Vertical Arrangements and Restrictions in Europe

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A. Introduction

Article 101 of the Treaty on the Functioning of the European Union[1] (TFEU) prohibits agreements between undertakings within the EU that have the object or effect of restricting competition. This prohibition applies to both horizontal and vertical agreements. However, certain vertical agreements as defined in the Vertical Block Exemption Regulation (VBER) are exempt from this prohibition. In June 2022, the European Commission issued an update to the VBER,[2] which replaced the prior version of the regulation from 2010.[3] Along with the new VBER, the European Commission also released accompanying guidelines on vertical restraints[4] (Vertical Guidelines) to guide courts and national competition authorities (NCAs) across the EU.

On the occasion of the two-year anniversary of the 2022 update to the VBER and its accompanying Vertical Guidelines, the Distribution and Franchising Committee of the ABA Antitrust Law Section hosted a webinar on July 11, 2024, titled "Vertical Arrangements and Restrictions in Europe." The webinar was moderated by Mr. Matthew Adler (Baker Botts) and featured a discussion with panelists Dr. Maren Tamke (Dentons), Dr. Tobias Kruis (Giesecke+Devrient), and Mr. Luis Blanquez (Bona Law).

The panelists provided an overview of the VBER and its Vertical Guidelines, with a particular focus on the treatment of dual pricing, resale price maintenance (RPM), and most favored nation (MFN) clauses under the VBER. They also discussed examples of recent enforcement actions in Europe involving vertical agreements and lessons from these actions that can be drawn for cross-border companies conducting business in Europe.

B. Overview of the VBER and the Vertical Guidelines

Dr. Tamke began by providing an overview of the VBER and Vertical Guidelines. He explained that Article 101 of the TFEU distinguishes between agreements that restrict competition “by object” and those that restrict competition “by effect.” Certain agreements, such as RPM agreements between vertically related suppliers, are considered to have the object of restricting competition. These types of agreements are prohibited even if they do not have a demonstrable negative effect on competition. For agreements that are not restrictions by object, their impact on competition must be assessed.

Dr. Tamke explained that under the VBER, however, certain types of vertical agreements can be exempted from prohibition, although the requirements to qualify for such an exemption are high. For example, companies with market shares below 30% that do not engage in so-called “hardcore” restrictions can benefit from a safe harbor. Outside of this safe harbor, companies must carry out a self-assessment to determine whether they qualify under the VBER, with the Vertical Guidelines informing this assessment. Although these Guidelines are not legally binding in courts or for enforcement actions of NCAs, they serve as useful reference points.

Dr. Tamke underscored that companies operating in the EU must also comply with the national competition laws of all the EU member states in which they are active. To ensure consistency in the application of the competition law, Dr. Tamke noted that the EU mandates that any agreement permissible under Article 101 must also be permissible under the national competition law of all member states, including those covered by the VBER. Nonetheless, individual member states may still adopt different approaches when applying rules, especially on new issues or where enforcement priorities differ from those of the European Commission.

Dr. Kruis provided additional insights into the varying priorities of enforcement agencies across Europe, noting that NCAs are often more active in the area of vertical constraints. He highlighted that the NCAs of Austria, France, Denmark, Germany, Portugal, Spain, and other Central and Eastern European member states have been particularly active recently, with RPM cases being the most frequently scrutinized. Other frequently pursued cases involved selective distribution systems and MFN clauses.

Dr. Kruis also highlighted that the Netherlands has been one of the least active NCAs in the area of vertical restraints, with no decisions issued between 2010 and 2020. However, this has changed recently, with the Dutch NCA issuing decisions against Samsung and LG for RPM practices in 2021 and 2023, respectively. At the EU level, Dr. Kruis explained that the European Commission typically intervenes in vertical restraints cases when there is a cross-border element.

Mr. Adler then inquired about the objectives of the new VBER and the Vertical Guidelines and how they are useful for practitioners.

Dr. Kruis emphasized that from an in-house perspective, the VBER and the Vertical Guidelines are invaluable tools for self-assessment. Before the 2022 update of the VBER, there was a general sense that more clarity, legal certainty, and flexibility were needed, particularly concerning RPM, non-compete clauses, and restrictions on online sales – areas that are common in many industries but challenging to navigate.

Dr. Tamke explained that, in principle, companies must perform self-assessments to determine whether their agreements might be considered restrictive or they could benefit from an exemption. The VBER aims to provide a degree of legal certainty regarding the safe harbors and conditions under which exemptions apply. Dr. Tamke observed that the European Commission, in principle, acknowledges that vertical restraints are generally less harmful than horizontal ones, as they often generate efficiencies to offset the potential harm to competition, especially when the involved parties lack market power.

Notably, Dr. Tamke added that the exemptions in the VBER do not apply to distribution agreements between competitors or to hybrid marketplace platforms that also compete with sellers active on the platform. The market share test applies to both parties to the agreement and depends on the relevant market, which may not always be straightforward to define. Dr. Tamke also noted that the exemptions also do not apply to agreements that include hardcore restrictions.

These include:

- RPM
- Territorial or other customer restrictions
- Restrictions on cross-supplies between the members of a selective distribution system
- Restrictions that prevent sellers from making effective use of the internet
- Restrictions on end users, independent repairers, wholesalers, and service providers from obtaining spare parts directly from the manufacturer of those spare parts

Additionally, the VBER specifies some restraints that cannot benefit from exemptions despite not being classified as hardcore restrictions. These include non-compete obligations that are indefinite or last more than five years, and wide price parity clauses by platforms. The Vertical Guidelines provide further guidance on assessing vertical agreements when the parties exceed the 30% market share threshold.

Importantly, Dr. Tamke emphasized that the European Commission and the NCAs of the member states can withdraw exemptions from the VBER in individual cases if they find that the particular agreements have anticompetitive effects.

C. Dual Pricing, RPM, and MFN Clauses in the VBER

The panelists then discussed several common vertical restraints, including dual pricing,[5] dual distribution,[6] RPM, MFN clauses, and regulations concerning these agreements in the VBER.

First, Mr. Blanquez explained that the VBER and Vertical Guidelines provide useful guidance for dual pricing agreements. To qualify for the VBER, price differences between online and offline channels must reasonably relate to cost and investment differences. Additionally, dual pricing must not have the object of restricting sales to particular territories or prevent effective use of the internet.

Regarding dual distribution, Mr. Blanquez noted that both EU and US practices are rather similar. In the US, non-price vertical restraints are generally assessed under the rule of reason and are permitted if there is no market power. This aligns with the EU's safe harbor thresholds. However, Mr. Blanquez noted that if a territory or customer restriction is not really vertical, but rather one in which the supplier imposes a restriction on wholesalers to allocate territories or customers, the restriction would be viewed as horizontal, and per se illegal.

On RPM agreements, Mr. Blanquez highlighted that these agreements are considered hardcore restrictions under the EU competition law and cannot benefit from the VBER, except in limited circumstances. The new Vertical Guidelines provide expanded guidance on RPM, including its relationship to price monitoring and minimum advertised prices (MAPs), which are also treated as indirect RPM and thus as hardcore restrictions.

Dr. Kruis discussed the 2023 Super Bock judgment by the European Court of Justice, which concerned RPM practices by a Portuguese beverage manufacturer.[7] The court ruled that competition authorities in the EU are obliged to analyze the specifics of the RPM agreement to determine whether the RPM agreement constitutes a restriction of competition by object, shifting the burden of proof to the authorities. Although the judgment may impact national enforcement practices, RPM remains a hardcore restriction under the VBER, requiring companies to perform self-assessments.

Lastly, the panelists turned to a discussion of MFN clauses. Mr. Blanquez explained that wide parity clauses, which require sellers to offer purchasers the same or better terms on all retail platforms, are no longer exempt under the VBER and must be individually assessed. In contrast, narrow parity clauses, which only apply to the seller's direct sales channels (typically its website) benefit from the safe harbor. He highlighted that in the US, MFN clauses can raise concerns when the benefiting party has substantial market share, or, in the case of an MFN-plus provision, when the MFN clause requires the seller to provide one buyer better terms than all other buyers.

Mr. Blanquez discussed the 2012 Apple e-books antitrust litigation as a potential example of an MFN-plus provision. He explained that the litigation concerned agency agreements that Apple entered into with five of the six largest e-book publishers, which incorporated MFN clauses stating that the Apple e-book store would have the lowest e-book reader prices. A US district court found that the arrangement facilitated a hub-and-spoke conspiracy among publishers, which resulted in higher retail prices to e-book readers. The district court's decision was affirmed by the Second Circuit, which acknowledged that while some MFNs can be lawful, the MFN in the agency agreement at issue enforced collective action among publishers.[8]

Dr. Kruis added that the VBER's exclusion of wide MFNs from the safe harbor only applies to MFNs in the context of online intermediation services or platforms. Other forms of MFNs, such as traditional wholesale MFNs, remain covered.

D. Recent Enforcement Actions

Next, Mr. Adler invited the panelists to speak on notable enforcement actions related to vertical exemptions by the European Commission and NCAs in recent years that may inform the application of the VBER and Vertical Guidelines. Dr. Tamke highlighted the following three cases related to cross-border trade restrictions:

- ***Valve Corporation v. Commission***:[9] In January 2021, the European Commission issued a ruling against Valve, an online video gaming platform, and five game developers, finding that agreements restricting cross-border sales (known as geo-blocking) prevented users and distributors in higher-priced regions from purchasing video games sold at lower prices in other countries. In September 2023, the European General Court upheld the European Commission's decision on the video game cases.
- **Mondelez International**:[10] In May 2024, the European Commission fined the global snacks company Mondelez International approximately €340 million for allegedly obstructing cross-border trade of chocolate, biscuits, and coffee products within the EU. The European Commission found that Mondelez engaged in 22 anticompetitive agreements that limited territories and customers for reselling their products, enforced higher prices for exports compared to domestic sales, and restricted passive sales.
- **Pierre Cardin**:[11] In July 2023, the European Commission issued a Statement of Objections to French fashion house Pierre Cardin and its licensee for allegedly entering into anticompetitive agreements to restrict sales across licensed territories and to low-price retailers. The outcome is still pending.

Dr. Tamke also briefly touched upon the Digital Markets Act (DMA), which imposes certain obligations on large digital players in the EU known as gatekeepers, which are also covered by the VBER.[12]

Dr. Kruis then discussed recent enforcement actions by NCAs. He highlighted that the Dutch NCA imposed fines nearing €50 million against Samsung and LG for allegedly engaging in RPM practices.[13] In Germany, the NCA emphasized that MAP policies are regarded as RPM and are generally not accepted. Additionally, in 2023, the French NCA fined Rolex nearly €92 million for allegedly prohibiting authorized retailers from selling watches online.[14] In 2020, the French NCA fined Apple €1.1 billion for practices allegedly including vertical customer allocation and RPM. Later, the RPM charge was dismissed, and the fine was reduced for the customer allocation charge.[15] In July 2022, the Spanish NCA imposed a fine of approximately €200 million against Amazon and Apple for allegedly agreeing to restrict resellers from selling Apple products on Amazon's marketplace.[16]

E. Navigating Dual Distribution in Europe: Key Insights for a Hypothetical US Widget Maker

Mr. Adler invited the panelists to share practical advice for a hypothetical US-based widget maker looking to expand its business into Europe. The hypothetical company, which already sells directly to some international customers, plans to use distributors to grow its presence in Europe. The discussion centered around the implications of dual distribution under the updated VBER in the EU and how these rules compare to the US approach.

Dr. Tamke opened the discussion by reassuring the widget maker that, despite recent changes, the fundamental benefits of the VBER still apply. The regulation allows companies to benefit from block exemptions even when they are in direct competition with their distributors in the EU. Notably, the scope of the exemption has been expanded to include wholesalers and importers, providing more flexibility in how the widget maker can structure its European distribution network.

Dr. Tamke noted that one of the critical issues in dual distribution is the exchange of sensitive information between the manufacturer and its distributors. The new VBER provides clear guidance, outlining what types of information exchanges are permissible. For example, technical details and recommended resale prices can be shared, provided they are necessary to improve production and distribution and do not lead to RPM. However, information on future prices, specific customers, and territorial restrictions is off-limits unless strictly necessary. Dr. Tamke advised that companies can mitigate risks by exchanging only aggregated or historical data or by implementing firewalls.

Dr. Kruis emphasized the importance of online sales in the context of the widget maker's expansion. The updated VBER acknowledges the growth of online sales and allows for more flexibility in how companies can manage their online distribution channels. While the widget maker cannot outright ban its distributors from selling online – a move now considered a hardcore restriction – it can impose certain quality-related requirements or even differentiate pricing between online and offline sales.

Moreover, the widget maker can require distributors to operate offline stores or meet minimum sales volumes through offline channels.

Dr. Kruis also advised that hybrid platforms – those that both sell their own products and host third-party sellers – are not automatically covered by the VBER's safe harbor provisions. These cases must be assessed individually, and while the European Commission might not prioritize enforcement in the absence of market power or hardcore restrictions, NCAs may take a stricter approach.

Dr. Kruis provided key pieces of advice for the widget maker:

- **Review and align distribution contracts**: Ensure that all distribution agreements are in line with the VBER. The new regulation offers opportunities to explore different distribution models, such as granting shared exclusivity to certain distributors or adjusting online sales strategies. Consistency and coherence in how restrictions and criteria are applied across different channels are key.
- **Train sales staff**: Compliance with the VBER goes beyond what is written in contracts. It is essential to train sales teams on the complexities of the regulation, especially regarding hardcore restrictions. Clear communication and a strong understanding of the rules will help prevent inadvertent violations.
- **Monitor national enforcement**: Despite the guidance provided by the VBER, enforcement and interpretation can vary across EU member states. The widget maker should stay informed about how different NCAs might approach specific issues, particularly around RPM and other practices that might be viewed differently under national laws.

Finally, Mr. Blanquez added that a one-size-fits-all approach is unlikely to work when expanding into Europe. Dual distribution and online intermediation services, in particular, may require US companies to revisit their existing business practices to ensure compliance with EU regulations. He noted that, while the new VBER is more permissive in areas like exclusive distribution and restrictions on online sales, it is crucial for companies to tailor contracts and strategies to fit the European market.

Endnotes

1 European Union, "Consolidated Version of the Treaty on the Functioning of the European Union," available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF.

2 European Union, "Commission Regulation (EU) 2022/720 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," available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720.

3 European Commission, “Antitrust: Commission adopts new Vertical Block Exemption Regulation and Vertical Guidelines,” available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2844.

4 European Commission, “Guidelines on vertical restraints,” available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0630(01).

5 Dual pricing means that a wholesaler pays a different price for goods sold online versus offline.

6 Dual distribution occurs when a manufacturer sells its products to customers both directly and through wholesalers.

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14 Autorité de la concurrence, “The Autorité de la concurrence fines Rolex €91,600,000 for prohibiting its authorised retailers from selling its watches online”, available at https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/lautorite-de-la-concurrence-sanctionne-rolex-dune-amende-de-91-600-000-euros.

15 Autorité de la concurrence, “Fines handed down to Apple, Tech Data and Ingram Micro,” available at https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/fines-handed-down-apple-tech-data-and-ingram-micro.

16 Comisión Nacional de los Mercados y la Competencia, “La CNMC multa a Apple y Amazon con 194 millones por restringir la competencia en la web de Amazon en España” [The CNMC fines Apple and Amazon 194 million for restricting competition on the Amazon website in Spain], available at https://www.cnmc.es/prensa/sancionador-amazon-apple-20230718.