differences in different member states. This would lead to further market integration, and lead to consumer welfare if the quality of goods is adequately regulated by the European Commission.

The EC also aims to avoid false negatives with regards to online sales restraints and indirect restrictions such as dual pricing and the equivalence principle. By this it is meant that it seeks to undo the restrictions within the VRBE that, on assessment, would be pursuant to Art 101(3) TFEU. Art 4(b) provides for shared exclusivity between appointed distributors. Art 4(c) adds additional protection to selective distribution systems against unauthorized distributors in the same territory. These measures would provide for a measured reduction in unauthorised sales at a competitive price and a reduction in anti-competitive tactics while maintaining competition between distributors through the faculty of introducing more distributors within one territory. This would increase market efficiency and consumer welfare in some markets but it may not adequately increase market integration on a whole due to the selectivity of competitive distribution.

Dual pricing requirements and the equivalence principle in online sales will no longer be treated as being subject to the hardcore restrictions. Instead online sales will be views as an efficient sales channel, which permits online sales and offline sales to have different wholesale prices set by a distributor. Furthermore,

the requirement of equivalence in the distribution criteria between offline and online stores will no longer apply. Online and Offline sales will be viewed as fundamentally different⁴². However, the exemptions concerning dual pricing and the equivalence principle will apply so long as the clauses do not have as their object the prevention of buyers or customers from purchasing or selling the goods online. These exemptions have in fact created a new online market and it is yet to be seen what the effect of such a distinction may be. An issue that is immediately apparent is a debate over how the aims of the EC may be measured in relation to the Online Market and by which parameters and indicators.

3.1.2. Effect on the Clarity of the Judicial Position

By virtue of the draft proposals, the Judicial position would be clear in several circumstances. This would be beneficial to the stakeholders within the decision process due to their dependence on the Judicial view for contracts.

For instance, the restriction of wide MFN clauses will clarify the position with regards to the precedent set by the Amazon case. However, narrow MFN clauses may still require a case-by-case assessment. Articles 4(b)⁴³ and 4(c)⁴⁴ have been simplified which could give clarity to businesses on the position of the courts. There will be a new 'by object' standard on indirect measures to restrict online sales through the revocation of hardcore restriction on the equivalence principle and dual pricing requirements⁴⁵. Dual distribution agreements restrictions under Articles 2(4) - 2(7)⁴⁶ have also set down certain market share limits beyond which such agreements are limited. Article 2(7) particularly has also recognised the position of platforms as gatekeepers being subject to the same market share limits. The Offline-Online distinction could also lead to a clearer understanding of the rulings in subsequent case law arising out of Pierre Fabre in Coty, Generics, and Budapest Bank. Section 6.1.2 of the Vertical Guidelines⁴⁷ also sets out when online selling qualifies as either active or passive.

⁴² Ibid.

⁴³ Draft VRBE Art 4(b)

⁴⁴ Draft VRBE Art 4 (c)

⁴⁵ Supra, n42

⁴⁶ Draft VRBE Art 2

⁴⁷ Draft VGL Section 6.1.2.

However, a concern arises with the distinction on online and offline markets. This could give rise to further deliberations relating to the suitable methods of market definition for online selling, suitable parameters for setting online market share limits, and the need for redefining market roles which could lead to judicial uncertainty. This is especially a necessity due to the proposed enactment of the Digital Markets Act and Digital Services Act⁴⁸ which give rise to online market platform restrictions, or gatekeeper restrictions. Also, the addition of multiple exclusivities and MFN restrictions could give rise to questions surrounding the narrowness of MFN clauses and possible issues of further geo-blocking of online shops by object within certain regions. The 'by object' standard for indirect measures to restrict online sales in relation to the equivalence principle and dual pricing may also need judicial qualification to bring better certainty in agreements.

4. Result of Evaluation

European Commission Aims

The draft VRBE proposals promote the competition law aims of the European Commission by emphasising market integration and transparency in relation to the revocation of false positives. The false negatives are also avoided to promote the market efficiency aims of the European Commission. Consumer welfare is promoted in managing false positives and negatives.

Judicial Certainty

Although the provisions have clarified many issues surrounding online sales and vertical restraints, there may be a need for further clarification in relation to MFN narrowness, geo-blocking issues with multiple exclusivities, the by object standard for indirect measures restricting online sales. There may also need to be further consultation on the methods of market definition, parameters for online market share limits, and the possibility of market role redefinition.

⁴⁸ European Commission Communication (EC) Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020].

5. Conclusion

This report has provided the relevant factual and legal backgrounds for the draft VRBE consultation. After which it has carried out an evaluative assessment of the proposed changes in the new draft VRBE and Guidelines. It has done so having regard to the aims of the European Commission and the aspect of judicial certainty in CJEU judgments.

This report has provided that the revision of the Vertical Restraints Block Exemption and Guidelines will be a necessary development which would promote aims of the European Commission in promoting market transparency, integration, and efficiency as well as consumer welfare. It has also provided that, the VRBE will also promote judicial certainty in the judgements of the Court of Justice of the EU (CJEU) in relation to vertical restraints in online sales, to an extent.

6. Bibliography

6.1. Table of Cases

➤ European Commission Decisions

- E-book MFNs and related matters (Case AT.40153) European Commission Decision [2017]
- Guess (Case AT.40428) European Commission Decision [2018]
- NBCUniversal Film merchandise (Case AT. 40433) European Commission Decision [2020]

➤ CJEU Decisions

- Case C-228/18 – Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others, ECLI:EU:C:2020:265.
- Case C-307/18 Generics (UK) Ltd and others v. Competition and Markets Authority, ECLI:EU:C:2020:52
- Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence [2011] ECR I-09419
- Case C-580/13 Coty Germany GmbH v Stadtsparkasse Magdeburg[2015] ECLI:EU:C:2015:485

6.2. Table of Legislation

➤ Primary Legislation

- Commission Regulation (EC) No 330 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 [2010] OJ L102 (VRBE)
- European Commission Information (EC) 130 Guidelines on Vertical Restraints (Text with EEA relevance) [2010] OJ L C 130/01 (VGL)
- Treaty Article (EC) 101 TFEU [2008] OJ L 11
- Treaty Article (EC) 101(1) TFEU [2008] OJ L 115
- Treaty Article (EC) 101(3) TFEU [2008] OJ L 115
- Treaty Article (EC) 103 TFEU [2016] OJ L C 202

6.3. Table of Secondary Sources

➤ Working Papers and Notices

- European Commission Communication (EC) Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020].
- European Commission Green Paper (EC) 721 green paper on vertical restraints in EC competition policy [1996]
- European Commission Notice (EC) 5038 ANNEX to the COMMUNICATION FROM THE COMMISSION Approval of the content of a draft for a commission regulation on the Guidelines on vertical restraints [2021] OJ X (Draft VGL)
- European Commission Notice (EC) 5038 ANNEX to the COMMUNICATION FROM THE COMMISSION Approval of the content of a draft for a commission regulation 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 [2021] OJ X (Draft VRBE)
- European Commission Notice Explanatory Note (EC) 5038 Revision of the Vertical Block Exemption Regulation [2021] OJ X (Revision Explanatory Note)
- Evaluation Roadmap (EC) DG Comp - A1 - HT.5455 Evaluation of the Vertical Block Exemption Regulation 2018

➤ Evidence Papers

- Oxera Consulting LLP, 'Vertical restraints: new evidence from a business survey', 24 March, 2016

➤ Journal Articles

- Andreas Themelis, 'After *Pierre Fabre*: the future of online distribution under competition policy', *International Journal of Law and Information Technology*, Volume 20, Issue 4, Winter 2012, Pages 346–369

➤ Textbook Chapters

- Kaczorowska-Ireland A, 'Chapter 27 – introduction to EU Competition Law' in *European Union Law* (4th, Routledge, Oxon and New York 2016)
- Kaczorowska-Ireland A, 'Chapter 28 - Article 101 TFEU' in *European Union Law* (4th, Routledge, Oxon and New York 2016)
- Sandra Marco Colino, 'Competition Law of the EU and UK' (8th edn, OUP 2019) ch9

➤ Web Publications

- Fountoukakos K, Rowland P and Geurickx K, “Kyriakos Fountoukakos” (eDecember 18, 2020) <<https://www.concurrences.com/en/bulletin/news-issues/december-2020/the-eu-commission-publishes-consultation-on-vertical-block-exemption-regulation>> accessed July 12, 2021
- Ronzano A, “Alain Ronzano” (Concurrences Review July 9, 2021) <<https://www.concurrences.com/en/review/issues/no-2-2021/alerts/reform-the-european-commission-publishes-its-draft-block-exemption-regulation>> accessed July 12, 2021