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The Ageing VBER – The Deceiving Simplicity Of A Schema

By Dr. Nils Gildhoff

The ageing VBER – the deceiving simplicity of a schema

The EU Block Exemption Regulation 330/2010 on Vertical Agreements ("VBER") is still valid until 31 May 2022. However, when applying the VBER to vertical agreements in practice, experience shows that the VBER, in (seemingly) more and more cases, proves to be too schematic and therefore probably too old to cope with the challenges nowadays to be faced under EU and national Competition Law.

It shall not be forgotten that the current VBER is already based on the experiences made with its predecessor, the EC Block Exemption Regulation 2790/1999 on Vertical agreements. The luring promise of the VBER remains unchanged: Every vertical agreement falling within its scope (including the satisfaction of the relevant market share thresholds for the parties to the vertical agreement) not containing the hardcore restrictions defined in Art. 4 VBER and the restrictions contained in Art. 5 VBER (*i.e.* essentially excessive non-compete obligations) shall be exempted from the cartel prohibition of Art. 101 para. 1 TFEU in its entirety.

The conditions for such an exemption from Art. 101 para. 1 TFEU as laid down in the VBER are very schematic. It goes without saying that some of those conditions are – depending on the vertical agreement in question – difficult to assess in practice (*e.g.* the question of whether provisions concerning intellectual property rights contain restrictions of competition having the same object as hardcore restriction laid down in Art. 4 VBER). Nonetheless, once this schematic test of the VBER has been satisfied, the parties of the vertical agreement reach the safe harbour of a complete exemption from the cartel prohibition. This might, however, not be true in all cases. This paper will briefly cover two examples where the VBER proves to be too schematic, which – of course – entails significant risks for the parties concerned.

LOOKING BEYOND THE WORDING OF THE VBER

A current example of the VBER proving to be too schematic is the use of clauses prohibiting the buyer from selling the contract goods or services via eBay, Amazon or comparable third party platforms. When applying Art. 4 (b) (i) VBER (or Art. 4 (c) VBER in case of a selective distribution system) to such restrictions, the intuitive conclusion should be: A per se prohibition for the buyer to sell the products via third party platforms (*i.e.* in the internet) is a restriction of passive sales, which is always prohibited under the VBER. However, when studying para. 54, sentence 6 of the Guidelines on Vertical Restraints ("Vertical Guidelines") in more detail, it seems that a supplier may prohibit the buyer from using third party platforms – even per se – for reasons of quality. This view would then be the final result of the application of the VBER (and the Vertical Guidelines) to such restrictions, exempting them from the cartel prohibition.

However, the German Federal Cartel Office ("FCO") currently interprets the VBER and the Vertical Guidelines differently, stating that its schematic application would be wrong in case of a per se prohibition of the use of third party platforms. The main reason for the FCO's more restrictive view in this regard is that it aims at protecting buyers who want to use the well-known third party platforms to reach more customers for the sale of the contract products. Arguably, this aim pursued by the FCO goes back to the fundamental idea of Art. 4 (b) VBER, protecting the buyer's right to sell the contract products wherever (territory) and to whomever (customer) he likes. However, when taking the Vertical Guidelines, para. 54 into account, the FCO's view seems to clearly fall outside of the scope of the VBER.

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The European Commission's ongoing sector inquiry in the eCommerce sector might shed more light on this question and the need for a different application of the VBER with regard to such per se prohibitions regarding the use of third party platforms.

A second example of the VBER proving to be too schematic is its relation to horizontal aspects of vertical agreements. Art. 2 para. 4 VBER starts with the simple decision that the VBER does not apply to (vertical) agreements entered between competing undertakings and then continues by defining two exceptions from this rule. For example, the VBER still applies to situations of dual distribution, *i.e.* non-reciprocal vertical agreements, where the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing manufacturer. Provided such a vertical agreement satisfies all conditions laid down in the VBER, the simple consequence must be that the exemption from Art. 101 para. 1 TFEU applies to the vertical agreement in question as a whole. The Vertical Guidelines support this view by stating that "any potential impact on the *competitive relationship* between the manufacturer and retailer at the retail level is of lesser importance than the potential impact of the *vertical* supply agreement on competition in general at the manufacturing or retail level" (see Vertical Guidelines, para. 28 – emphasis added). This cannot be correct, as the horizontal dimension of such vertical agreements would then be ignored. Vertical agreements might, for example, include an information-exchange mechanism amounting to an infringement of Art. 101 para. 1 TFEU. Therefore, if the vertical agreement that is to be assessed contains a (more or less) hidden horizontal cartel, the safe harbour of the VBER has to be left for a more profound analysis of such restrictions of competition. The more recent Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements might then be of more help, even though the Vertical Guidelines do only refer to the former in case of vertical agreements concluded between competitors clearly falling outside of the VBER's scope (see Vertical Guidelines, para. 27).

Further examples could be provided in this connection, *e.g.* the protection of the buyer from active and passive sales by the supplier in a potential dual distribution scenario, which seems to be covered by the VBER, even though this could arguably amount to a horizontal market partitioning by territory or customer group under Art. 101 para. 1 TFEU.

Conclusion

The straight-forward concept of the VBER of exempting all vertical agreements from the cartel prohibition generally has to be recognised as a big achievement, providing a significant amount of legal certainty in the day-to-day assessment of vertical agreements. However, even if all conditions laid down in the VBER are satisfied and the concrete vertical agreement in question does not contain any hardcore restrictions, it might still be necessary to assess the agreement from a more general competition law perspective. Such an additional assessment is not limited to the examples cited above (*i.e.* a per se prohibition of sales via third party platforms, information-exchange mechanisms or protection from active and passive sales by the supplier in dual distribution scenarios). Looking into the future, it would certainly further strengthen the reliability of the VBER's safe harbour promise, if such cases of uncertainty are explicitly covered (or covered in more detail) in the successor regime entering into force after the expiry of the current VBER on 31 May 2022.

Dr. Nils Gildhoff has more than 10 years of experience in the fields of German and EU competition/antitrust law. He advises undertakings and private individuals in the above mentioned fields on a regular basis. His work includes the competition law aspects of M&A transactions (notably merger control law and compliance), cartel proceedings, distribution agreements, cooperation of competitors and competition law compliance. He has experience in several industry sectors, notably consumer products, oil, pharmaceuticals, engineering and construction. Nils Gildhoff is qualified as an Attorney-at-Law. From 2005 until 2011 he was a member of the competition law team of Allen & Overy. In 2011 he joined Corinius (since 2012 as a salary partner). In 2014 he joined Möhrle Happ Luther as a partner. He is fluent in English, French and German.