Cooley

Review of EU Competition Rules on Vertical Agreements

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European Commission publishes findings of its evaluation of EU competition rules on vertical agreements

On September 8, the European Commission (EC) published a **Staff Working Document** summarising the findings of its evaluation of the Vertical Block Exemption Regulation (VBER) and the accompanying Vertical Guidelines (Guidelines). The findings show that the VBER and the Guidelines are useful tools that enable businesses to self-assess the compliance of their vertical agreements with EU competition law. However, the market has significantly changed since the adoption of the VBER and the Guidelines in 2010, notably with the growth of online sales, the expanded role of online platforms and the changes in distribution models. As a result, the EC's evaluation identified a number of issues with the VBER and the Guidelines that need to be addressed. Below we summarise the main issues identified and the likely priority areas for the EC as it begins the next phase of its review.

Background

Vertical agreements are agreements between businesses operating at different levels of the production or distribution chain, such as an agreement between a manufacturer and a distributor. Under current EU rules, companies must self-assess the compliance of their vertical agreements with EU competition law, which prohibits agreements that restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union. The VBER exempts certain types of agreements from the Article 101(1) prohibition if certain conditions are met, thereby providing businesses with the legal certainty that their agreement is compliant with EU competition law.

The VBER and the accompanying Guidelines are due to expire on May 31, 2022. The EC has undertaken a two-year evaluation to determine whether the VBER and the Guidelines should lapse, be renewed or be revised by collecting evidence from various sources, including a public consultation, a targeted consultation of national competition authorities, a stakeholder workshop and an external evaluation support study. The EC has also gathered evidence through the results of its ecommerce sector inquiry, which was launched in May 2015 and concluded in May 2017. Moreover, the EC has gained insight through its own enforcement experience with regard to vertical restrictions in recent years.

Main findings

Overall, the evidence gathered confirms that the VBER, together with the Guidelines, are useful instruments and should be retained. However, the evaluation has identified a number of issues with regard to the functioning of the rules, namely:

- More clarity is required regarding **online sales restrictions**. Various parties underlined that the current rules were originally conceived to address offline restrictions and, for this reason, they are not sufficiently clear to assess restrictions linked to the development of ecommerce, notably in the context of selective distribution systems. In particular, there is a need for **more guidance** regarding the treatment of **online advertising restrictions**, specifically on the use of trademarks and brand names, as well as more guidance on **online platform bans** and restrictions on the **use of price comparison websites**.
- Companies can presently benefit from the VBER if the vertical agreement contains no "hardcore restrictions" on competition

and neither party's market share exceeds 30%. However, stakeholders and National Competition Authorities (NCAs) have pointed to the difficulties in assessing market shares, particularly for online platforms, which may require external legal assistance, thereby generating costs for businesses.

- Distribution models have changed over the last 10 years, with an increasing use of **selective distribution**. However, there remains a lack of clarity regarding the possibility of combining **selective and exclusive distribution**, including at different levels of the supply chain (e.g., exclusive distribution at the wholesale level and selective distribution at the retail level) and in different territories. In addition, with increasing digitalisation and the growth of online sales, more manufacturers are now selling their products directly to consumers, as well as through a resale channel, so-called, "dual distribution". There is presently insufficient clarity as to what extent and under what conditions information exchanges in dual distributions are to be treated.
- There remains significant scope for **diverging interpretations** of the rules by **NCAs** and national courts, which is an important issue of concern for stakeholders, as it reduces the benefit of the rules. For example, with **resale price maintenance** (**RPM**), the most investigated vertical restriction between 1 June 2010 and 1 January 2020 across the EU (including the UK), NCAs seem to pursue divergent approaches, particularly with regard to novel implementations of RPM. In addition, in the assessment of **selective distribution systems**, there is an inconsistent approach taken by NCAs regarding online sales bans, marketplace/platform bans and dual pricing.
- **Case law and enforcement practice** has **developed significantly** since the rules were implemented in 2010 and the rules need to be updated to reflect these developments. For example, there have been EU judgments like *Auto 24* [1] and *Coty*[2], as well as the enforcement practice of the EC (e.g., *Sanrio*[3], *NBC Universal*[4]) and NCA decisions (e.g., the *Asics*[5] case in Germany) which need to be reflected in the revised rules in order to provide businesses with legal certainty.
- Some provisions lack clarity, such as the rules defining **agency agreements**, where the **level and type of risks** that are relevant to determine whether a vertical agreement can be considered a **genuine agency agreement** is currently unclear.
- While the use of **parity clauses** has increased, especially at the retail level, there is insufficient guidance on their treatment resulting in the adoption of divergent approaches by NCAs.
- Other provisions are difficult to apply or are no longer adapted to the current business environment, notably when it comes to applying the existing rules to new market players that do not fit into traditional supply and distribution concepts and to new online sales restrictions. For example, **non-compete obligations** with a maximum duration of five years is regarded as not economically justified since businesses often enter into longer commercial relationships, coupled with long-term investments. A five-year non-compete clause can create an unnecessary burden for businesses that either have to include a renegotiation clause or sign a new contract in order to continue their contractual relationship beyond five years. Similarly, the current **market definition rules** do not appear well-suited to online platforms.
- There is also room for **simplification** and **further cost reduction**, notably by reducing the complexity of the rules and by exempting additional vertical agreements in some areas.

Next steps

The Staff Working Document is an important stage in the EC's review of the VBER and the Guidelines; it closes the evaluation phase and launches the impact assessment phase where the EC will look into the issues identified in more detail. A draft of the revised rules is expected to be published in 2021 for public consultation, with the new rules eventually coming into force by the time the existing VBER and Guidelines expire on May 31, 2022.

From a UK perspective, it is the current position that the UK will continue to apply the VBER until it expires. Post May 31, 2022, it will be interesting to see whether the UK will adopt similar rules to the revised VBER or take a different approach.

Notes

1. Judgement of the European Court of Justice, 14 June 2012, *Auto 24*, Case C-158/11.
2. Judgement of the European Court of Justice, 6 December 2017, *Coty,* Case C-230/16.
3. European Commission, 9 July 2019, *Sanrio,* Case AT. 40432.
4. European Commission, 30 January 2020, *NBC Universal,* Case AT. 40433.
5. Bundeskartellamt, 27 August 2015, *Asics*.

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