COUNTDOWN | 1 June 2022

Distribution Law Center Countdown XXIV - Wrap-up (The new VBER regime in a nutshell)

Introduction

Since December 2021, the Distribution Law Center has been publishing a weekly countdown newsletter on the expected changes of the Vertical Block Exemption Regulation (the "VBER") and the Vertical Guidelines (the "VGL"). Now that the new VBER and VGL have been adopted and enter into force on 1 June 2022, it is time for us to wrap up our DLC countdown. This last countdown provides an overview of the main topics that we discussed during the past weeks and indicates for each of these topics how they found their way in the new VBER and VGL. At the same time, we would like to bring a number of additional changes to your attention. Be sure however to read through to the end of this countdown to find out what new series the Distribution Law Center has in store for you.

Period of validity

Before moving on to the different topics, we would like to draw your attention to the period of validity of the new texts. The VBER and VGL will apply for a period of 12 years (i.e., until 31 May 2034). The Commission has chosen a period of validity of 12 years, rather than 10, because in 2034 a new Commission will take office. Please also note that vertical agreements that comply with the previous VBER benefit from a transitional period of 1 year (i.e., until 31 May 2023) to satisfy the conditions of the new VBER.

Agency

Our DLC countdown started with the draft new rules on agency, which showed that a stricter regime would apply to agency agreements. The most important developments were (i) the legal test to measure the significance of the risks undertaken by the agent (see, DLC countdown no. 3), (ii) the temporary transfer of ownership (see, no. 4), and (iii) the combination of agency and distribution for so-called dual role agents (see, no. 5).

The new VGL confirm the stricter regime. Going forward, suppliers appointing agents should be aware of the following:

- The new VGL confirm the case law stating that the exception for agency agreements to fall outside the scope of Article 101(1) TFEU must be interpreted narrowly. For example, where the agent negotiates and/or concludes contracts on behalf of a large number of principals, it is less likely that he will qualify as a "genuine agent".
- The test to qualify as a genuine agent in a dual role scenario of agent and distributor has become rather burdensome and costly. First, burdensome, because the independent distributor must be genuinely free to enter into the agency agreement and it must be possible to effectively delineate the commercial and financial risks related to the agency. Second, costly, because of a quite expansive reading of the commercial and financial risks linked to the sale of the goods or services covered by the agency agreement, including market-specific investments, must be borne by the principal. With respect to market-specific investments, the principal must reimburse all investments that are required to operate in the relevant market. In other words, only investments exclusively related to the distribution of differentiated products outside the scope of the agency agreement are not covered by this obligation.

To end this section on a positive note, the new VGL do confirm that an agreement will not necessarily be excluded from the exception if the agent acquires the ownership of the goods for a very short period of time while selling them on behalf of the principal.

Non-compete obligations

Moving on from agency, the following DLC countdowns focused on non-compete obligations, either imposed during the term of the distribution agreement (see, no. 6) or post-term (see, no. 7). Based on the draft VGL, the expectation was that the regime would remain largely unchanged. This is now confirmed:

- The definition of non-compete obligations continues to cover two types of obligations: single branding and the 80%-rule.
- Non-compete restrictions must in principle still be limited to five years to benefit from the exemption of the new VBER. However, non-compete obligations that are tacitly renewable beyond a period of five years can as well be exempted, provided that the distributor can effectively switch to a competing supplier. This means that the distributor must be given the opportunity to terminate the agreement within a reasonable time and at a reasonable cost.

The new VBER exempts post-term non-compete obligations under the same strict and cumulative conditions that applied previously.

Hardcore restrictions (1): RPM

The DLC countdowns continued with the centrepiece of the VBER, namely the hardcore restrictions. After a general introduction (see, no. 8), we addressed resale price maintenance (see, no. 9), dual pricing (see, no. 10), and equivalence (see, no. 11).

New compared to the previous VBER is Article 4(e): the prevention of the effective use of the internet by the distributor or its customers to sell the contract goods or services is now explicitly blacklisted as an illegal territorial or customer restriction.

Otherwise, the list of hardcore restrictions in Article 4 remains largely the same, even if it is now split between exclusive, selective and open distribution. The attentive reader will however note that the actual split is between selective and non-selective distribution, as the lists of hardcore restrictions for exclusive and open distribution are identical.

As regards resale price maintenance ("RPM"), the following additions are worth mentioning:

- A provider of online intermediation services qualifies as a supplier, so that it is prohibited from imposing fixed or minimum sales prices for the transactions it intermediates.
- Imposing minimum advertised prices ("MAP") is RPM.
- Under a fulfilment contract, where the customer selects the company providing the fulfilment services, the imposition of a resale price by the supplier may restrict the competition for the provision of the fulfilment services and amounts to RPM.
- Price monitoring is not in itself RPM, but increases price transparency and may therefore facilitate it.
- The new VGL provide an additional example of RPM that may lead to efficiencies: a minimum resale price or MAP can be used to prevent a particular distributor from regularly using a product as a loss leader, because this may damage the brand image and lead to a reduction of demand.

As regards online sales, the new regime is more flexible in relation to dual pricing and the previously existing equivalence requirement:

- Dual pricing of products sold online or offline — i.e., charging a different wholesale price for products sold online than for products sold offline — is a hardcore restriction only if it aims to prevent the effective use of the internet by the buyer, not if it is meant to incentivize or reward a difference in investments in online or offline sales channels made by a buyer.

The same goes for the equivalence requirement. A supplier is henceforth entitled to impose online selective criteria that differ from the offline selective criteria, provided that the distinct online criteria do not aim to prevent the authorized distributors from effectively selling the contract product online.

Hardcore restrictions (2): Active sales restrictions

Next, the DLC countdowns addressed the conditions to legally impose active sales restrictions toward exclusive territories or customers: no. 12 dealt with the exclusivity condition, no. 13 with the parallel imposition requirement, and no. 14 with the roll-over prohibition.

Before addressing these conditions, it is worth highlighting that the concepts of active and passive sales are now defined in the VBER, and that the definition of active sales confirms that specific forms of online promotion (use of language and top-level domain names) can lead to active sales, because the promotion is specifically targeting certain territories or customers.

The new VBER finetunes the conditions for imposing active sales restrictions to better protect exclusive distributors and their investments, while at the same time allowing more intra-brand competition through shared exclusivity:

- The definition of exclusivity confirms that the exclusivity condition encompasses the possibility of shared exclusivity, now that a supplier may allocate a territory or customers to a maximum of five distributors.
- The requirement of parallel imposition, which is often a challenge in daily practice, is here to stay: the VBER unequivocally stipulates that the supplier must impose the active sales restriction on all its other buyers.
- The new VBER softens the roll-over prohibition. Under the new regime, suppliers are allowed to impose an active sales restriction not only on their buyers, but also on direct customers of the buyers.

Dual distribution

The DLC countdowns dealing with dual distribution discussed the envisaged extension of the exception to wholesalers and importers (see. no. 15), the introduction of a market share threshold (see, no. 16) and how to deal with information exchanges in a dual distribution set-up (see, no. 17 and no. 18).

The main features of the new regime on dual distribution are as follows:

- Article 2(4)(a) of the new VBER extends the safe harbour for (non-reciprocal) vertical agreements concluded

between competitors, as long as the buyer does not compete with the supplier at the upstream level where the buyer buys the contract goods. The upstream level may be the level where the supplier is active as manufacturer, importer or wholesaler.

- Information exchanges in the context of dual distribution are excluded from the safe harbour only if they (i) are not directly related to the implementation of the vertical agreement, or (ii) are not necessary to improve the production or distribution of the contract products, or (iii) fulfill neither of these two conditions. The new VGL (see, paragraphs 99-100) clarify what type of information exchanges are likely or unlikely to fulfil these conditions, and what precautions parties can take if their information exchange does not benefit from the exemption of the new VBER (firewalls).

Vertical agreements relating to the provision of online intermediation services do not benefit from the safe harbour if the provider of the online intermediation services competes on the relevant market for the sale of the intermediated goods or services. Briefly said, hybrid platforms require an individual exemption. Interestingly, the Commission will not prioritize enforcement action in respect of hybrid platforms if a supplier allows its buyers to use its web shop, but does not allow that web shop to be used to offer competing brands of products and the supplier is not otherwise active on the relevant market for the provision of online intermediation services (see, paragraph 109 of the new VGL). This benefits SMEs that have an online presence mainly or exclusively via the website of their supplier and was a suggestion of the Distribution Law Center in its comments on the draft new section on dual distribution.

Better protection for selective distribution

The DLC countdowns also examined a number of envisaged changes to selective distribution (see, no. 19) and to hybrid distribution systems — i.e., when exclusive and selective distribution systems are combined (see, no. 20).

The Distribution Law Center is pleased to see that the new VBER allows a better protection of authorized distributors when a supplier operates selective distribution in certain territories and exclusive or open distribution in other, for instance because it is gradually rolling out selective distribution in the EU.

In order to protect the authorized distributors against sales to unauthorized distributors in the territory where the supplier operates selective distribution, it may from now onwards restrict active and passive sales by all other distributors and their customers (so not only their direct customers, but all customers) to unauthorized distributors located in that territory. This is a major improvement to enforce the closed nature of a selective distribution system.

E-commerce

As the DLC countdowns on e-commerce were mostly published after the adoption of the new VBER and VGL, they already contain a handy overview of the rules applicable henceforth to restrictions or a ban of sales on online marketplaces (see, no. 22) and bans on price comparison services (see, no. 23).

In summary, suppliers whose products are sold online should bear in mind the following principles:

- The new VGL (see, paragraph 208) provide that restrictions relating to the use of particular online sales channels, such as online marketplaces, may generally benefit from the VBER, provided that they do not constitute a hardcore restriction and prevent the effective use of the internet by the distributors and their customers. This will generally not be the case where the distributors remain free to operate their own online store and may advertise online.
- The Commission is less tolerant when it comes to ban the use of price comparison services as an entire advertising channel. Such ban constitutes a hardcore restriction. By contrast, a ban on the use of particular price comparison services or restrictions on the use of price comparison services based on quality requirements does not amount to an absolute ban and can therefore benefit from the new VBER (again, provided that it does not have as its object the prevention of the effective use of the internet by distributors and their customers).

The above rules apply to vertical agreements that fall within the VBER. When this is not the case (e.g., because the 30% market share threshold is exceeded) it is recommended to carefully consider imposing any of the above restrictions above. The new VGL (see, paragraphs 340-342 and 353-355) can help assessing whether a restriction imposed can benefit from an individual exemption in accordance with Article 101(3) TFEU.

Withdrawal in individual cases

Finally, the power of the Commission or a national competition authority to withdraw the benefit of a block exemption in individual cases — respectively for the EU and the Member State concerned – can be found in the basic regulation for the implementation of Articles 101 and 102 TFEU — i.e., in Article 29 Regulation 1/2003. In the new block exemption regulations (see e.g., the draft horizontal block exemption regulations) the possibility to withdraw the benefit of the block exemption is now incorporated in the block exemption itself. Article 6 of the new VBER foresees the possibility of withdrawal of the block exemption for a highly concentrated market for online intermediation services, where buyers use multiple providers of online intermediation services that apply narrow parity obligations, which would lead to a situation where those buyers are restricted from offering, selling or

reselling products to end users under more favorable conditions on their direct sales channels.

What's next?

This last DLC countdown completes the examination of the differences between the previous and the new VBER regime. The countdown to the new VBER and VGL ends here.

We hope that you enjoyed it as much as we did.

Whilst the countdown ends here, our actual journey for the next 12 years has only just started. Together with you, we look forward to seeing what impact the new rules will have on the daily business of millions of European companies, and what issues or questions will arise going forward.

This impact will be the subject of a new series which the Distribution Law Center will launch in fall 2022. Every month, we will address a concrete question originating from the business and explain the applicable rules in a practical way. Therefore, stay tuned more than ever!

Want to know more? Stay tuned...

Please check out the Distribution Law Center platform (www.distributionlawcenter.com) and our LinkedIn page for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.

A translation of this Countdown newsletter is available in the following languages: Czech, Portuguese, Spanish, Swedish.