Implications of the new MFN rules in the EU and UK for online intermediaries

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I. Introduction

1. The application of competition law to e-commerce has been the subject of much debate in recent years, particularly the extent to which there are sound reasons to differentiate between e-commerce and brick-and-mortar not online commerce. The debate has unfolded both in the context of enforcement efforts, including *E-books I* (Apple),[1] *E-books II* (Amazon)[2] and *hotel booking* cases, but also in the deliberations over the EU Digital Markets Act (DMA) and the revised EU Vertical Block Exemption Regulation (VBER), and its related Guidelines. This article focuses on vertical agreements containing parity obligations (or MFNs) relating to online intermediation and platform services.

II. Background

2. The 2022 VBER[3] and Guidelines[4] were published on 10 May 2022, and were followed on 11 May 2022 by the UK VABEO[5] (and the Guidance on the VABEO[6] in July). Both the 2022 VBER and VABEO entered into force on 1 June 2022. Both provide a one-year transitional period. The VABEO will be in force for a period of six years, while the 2022 VBER will be for a period of twelve years.

3. The DMA was approved by the European Council on 18 July 2022,[7] and will become applicable six months after its publication in the Official Journal (expected in October), such that the deadline for notification by gatekeepers to the European Commission (EC) will be approximately June 2023 (with the EC designating gatekeepers in approximately August 2023, and obligations and prohibitions taking effect in February 2024). The DMA will apply to companies designated as gatekeepers that supply core platform services.[8]

III. Thresholds and definitions

4. The basic structure of the 2022 VBER (and VABEO) mirrors that of the 2010 VBER, in that vertical agreements are exempted, provided that:

- the market share of the supplier does not exceed 30% on the relevant market on which it sells contract goods or services;
- the market share of the buyer does not exceed 30% on the relevant market on which it purchases contract goods or services; and
- the agreement does not contain hardcore restrictions.

5. However, the 2022 VBER introduces a significant change, the concept of "online intermediation service" providers (which include e-commerce marketplaces,

1 Eur. Comm., dec. C(2013) 4750 of 25 July 2013, *E-Books*, case COMP/39847.

2 Eur. Comm., dec. C(2017) 2876 final of 4 May 2017, *E-book MFNs and related matters*, case COMP/40153.

3 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, OJ L 134, 11.5.2022, p. 4.

4 Communication from the Commission, Commission Notice, Guidelines on vertical restraints (2022/C 248/01), OJ C 248, 30.6.2022, p. 1.

5 Order 2022 No. 516 of 9 May 2022, The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022.

6 CMA Guidance on Vertical Agreements Block Exemption Order, CMA 166.

7 Eur. Council, press release 678/22 of 18 July 2022, DMA: Council gives final approval to new rules for fair competition online.

8 Core platform services include online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services, advertising services, and web browsers.

app stores, price comparison tools, and social media services).[9] As a result, "distribution" agreements involving such providers have two "suppliers" (for the purposes of applying the 2022 VBER)—the supplier of the product/service being ultimately acquired by consumers and the supplier of an online intermediation service (who is supplying that service to the product/service supplier, making the latter a "buyer" of that service).[10] The supplier of online intermediation services is not a "buyer" of the goods/services offered by the supplier or those goods/services.[11]

6. Under the DMA, the following providers of core platform services will be gatekeepers:

- they provide the same core platform service(s) in at least three Member States;
- they achieved an annual turnover in the European Economic Area (EEA) of at least EUR 7.5 billion in each of the last three financial years, or had an average market capitalisation or equivalent fair market value of at least EUR 75 billion in the last financial year; and
- they had at least 45 million monthly active end users in the EU and at least 10,000 yearly active business users established in the EU in each of the last three financial years.

IV. Parity obligations under the 2022 VBER and DMA

7. Parity obligations, sometimes referred to as "most favoured nation" (MFN) clauses, require a seller to offer goods and services to its counterparty on conditions that are no less favourable than the conditions offered to others, including price or non-price conditions.

8. Over the last ten years, such clauses involving suppliers of online intermediation services have come under significant scrutiny from competition authorities, including in the context of the supply of e-books and online hotel bookings. Those cases have found that, in certain contexts, such clauses can preclude suppliers from offering lower prices (or otherwise more advantageous terms) either through online intermediaries, third-party retailers and their own direct channels, depending on the scope of the clauses and the market dynamics.

9. For example, in *E-books I*,[12] five major publishers and Apple jointly agreed to switch the sale of e-books from a wholesale to an agency model with the same key pricing terms (including an MFN clause requiring the publishers to match the retail price of an e-book on Apple's store with any lower retail price offered by any third-party retailer). The EC concluded that this amounted to a concerted practice with the object of either raising retail prices of e-books or preventing the emergence of lower prices of e-books. The EC's similar investigation regarding the Amazon store considered MFNs that required publishers to inform and offer Amazon more favourable or alternative terms offered to competitors. The EC considered that these clauses could make it more difficult for other e-book suppliers to compete with Amazon by developing new and innovative products and services.[13]

10. In the online hotel booking sector, a significant number of national competition authorities (NCAs) investigated MFN clauses in the arrangements between online travel agencies and hotels. The German Bundeskartellamt[14] prohibited both "wide" and "narrow" MFN clauses, with the Düsseldorf Court of Appeal overturning the decision in relation to "narrow" MFNs,[15] a judgment that was in turn annulled by the Bundesgerichtshof (Federal Court of Justice), finding that "narrow" MFNs could not be considered to be ancillary or be individually exempted.[16] In contrast, in France, Italy, and Sweden, the authorities accepted a five-year commitment not to use "wide" MFNs, but permitted the ongoing use of "narrow" clauses.[17] The inconsistency in the approaches across Europe was reflected in the commentary of the *Support studies for the evaluation of the VBER*, which stated that "*clear guidance could be provided on the circumstances in which the use of* [parity clauses] *should not raise competition concerns, such as safe harbours, as well as the circumstances where the presumption would be of illegality.*"[18]

9 Guidelines on vertical restraints (2022/C 248/01), para. 64.

10 Ibid., para. 67.

11 Ibid., para. 67(a).

12 Eur. Comm., dec. C(2013) 4750 of 25 July 2013, *E-Books*, case COMP/39847.

13 Eur. Comm., dec. C(2017) 2876 final of 4 May 2017, *E-book MFNs and related matters*, case COMP/40153.

14 Bundeskartellamt, 22 December 2015, case B9-121/13.

15 Kartellsenat, 9 January 2015, 2015:0109.VI.KART1.14V.00.

16 Bundesgerichtshof, 18 May 2021, case KVR 54/20.

17 Fr. NCA, dec. No. 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector; Autorità Garante della Concorrenza e del Mercato, 21 April 2015, case 1779, Commitments offered by Booking.com: closed the investigation in Italy, France and Sweden; and Konkurrensverket, 15 April 2015, case 596/2013.

18 *Support studies for the evaluation of the VBER, Final Report*, Publications Office of the European Union, Luxembourg, 2020, p. 109.

V. MFN clauses under the 2022 VBER

11. As the cases described above make clear, the EC and NCAs differentiate between wholesale and retail MFNs, and between "wide" and "narrow" retail MFNs. "Wide" MFN clauses prohibit a supplier from offering products or services provided more cheaply (or on otherwise better terms) than through the supplier's own direct channels or any other intermediation service/platform, ensuring that the product or service is offered through the intermediation service/platform at the lowest price offered through any other channel. "Narrow" MFN clauses restrict suppliers from offering better conditions through their own direct channels, but allow them to offer better conditions through other indirect channels.

12. Although the 2010 VBER exempted all parity obligations, the 2022 VBER narrows the scope of the safe harbour afforded to MFNs, and specifically addresses obligations imposed by providers of intermediation services. Article 5(1)(d) excludes (from the scope of the block exemption) parity clauses imposed by providers of intermediation services/platforms on buyers of those intermediation services that preclude them from offering their goods or services on more favourable conditions via competing online intermediation services. The 2022 Vertical Guidelines note that such conditions could relate to prices, inventory, and availability, and could be explicit contractual clauses (or other direct measures) or could be indirect, including through the use of differential pricing. "Narrow" retail parity obligations and wholesale MFN clauses continue to be block-exempted.

13. This prohibition on online intermediation services imposing "wide" retail parity clauses reflects the approach taken by the EC in the e-books cases and the majority of European NCAs in relation to MFN clauses included in arrangements between hotels and travel agents. As a result of the investigations relating to "wide" clauses, and subsequent legislation in a number of jurisdictions (including France,[19] Austria,[20] Italy[21] and Belgium[22]), "wide" parity clauses in contracts between accommodation providers and hotel online travel agencies are prohibited. Interestingly, however, a recent market study on the distribution of hotel accommodation in the EU (completed for the EC by VVA and LE Europe) found that the differences in prices and availability for hotel rooms had decreased across booking intermediary platforms (following the investigations and enforcement decisions in the online hotel booking sector in Germany, France, Italy and Sweden).[23] The EC indicated that it would take these findings into account in ongoing monitoring and enforcement work in the lodging sector.[24]

14. It is important to appreciate how the 2022 VBER impacts the relationship between "suppliers" of online intermediation services and suppliers of intermediate products/services. In particular, restrictions imposed by suppliers of online intermediation services on buyers of those services that relate to the price at which, territories to which, or customers to whom, the intermediate products/services may be sold are hardcore restrictions of competition. Further, under Article 5(1)(d) of the 2022 VBER, "wide" retail MFN (direct or indirect) obligations that prevent buyers of intermediation services from offering, selling or reselling products/services to end users on more favourable conditions via competing intermediation services are excluded from the 2022 VBER.[25]

15. As a result, the application of the 2022 VBER to the suppliers of online intermediation services in certain sectors may have unintended consequences. For example, in the online travel sector, there may well be at least two online intermediaries between the ultimate service provider (e.g. an airline) and the end user—all global distribution service providers (GDSs), metasearch engines (MSEs) and online travel agents are suppliers of online intermediary services.

16. That said, even in relation to the exemption of "narrow" MFNs, the EC explicitly noted in its *Competition policy for the digital era*[26] report that it may be appropriate also to prohibit "narrow" MFNs if competition between the relevant platforms is weak, such that competitive pressure on online intermediation service providers can only come from other channels. To that end, Article 6 of the 2022 VBER includes the potential to withdraw the benefit of the block exemption if a vertical agreement has effects that are incompatible with Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), referring to retail MFN clauses in concentrated online intermediation markets where the cumulative effect of "narrow" retail MFN clauses imposed by intermediaries restricts competition.

17. Finally, wholesale MFNs continue to be block-exempted, even when imposed by suppliers of online intermediation services on suppliers of intermediate products/services that supply their products/services to

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19 Law No. 2015-990 for Growth, Activity and Equal Economic Chances, adopted on 10 July 2015.

20 Federal Act amending the Federal Act Against Unfair Competition 1984 and the Federal Act on Price Marking, adopted on 17 November 2016.

21 Annual Bill for Market and Competition, adopted on 2 August 2017.

22 Act on pricing freedom for tourist accommodation operators in contracts concluded with online reservation platform operators, adopted on 19 July 2018.

23 *Market study on the distribution of hotel accommodation in the EU COMP/2020/OP/002, Final Report*, Publications Office of the European Union, Luxembourg, 2022. p. 36. https://competition-policy.ec.europa.eu/document/download/1551a94d-e3c0-4175-bdff-d54aef2f6606_en.

24 Eur. Comm., press release IP/22/5045 of 26 August 2022, Antitrust: Commission publishes market study on hotels' distribution practices.

25 Guidelines on vertical restraints (2022/C 248/01), para. 253.

26 J. Crémer, Y.-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era*, Publications Office of the European Union, Luxembourg, 2019.

retailers without the intermediary being party to that supply contract. This appears to reflect the assumption that MFNs in the context of arrangements between two "upstream" business users do not impact retailer prices, on the basis that the business interacting with consumers will set its own price for the product or service before supplying it to the business interacting with customers.

18. However, this distinction between wholesale and retail MFNs can be overly simplistic in the context of service markets where the intermediary business is simply passing through to the business interacting with customers offers for services. For example, in the supply of air transport services, offers made (and fulfilled) by airlines are aggregated by GDSs. GDSs then supply aggregated information about offers from multiple airlines to travel agents (who make offers that often include other services, such as hotels) to consumers. GDSs operate as online intermediaries between airlines and travel agents (which are themselves online intermediaries), such that it appears that the 2022 VBER would consider the arrangements between airlines and GDSs to be wholesale arrangements. GDSs have long imposed MFN clauses that preclude airlines from offering lower-priced fare classes through lower-cost channels (such as their own websites and, more recently, to travel agents working with other online intermediaries that have adopted business models that are lower cost than the GDSs). While these MFN clauses may be characterised as being imposed at the "wholesale" level, their effect is to deprive travellers (end users) of access to lower-priced fare classes that airlines (and travel agents) could otherwise offer.

VI. MFN clauses under the DMA

19. The DMA imposes a series of obligations on designated gatekeepers (in Articles 5, 6, and 7). Article 5(3) provides that gatekeepers cannot prevent users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or on conditions that are different from those offered through the online intermediation services of the designated gatekeeper. In other words, both the 2022 VBER and the DMA will apply to certain providers of online intermediation services.

20. However, the DMA goes well beyond the 2022 VBER, effectively precluding gatekeepers offering intermediation services from imposing MFNs on business users of their intermediation services, whether those restrictions are "narrow" or "wide." That said, the language does focus the prohibition on retail clauses (through its reference to offering products or services to end users), raising the same concern noted above about the artificial nature of the distinction between retail and wholesale clauses in the context of intermediaries that merely aggregate data from multiple service suppliers, provide that aggregated data to a business user who has a relationship with end users and facilitates entry into a service supply relationship between the end user and the ultimate service provider.

21. Further, a gatekeeper must allow business users to promote offers to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users even if the business users use the gatekeeper's core platform services. As a result, where a business user offers more attractive pricing or other conditions through another channel, gatekeepers must permit that business user to promote those other offers through the intermediation service. This provision in the DMA is clearly intended to "tip the balance" in favour of business users.

VII. MFN clauses in the UK under the VABEO

22. Article 8 of the VABEO mirrors the DMA approach to "wide" retail MFNs, providing that they are hardcore restrictions (rather than merely excluding them from the scope of the exemption), and noting that most hardcore restrictions are also "by object" restrictions. However, it is in some respects even broader, applying to both online and offline clauses.

23. It is, however, important to note that the recent Competition Appeal Tribunal (CAT) judgment relating to the CMA's decision fining Compare the Market[27] over its "wide" MFN clauses (which prohibited home insurance providers from offering lower premiums on other price comparison websites and through their own direct channels). However, it is important to note that the CMA did not pursue Compare the Market's "wide" MFNs to be "by object" restrictions. The CAT overturned the CMA's decision, finding that the evidence relied on by the CMA was merely "anecdotal," lacked depth and consistency with the theory of harm, and was untestable. The CAT agreed with the CMA that the relevant MFNs were not by object restrictions, and went on to doubt the effectiveness of the "wide" MFNs, and to find that the theoretical argument against "wide" MFNs was not particularly strong in the particular markets at issue. In short, the CAT appears to have considered that there is doubt that "wide" MFNs are necessarily anticompetitive, such that the 2022 VBER "exclusion" of such clauses (rather than considering them to be hardcore restrictions of competition) might be the more appropriate approach. However, the CAT's judgment does not mention the treatment of "wide" retail MFNs under the VABEO, and there is no suggestion that the VABEO will be revised in the near term. As a result, entities wishing to ensure that

27 CAT, 8 August 2022, *BGL (Holdings) Limited & Others v. Competition and Markets Authority*, case No. 1380/1/12/21.

their vertical arrangements are block-exempted under the VABEO should not include "wide" retail MFNs in their UK arrangements.

VIII. Implications for suppliers and intermediaries

24. There is clearly material room for divergence between the EU and UK treatment of MFNs that will need to be navigated by both online intermediaries and service providers who are their business users operating on a pan-European basis. Aside from the potential implications for product design (including the supply of "direct" channel offers by service providers), the potential for arbitrage of regulatory differences could raise questions ordinarily associated with the treatment of passive parallel sales.

25. The divergence between the UK and EU approaches (at least for online intermediary service providers who are not also gatekeepers) means that, while a "wide" MFN clause will not be block-exempted in the EU, the remainder of the agreement will be, while in the UK the enforceability of the agreement will turn on the case-by-case assessment of the MFN clause. However, the CAT's *Compare the Market* judgment may well embolden online intermediation service providers operating in the UK to simply conduct an effects-based self-assessment for the UK (alongside the EU self-assessment), and wait for the CMA to challenge their approach.

26. Entities will also need to consider the implications of the differences in the way that the 2022 VBER and DMA, on the one hand, and VABEO, on the other, define the "wide" retail MFN concept. The 2022 VBER addresses restrictions imposed by providers of intermediation services on buyers of those services, while the VABEO identifies "wide" parity clauses as those imposed on any of a supplier's indirect channels, whether online (e.g. price comparison websites or online marketplaces) or offline (e.g. a traditional broker), which ensure that the prices or other terms and conditions on which a supplier's products are offered to end users on the indirect channel are no worse than those offered by the supplier on another channel. In other words, the 2022 VBER and DMA look "up" to restrictions imposed on the ultimate service provider, while the VABEO focuses on restrictions imposed on the supplier's indirect channels. This creates further potential for diverging enforcement between the EU and UK.

27. Finally, both the 2022 VBER and VABEO enable the withdrawal/cancellation of the remaining exemption. According to the EU Guidelines, withdrawal of the 2022 VBER is particularly likely where "narrow" retail MFNs are imposed by the three largest providers of online intermediation services in the relevant market, and those providers hold a combined market share exceeding 50%. In the absence of efficiencies, the block exemption may also be withdrawn where buyers representing a significant share of total demand for online intermediation services are subject to "narrow" MFNs, or in relation to agreements with all providers of intermediation services whose "narrow" retail parity obligations make a significant contribution to a cumulative anticompetitive effect (and the individual provider's market share exceeds 5%). According to the CMA's July Guidance, in deciding whether to cancel the benefit of block exemption, the CMA will consider factors including the market position of the intermediary that imposes the "narrow" retail parity obligation, the relative size of the direct channel(s) covered by the obligation, the substitutability of the direct channels and intermediaries from the perspective of both the suppliers of the products and end users, and whether the restrictions are imposed by multiple intermediaries (such that there is a cumulative effect). ■