VERTICALLY CHALLENGED - INSIGHT INTO THE EU COMMISSION'S EFFORTS TO UPDATE THE EU RULES ON VERTICAL AGREEMENTS

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EU Competition Alert

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The European Commission (Commission) has launched the impact assessment phase concerning its ongoing revision of the Vertical Block Exemption Regulation (VBER) and the accompanying Vertical Guidelines, which set out the rules for distribution systems throughout Europe. This means that we finally have the first formal insight into the Commission's thinking on the various issues that have been raised by numerous stakeholders during the VBER review process. The overarching point to note is that the Commission appears to be considering taking a more commercial and practical focus with respect to a number of key aspects of supplying goods in Europe. The current rules do not appear well adapted to market developments (notably the growth of online sales and new market players, such as online shopping platforms), nor do they provide sufficient clarity or take into account recent case law from the European courts. Areas of focus for the Commission include resale price maintenance, customer-competitor relationships, active cross-border sales restrictions, and online sales restrictions.

Issues identified, and the corresponding potential Commission solutions, include the following:

	What issue is the Commission seeking to address?	**What solution is the Commission considering?**
Resale price maintenance (RPM)	Many stakeholders have lobbied for a relaxation in the rules against stipulating resale prices/RPM. In particular, many feel that the current treatment of RPM policies as hardcore restrictions of competition law ignores possible efficiencies, which result from such practices.	The Commission has said that it is willing to explore engaging in a dialogue with businesses on instances where RPM practices are capable of leading to market efficiencies, such as expanding demand during the introductory stage of a product, which is recognised in the Vertical Guidelines.
Dual distribution	With the recent growth of direct-to-consumer online sales, dual distribution (where a supplier competes directly with its supply chain at the retail level) has become more commonplace. There is a concern that the current rules no longer	Among the solutions considered by the Commission is the limitation of the scope of the current block exemption to dual distribution relationships, which are unlikely to raise horizontal concerns by introducing a market share threshold in

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	adequately take account of the horizontal issues that may exist between a supplier and distributor when they compete for the same customers. Dual distribution is generally covered by the block exemption at present but may inadvertently protect such horizontal issues.	the downstream retail market. On the other hand, the Commission is contemplating whether to extend the exemption of dual distribution to wholesalers and importers (who, strictly-speaking, do not currently benefit).
Active sales restrictions	Restrictions on active sales (i.e., actively approaching individual customers, specific groups of customers, or customers in a specific territory) by resellers are generally prohibited within the European Economic Area, unless they relate to active selling to exclusive territories, exclusive customer groups, or unauthorised resellers in a selective distribution system. Many stakeholders have described the rules as rigid because they prevent businesses from designing distribution systems according to local commercial needs. Respondents have also lobbied for a combination of exclusive and selective distribution in the same or different territories.	One possible option proposed by the Commission is to expand the exceptions for admissible active sales restrictions to provide suppliers with more flexibility to design their distribution systems. Another potential solution is to ensure more effective protection of selective distribution systems by allowing restrictions on sales from non-selective distribution territories to unauthorised resellers within selective distribution territories.
Online sales restrictions	Most online sales restrictions are currently regarded as hardcore restrictions of competition. One of the identified issues is that the current rules do not recognise that there are various indirect measures that may make online selling more difficult but that may be necessary and justified due to objective differences between the channels, e.g., the need to differentiate wholesale	The Commission is contemplating whether to stop regarding dual pricing practices as hardcore restrictions.

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	prices based on the costs specific to each channel (dual pricing).	
Most-favored nation (MFN) clauses	Although parity obligations (where a supplier is required to offer the same/better conditions as those offered to others) are currently block exempted, some stakeholders have identified the anticompetitive effects of such MFN clauses, especially given their increased use in recent years. Concerns have been identified with MFN clauses in competition investigations into the hotel online booking sector and in the case of e-books.[1]	Among the possible solutions, the Commission is considering whether to exclude certain types of sales channels from the exemption of MFN clauses or whether to exclude MFN clauses as a whole from the block exemption and instead require an effects-based assessment.

WHAT'S NEXT?

The Commission's impact assessment is now open for feedback until 20 November 2020. The Commission will also launch an open public consultation toward the end of 2020 to gather feedback on the policy options summarised above and their ability to tackle the identified issues. In 2021, the Commission will publish a draft of the revised VBER and the Vertical Guidelines for stakeholder comments. The aim is to have the new VBER and Vertical Guidelines in place before the current rules expire on 31 May 2022, and they will likely remain the key legal framework for European distribution systems for the next decade.

HOW K&L GATES CAN HELP YOU

This presents a great opportunity for brands to have a system in place that is ready to evolve and benefit from the Commission's findings. We have a deep understanding of the challenges brands are facing and we pride ourselves on designing highly tailored, flexible go-to-market strategies that will allow our clients to benefit from the Commission's forthcoming policy changes. We would also be happy to speak with you to understand the level at which you might want to participate in the Commission's consultation, whether anonymously or not, and can work with your business to promote its interests, with a view to shaping a sensible and workable legal framework.

FOOTNOTES

[1] Please see further information on such investigations, here and here.

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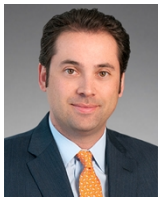

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