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By: Philip Torbøl, Mélanie Bruneau, Giovanni Campi, Francesco Carloni, Miguel A. Caramello Alvarez, Alessandro Di Mario, Antoine De Rohan Chabot, Nicolas Hipp

ANTITRUST AND COMPETITION

The European Commission Consults on New EU Competition Rules for Distribution Agreements

The Vertical Block Exemption Regulation (VBER) and its accompanying Vertical Guidelines (VGL) are designed to provide predictability to companies entering into supply and distribution agreements in Europe. Under the VBER, EU competition rules do not apply to vertical agreements entered into by companies with market shares not exceeding 30%. If the agreement contains so-called hardcore restrictions, i.e., a presumption of severe restriction of competition due to, for instance, illegal resale pricing restrictions or territory or customer allocation, then the VBER no longer applies but companies can still demonstrate that in their particular case the pro-competitive effects outweigh the negative effects.

Whilst the VBER and VGL are useful tools that greatly facilitate the self-assessment of supply and distribution agreements, the market has changed significantly since the adoption of the VBER and VGL in 2010. This is mainly due to the growth of online sales and the emergence of new market players such as online platforms. These developments have led to a number of changes in companies' distribution models and have also prompted the Commission's thinking on how to ensure that the rules remain fit for a world that is increasingly digital and changing at a fast pace.

As part of this consultation, the Commission is currently seeking stakeholders' views on a number of issues with regard to the functioning of the EU rules. 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.

Key areas of focus for the Commission include resale price maintenance (RPM), customer-competitor relationships, active cross-border sales restrictions, and online sales restrictions.

- *RPM:* The VGL recognizes that RPM can lead to efficiencies under certain circumstances (e.g., to achieve an expansion of demand during the launch of a new product). However, companies criticize the lack of clarity and guidance regarding the conditions under which such efficiencies can be claimed. In addition, national competition authorities often adopt a strict approach when it comes to RPM. As a result, companies prefer not to resort to RPM, even though it could be justified by efficiencies. The purpose of the public consultation is to gather stakeholders' experiences/views on cases in which RPM has led to efficiencies or could have led to efficiencies if the parties did not refrain from using RPM.

- *Customer-competitor relationships*: When the VBER was adopted, the retail activities of suppliers engaging in dual distribution (i.e., where a supplier sells its goods or services directly to end customers, thus competing with its distributors at the retail level) were considered negligible and unlikely to give rise to horizontal competition concerns. However, given that the growth of e-commerce has made it easier for suppliers to engage in dual distribution, the Commission is asking for feedback as to whether the scope of the exception should be limited to scenarios where horizontal concerns are unlikely to arise. Furthermore, the Commission is asking whether to extend the exemption to dual distribution by wholesalers and/or importers or whether to simply remove the exemption, thus requiring a case-by-case assessment in all cases of dual distribution.
- *Active cross-border sales restrictions:* The VBER currently permits restrictions of active sales (i.e., responses to unsolicited requests from individual customers) in certain limited cases. In particular, active sales into exclusive territories can be restricted and members of a selective distribution system can be restricted from selling to non-members. The Commission is currently asking for feedback on whether it is necessary to expand the exceptions for active sales restrictions to give suppliers the necessary flexibility to design their distribution systems according to their needs and/or to restrictions on sales from outside the territory in which the selective distribution system is operated to unauthorized distributors inside that territory.
- *Online sales restrictions*: Under the VBER, restrictions of online sales are considered hardcore. However, over the past ten years, online sales have become a well-functioning sales channel, while physical stores are facing increasing pressure (even more during the COVID-19 crisis). Considering this, the Commission is contemplating to no longer treating certain forms of online sales restrictions as hardcore. This concerns, in particular, charging a different wholesale price for products to be sold online and for products to be sold offline (so-called dual pricing) and the imposition of significantly diverging offline and online sales criteria (so-called equivalence principle).

The issues and potential solutions identified by the Commission in its consultation (which is open until 26 March 2021) are critical for companies doing or seeking to do business in Europe. The Commission intends to have the revised VBER and VGL in place before the current rules expire on 31 May 2022. A number of companies and trade associations are therefore taking this opportunity to try to shape the future form of the EU competition rules, which will apply to their supply and distribution arrangements for the next decade.

DIGITAL ECONOMY

European Union's New Cybersecurity Strategy

On 16 December 2020, the European Commission presented a new Cybersecurity Strategy (Strategy), along with proposals to address both cyber and physical resilience of critical entities and networks (proposed NIS 2 Directive and the Critical Entities Resilience Directive). The Strategy aims to enhance Europe's collective resilience against cyber threats and ensure trustworthiness and reliability of services and digital tools.

The Strategy has three pillars:

- *Resilience, technological sovereignty and leadership*

    - This pillar aims to reform the rules on the security of network and information systems in order to increase the level of cyber resilience of critical public and private sectors (such as hospitals, energy grids, railways or data centres). It also proposes to create a network of Security Operations Centres across the EU, providing for a 'cybersecurity shield' for the EU.
- *Building operational capacity to prevent, deter and respond*
    - The Commission envisages the creation of a new Joint Cyber Unit pursuant to this pillar. The unit will strengthen cooperation between EU bodies and Member State authorities responsible for preventing, deterring and responding to cyber-attacks. The EU Cyber Diplomacy Toolbox will also be strengthened to prevent, discourage, deter and respond effectively against malicious cyber activities.
- *Advancing a global and open cyberspace through increased cooperation*
    - This pillar outlines an increase in cyber capacity-building efforts to third countries by developing an EU External Cyber Capacity Building Agenda and a global EU Cyber Diplomacy Network to promote the EU vision of cyberspace. The Strategy also recommends that the EU increases its engagement in international standardisation processes, and enhances its representation in international and European standard development organisations. The Commission committed to implementing the Strategy in the coming months. The European Parliament and the Council first will have to examine and adopt the proposed NIS 2 Directive and the Critical Entities Resilience Directive. Once the proposals are agreed and adopted, EU countries would then have to transpose them within 18 months of their entry into force.

Commission publishes Ranking Transparency Guidelines

In July 2019, *Regulation (EU) 2019/1150 promoting fairness and transparency for business users of online intermediation services* entered into force (P2B Regulation) introducing new transparency obligations for online intermediaries (e.g. online marketplaces) and search engines. Along with the P2B Regulation, the Commission was tasked to publish guidelines on the application of Article 5, which imposes an obligation to set out in terms and conditions the main parameters determining ranking. The Guidelines were finally published on 7 December 2020, pass the application date (12 July 2020) of the P2B Regulation.

Although not legally binding, the Guidelines, will support online intermediaries and search engines in complying with their transparency obligation for how ranking works on their services. Their stated aim is to enable merchants to compete on a level playing field when deciding their sales strategies and make an informed assessment of whether to invest in 'ranking strategies'.

In selecting their ranking parameters, the Guidelines encourage online intermediaries and search engines to have a user-oriented approach and assess the appropriate level of disclosure for each platform individually, depending on its users. The Guidelines provide practical guidance to do so, by giving examples of possible ranking parameters (e.g. consumer's history, page's loading speed, and consumer's reviews) and emphasize the need for a case-by-case assessment.

Concerning “the right level of detail”, the Guidelines warn against excessive detail that would enable users to manipulate the ranking and mislead consumers. The rules are merely designed to provide enough information so that users are given an adequate understanding of how ranking functions. This should be done by taking into consideration the nature, technical ability, and needs of 'average' businesses. Providers are not required to disclose the detailed functioning of their ranking mechanisms, including algorithms.

While these Guidelines are helpful to clarify an important element of the P2B Regulation, new rules on the relationship between businesses and platform providers are already under development -- specifically, the Digital Markets Act, which will take the transparency obligations of the P2B Regulation one-step beyond by introducing a list of “dos and don'ts” for so-called 'gatekeepers'. In the meantime, these Guidelines bring yet another layer to the regulatory framework for online platforms.

ECONOMIC AND FINANCIAL AFFAIRS

Global Standard Setters Respond to the IFRS Consultation on Developing a New Global Approach to Sustainability Reporting

In September 2020, the Trustees of the IFRS Foundation published a Consultation Paper seeking stakeholders' input, among other topics, on:

1. The establishment of a new Sustainability Standards Board. The new board could operate alongside the International Accounting Standards Board under the same three-tier governance structure, build on existing developments and collaborate with other bodies and initiatives in sustainability, focusing initially on climate-related matters.
2. The development of a set of comparable and consistent standards, which will allow businesses to build public trust through greater transparency of their sustainability initiatives.
3. Developing an assurance framework for sustainability information that is similar to that for financial reporting.

Against this backdrop, in December 2020, the Financial Stability Board (FSB) and the International Organization of Securities Commissions (IOSCO) published their responses to the Consultation Paper.

As part of its response, the FSB strongly encouraged the IFRS Foundation to build on the work of the FSB Task Force on Climate-related Financial Disclosures (TCFD), by using the TCFD recommendations as the basis for standards for climate-related financial disclosures. To this end, it also encourages national or regional authorities that are developing requirements or guidance for climate-related disclosures to consider using the TCFD recommendations as the basis. The FSB stated that “Such consistency in approach would help to avoid the risk of market fragmentation, both across jurisdictions, and between requirements and guidance being developed today and international standards that may be introduced in the future”.

In a similar vein, IOSCO supported the establishment of a Sustainability Standards Board under the IFRS Foundation subject to the Trustees' consideration of how the “requirements for success” set out in the consultation paper are met. In this regard, IOSCO noted that the success of IFRS is based on certain key governance characteristics including: (i) public accountability and the independence of its respective standard setting bodies; (ii) rigorous, transparent and participatory due process; (iii) a clear mission statement and a defined targeted audience; (iv) assurance standards applying to the information published; and (v) a robust process for selecting topics for new standard setting that focus on specific accounting issues where enhanced comparability would be meaningful.

Furthermore, IOSCO noted the importance of securing the right expertise for developing sustainability reporting standards, acknowledging that it is distinct from traditional financial reporting expertise.

ESMA Publishes Cloud Outsourcing Guidelines

On 18 December 2020, the European Securities and Markets Authority (ESMA) published the final report on guidelines on outsourcing to cloud service providers. The purpose of the guidelines is to help firms identify, address and monitor risks that may arise from their cloud outsourcing arrangements and to support a convergent approach to the supervision of cloud outsourcing arrangements across EU countries. The report incorporates feedback received during the consultation process for these draft guidelines as well as the relevant outsourcing guidelines from the European Banking Authority and the European Insurance and Occupational Pensions Authority. While working on these guidelines, ESMA also has been mindful of the proposal for an EU Digital Operational Resilience regulation and the IOSCO consultation on new proposed principles on outsourcing. More concretely, the guidelines focus on:

4. Risk assessment and due diligence that firms should undertake on the cloud service providers.
5. Governance, organizational, and control frameworks that firms should put in place to monitor the performance of cloud service providers.
6. How to exit the cloud outsourcing arrangements without undue disruption to business.
7. Contractual elements that a cloud outsourcing agreement should include.
8. The information required to be included in notifications to competent authorities.
9. Guidance to competent authorities on the supervision of cloud outsourcing arrangements, with a view to fostering a convergent approach in the EU.

The guidelines are not prescriptive on the exact form that the cloud outsourcing strategy needs to take, meaning that they may form part of broader IT or outsourcing strategies. The same is also the case for the governance and oversight framework of cloud outsourcing arrangements. As for next steps, the guidelines apply from 31 July 2021, to all cloud outsourcing arrangements entered into, renewed or amended on or after this date. Firms should review and amend accordingly existing cloud outsourcing arrangements with a view to ensuring that they take into account these guidelines, by 31 December 2022.

TRADE

The EU and China Comprehensive Agreement on Investment

On 30 December 2020, the European Union (EU) and China concluded the negotiations for a Comprehensive Agreement on Investment (CAI). The CAI seeks to improve economic relationships between the EU and China. It includes obligations on i) market access, ii) level playing field, and iii) sustainable development but does not include trade issues.

Market Access

Openness to foreign investment is a key principle for the EU, and a major source of growth for the EU economy. The EU has traditionally been more open than China to foreign investments, whereas EU investors have faced continuous impediments in accessing the Chinese market. To rebalance the current asymmetry, China has made relevant commitments on eliminating quantitative restrictions, equity caps or joint venture requirements in a number of sectors. In particular, China has made comprehensive commitments in the manufacturing sector, which represents more than half of the EU investment in the country.

Level Playing Field

The CAI will include obligations that aim at improving the level playing field for EU investors, thus contributing to fairer competition on the Chinese market. It will introduce rules on transparency on subsidies, prohibit forced technology transfers, and require Chinese state-owned enterprises to act according to commercial considerations and not discriminate against EU companies.

Sustainable Development

The EU and China also agreed to promote investments that protect the environment and labour rights, including fighting against climate change and forced labour. China has taken commitments not to lower standards of protection and to respect its international obligations. Furthermore, China has committed to implement effectively the Paris Agreement on climate change, and to work towards the ratification of the International Labour Organisation's fundamental Conventions.

Next steps

Concerns were raised with regard to several aspects of the agreement. In particular, on human rights and environmental standards, as well as on the EU's ability to address and enforce those issues under the agreement. The EU was also criticized for rushing to conclude the agreement instead of waiting for the new US presidential administration to jointly pressure China to commit to higher standards. The European Commission published the text of the agreement on January 22. The text may still undergo further modifications as a result of the legal and technical review process, and, once finalized, it will be submitted to the EU Council and the European Parliament for approval.

KEY CONTACTS

PHILIP TORBØL
PARTNER

BRUSSELS
+32.(0)2.336.1903
PHILIP.TORBOL@KLGATES.COM

MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.(0)2.336.1940
MELANIE.BRUNEAU@KLGATES.COM

GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.(0)2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.(0)2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

MIGUEL A. CARAMELLO ALVAREZ
COUNSEL

BRUSSELS
+32.(0)2.336.1946
MIGUEL.CARAMELLOALVAREZ@KLGATES.COM

ALESSANDRO DI MARIO
SENIOR ASSOCIATE

BRUSSELS, MILAN
+32.(0)2.336.1938
ALESSANDRO.DIMARIO@KLGATES.COM

ANTOINE DE ROHAN CHABOT
SENIOR ASSOCIATE

BRUSSELS
+32.(0)2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

NICOLAS HIPP
ASSOCIATE

BRUSSELS
+32.(0)2.336.1921
NICOLAS.HIPP@KLGATES.COM