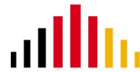

BUNDESRECHTSANWALTSKAMMER

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Statement on the revision of the European Block Exemption Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices ("VBER") and the Commission's Guidelines on Vertical Restraints 2010/C 130/01 ("VGL") in the course of the Commission's review process

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The German Federal Bar (Bundesrechtsanwaltskammer, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 166,000 lawyers, vis-à-vis authorities, courts and organisations at national, European and international level.

Opinion

A. Review Process

In the Commission's initial public consultation regarding the review of the VBER the BRAK provided comprehensive responses to the online Questionnaire in May 2019. The BRAK is pleased to see that many concerns and issues raised by it in this consultation have now been addressed in first published Drafts of the revised VBER dated 9 July 2021 and of its accompanying revised VGL of the same date.

The present statement will comment on both Drafts, thereby focusing on a number of aspects relevant for the BRAK's members in rendering legal advice to organisations and companies of all kinds of industrie1s and sectors.

B. Comments

The following comments are made by topic and not according to the chronological order of the articles of the Draft VBER (in the following referred to as "**Art.**") or paragraphs of the Draft VGL (in the following referred to as "**Para.**").

I. General Comment

The BRAK has concerns that <u>certain changes proposed by the Commission jeopardize the VBER's function as a straightforward, easy-to-apply group exemption</u>, i.e. safe harbour from the prohibition of Art. 101(1) TFEU. This concern stems from the introduction of (i) certain undefined terms in the Drafts (e.g. the notion of *"proportion"* in the context of shared exclusivity in Art. 1(1)(g)), as well as (ii) a new "limiting principle" regarding internet restrictions (namely the test whether a restriction *"has as its object (…) from effectively using the internet (…)"*, e.g. Art. 1(1)

(n), as well as Para. 192, 194, 195 etc.) both of which determine whether the respective restrictive agreement qualifies as hard-core restriction (and not exempted) or profit from the benefit of the VBER. A more detailed discussion will follow below.

These changes (i) neither provide additional legal certainty for businesses and their advisors (ii) nor do they reduce the businesses' compliance costs. The former has always been understood to be the overarching goal of a block exemption regulation from the cartel prohibition like the VBER. The latter has been explicitly declared by the Commission as an objective of the current review of the rules applying to vertical restraints.

II. Dual Distribution

The BRAK appreciates that the issue of potential horizontal aspects in the dual distribution scenario has now been addressed in Art. 2(4)-(7). It is also understood that the Commission has an obligation to eliminate "false positives" under the VBER. Nevertheless, the BRAK subjects the following changes in order to ensure a more measured and appropriate approach to tackling potential horizontal aspects of competing undertakings within the meaning of Art. 2(4) (a) and (b) in the dual distribution context.

1. Agreements between parties on different levels of the distribution chain

In line with the Commission's supposed intention, the wording of Art. 2(4) (a) should be adjusted in that not only agreements with the therein defined group of suppliers and a distributor but also among the listed suppliers are covered, as long as the respective suppliers operate on a different level of the production/distribution chain and the buyer in this scenario does not compete with its respective supplier on the latter's level.

2. The additional 10% market share threshold

If an additional market share threshold is indeed intended to be introduced in Art. 2(4) and Art. 2(5), this threshold should be set by the Commission at 20% and not 10%.

Initially the Commission considered 20% itself during the Impact Assessment. The threshold of 20% is also applied in other block exemption regulations relating to agreements between competitors, namely the Technology Transfer BER and the Specialization BER. There is no imperative reason to set the threshold at 10%. The Commission's argument that a 10% threshold is equally applicable for agreements between competitors in the Commission's De Minimis Notice does not support this decision given that pursuant to the Commission's enforcement policy as per the De Minimis Notice such agreements do not even risk to appreciably restrict competition and thus fall outside the scope of Art. 101(1) TFEU, whereas in the context of a block exemption a potentially restrictive agreement (likely restrictive within the meaning of Art. 101(1) TFEU) is then exempted without the need for an individual exemption pursuant to Art. 101(3) TFEU. As with all market share thresholds (within this lower range) the exact level is ultimately a policy decision and obviously not based on any empirical evidence from which market share level onwards the restrictive agreement would have an appreciable impact on competition in the relevant market.

3. Scope of non-exemption of information exchange

If a further market share is indeed intended to be introduced in Art. 2(5) – as per the BRAK's proposal in excess of 20% –, the Commission's proposal to exclude *"any"* exchange of

information between the parties from the benefit of the block exemption appears to go beyond what is necessary to comply with its legal obligation to eliminate false positives under the VBER and should therefore be narrowed down by the Commission. In practice, a successful and effective (vertical) relation between the supplier and its distributors will almost invariably require the sharing of information about sales, products, marketing campaigns, market trends and consumer preferences on a continuous basis. Therefore, the BRAK proposes that only the exchange of information between the parties *“that is not necessary for the implementation of the vertical agreement”* should not be exempted under the VBER. Undisputed examples should be sales data of the buyer that the manufacturer-supplier requires for production and capacity utilization purposes, or comparable data that the dealer-supplier requires for stocking and logistic purposes. In this context, the Commission should also provide examples in its announced guidelines on information exchange in the distribution context (see below).

4. Guidance on information exchange

Contrary to the Commission’s proposal, the BRAK takes the view that the announced guidance on information exchange in the distribution context should not be included in the existing chapter on information exchange between competitors in the currently revised Horizontal Guidelines as suggested in Art. 2(5) and Para. 83. In the BRAK’s view there is otherwise a considerable risk that the guidance on the information exchange focuses on horizontal aspects of the relation of the parties whereas their relation is in fact of a fundamental vertical nature, which equally applies to the related information exchange. In the vast majority of such cases of information exchange (and within said share threshold), the potential effects on competition should be outweighed be the positive effects on improving the distribution of the products in question.

Therefore, it would be more appropriate in the BRAK’s view if practical and business-oriented guidance on information exchange in the distribution context were included in the VGL. More specifically, and further to the BRAK’s preceding proposal, the Commission should provide concrete examples for the different categories of information exchange, namely such information exchange (i) that is always exempted by the VBER because it is “necessary” for the implementation of the vertical agreement (see above), (ii) that is never exempted by the VBER because it has as its object to restrict competition between the supplier and the distributor (see Art. 2 (6); see also comment in 5. below), and lastly the type of information exchange (iii) that does not fall into the category of always group exempted “necessary information exchange” (see above) and may effect competition (but falls short of a restriction by object). In the latter case, the Commission should provide guidance under which circumstances such information exchange in the distribution context could fulfil the requirements for an exemption under Article 101(3) TFEU.

5. Restrictions by object

With the Commission’s planned introduction of Art. 2(6) suppliers with dual distribution systems are required to assess whether any system-inherent exchange of information with their distributors qualifies as a by-object-restriction. Unless practical guidance with a conclusive list of case scenarios is provided by the Commission, such assessment of dual distribution systems would jeopardize the VBER’s goal to provide a straightforward, easy-to-apply safe harbour from the cartel prohibition for distribution agreements with market shares below 30% and at the same time run counter to the Commission’s objective of the vertical review to reduce compliance costs for businesses (see comment in I. above).

Taking into account the Commission's existing guidance on information exchange (Horizontal Guidelines, para. 72-74), pursuant to which the exchange of information between competitors (outside the vertical relation) that could amount to a by-object-restriction is limited to the exchange of information concerning future prices or future quantities, the information exchange in a dual distribution system should only qualify as a by-object-restriction if the distributor must disclose its resale prices to the supplier before their implementation or before sending a corresponding price information to its customers.

6. Online intermediation service providers with hybrid function

Under the Draft VBER, the block exemption shall not apply to online intermediation services ("OIS") providers that have a hybrid function (cf. Art. 2 (7)). From the Commission's explanations (Para. 91 et seq.) it is not entirely clear, and should therefore be clarified in the VGL, whether this also means that any restrictions in supply agreements between OIS providers (in their function as suppliers of products) and end users (undertakings) cannot be exempted under the VBER. In the BRAK's view, to refuse the benefit of the VBER to such vertical agreements that are not concluded with a supplier competing with the OIS provider on the retail level would not be supported by the Commission's rationale of the dual distribution exception (Art. 2 (4)), namely to exclude a block exemption because of horizontal concerns. This equally applies to restrictions in supply agreements between OIS providers (suppliers of products) and end users that relate to the extent to which and the conditions under which OIS can be provided by the OIS provider to third parties; such restrictions merely correspond to a non-compete obligation imposed on the supplier (cf. Art. 1 (1) (d)) and should be group exempted. Again, in this scenario, horizontal concerns regarding the relation between the supplying OIS provider and the buying end user do not arise. In sum, and contrary to the Commission's current proposal, the BRAK takes the view that it is only justified to exclude the benefit of the VBER for restrictions in service provision agreements or product supply agreement entered into between suppliers of products and OIS provider that compete with these suppliers on the retail level.

For the reasons outlined in 4. above, the Commission's guidance on the assessment of vertical agreements with hybrid OIS providers, including its horizontal aspects, should be included in the VGL – as opposed to the Horizontal Guidelines (Para. 92) – due to their fundamentally vertical nature.

III. Exclusive Distribution and Active Sales Restrictions

1. Shared exclusivity and concept of proportion

The BRAK welcomes the concept of shared exclusivity which provides more flexibility for businesses in structuring their distribution systems within the scope of the VBER (Art. 1(1) g, Art. 4(b)-(d)). However, the BRAK takes the view that the newly introduced proportion test must be specified in the VGL in order to ensure legal certainty for businesses (see comment in I. above). This is particularly important as the lack of "proportion" would result in the concerned territorial and customer-related resale restrictions qualifying as hard-core restriction (Art. 4(b)-(d)) and, consequently, the loss of the VBER for all other restrictions in the respective vertical agreement.

By contrast, it does not provide for sufficient legal certainty that the Commission has set out in the Draft VGL the purpose underlying its concept of shared exclusivity (namely to appoint such a number of distributors in/for a given territory/customer group *"to secure a certain volume of business that preserves their investment efforts"*, cf. Para. 102, 107) and suggests that

businesses self-assess in view of said purpose whether the number of appointed distributors is within or out of “proportion”. Rather, to ensure a practically manageable application of the VBER rules in view of the fine dividing line between an exemption and a hard-core restriction in these scenarios, the BRAK suggests alternative measurement parameters to determine the “proportion” between the number of appointed distributors and the size of the territory or customer group (e.g. by turnover, square meters/kilometers, number of inhabitants, etc.).

2. Combination of exclusive and selective distribution in multi-level distribution systems

The BRAK understands that contrary to the option considered by the Commission during the Impact Assessment it has now decided against allowing a combination between exclusive and selective distribution in multi-level distribution systems within the same territory, namely exclusivity on the importer/distributor level and selective distribution on the retailer level (Para. 222 et seq.). The BRAK considers this a missed opportunity as such combination would have addressed business realities without any discernible harm to competition. It is not clear to the BRAK which theory of harm has now caused the Commission to opt against the exclusion of such combination in multi-level distribution systems from a group exemption. The BRAK therefore <u>submits that the Commission should reconsider its approval</u>.

Also, in contrast to the current VGL, the Draft VGL does not provide guidance for an individual assessment of such combined multi-level distribution systems under Art. 101(3) TFEU. Providing such guidance outside the scope of the VBER would increase legal certainty for operators of selective distributions systems. As the majority of pan-European wide systems consist of at least two distribution levels, this topic is of high relevance for the business community.

IV. Specific Online Sales Restrictions

The BRAK appreciates that the Commission has fully implemented in its Drafts the analytic approach taken by the Court of Justice in *Coty* as regards the group exemption of certain methods of selling and advertising online – as opposed to an outright or a *de facto* online sales prohibition in the Court of Justice’s *Pierre Fabre* case –, more specifically of online marketplace bans (see also comments in 3.-5. below). This will ensure a convergent application of the VBER across the EU Member States (cf. Para. 188).

1. Restrictions having the objective to prevent an effective internet usage

However, in view of the nature of the VBER as group exemption, i.e. safe harbour, as well as the Commission’s explicit objective of the ongoing vertical review to reduce compliance costs for businesses (see comment in I. above), it is unfortunate that the Commission has now included a “limiting principle” regarding online sales/advertising restrictions which more or less amounts to an effects test in determining whether such restrictions falling short of an outright internet sales ban are hardcore restrictions or exempted under the VBER instead. This new “limiting principle” is introduced in Recital 13 and Art. 1(n) and referenced throughout the Draft VGL (e.g. Para. 188, 192, 194, 195, 221). It reduces legal certainty in the context of the VBER to a considerable extent. In the BRAK’s view it would be preferable as an alternative to exempt all online sales restrictions within the VBER market shares threshold of 30%, with the exception of direct internet sales bans as well as *de facto* online sales restrictions qualifying as hard-core restrictions in line with the Court of Justice’s case law.

Even if the Commission has listed in Para 192 a number of factual examples for direct or indirect online restrictions having as their objective to prevent the effective use of the internet, it remains the businesses' risk to self-assess as to whether a certain, not listed internet sales restriction is either exempted or a hardcore restriction under this principle.

Further, it is unclear which abstract criteria the Commission would apply to conduct such assessment. Recital 13 merely provides one example, namely whether the restriction *"is capable of significantly diminishing the overall amount of online sales in the market."* Beyond this example, the BRAK submits that a set of abstract assessment criteria should be specified by the Commission in the VGL. Only this will ensure that for the duration of the VBER business are able to make the necessary assessment of future internet restriction that will develop in the course of the further development of online sales and advertising methods over time and that are currently not predictable in this constantly developing area. In the digital and e-commerce context, the importance of determining abstract assessment criteria – as opposed to merely providing fact specific, status-quo examples – should be self-explanatory in view of the enforcement experience made by the Commission and the national competition authorities since the entering into force of the current VBER in 2010.

To be able to conduct a self-assessment the Commission should also specify in the VGL how the notion *"having as their objective (to prevent the effective use of the internet)"* is to be interpreted. The rules applicable for determining restrictions on competition "by object" pursuant to Art. 101(1) TFEU do not appear to be relevant for this additional requirement given that for restrictions to be hard-core within the meaning of Art. 4 they must qualify as by-object-restrictions anyway.

2. Equivalence Test

The same considerations as described in 1. above should apply in the context of the planned abolishment of the equivalence test as regards qualitative selection criteria for online and offline sales channels in selective distributions systems (Para. 221). Here again, the Commission suggests to apply said "limiting principle", i.e. setting (different) selection criteria for online sales channels are not exempted by the VBER if they have as their objective to prevent an effective internet usage.

Further, it is the BRAK's understanding from Para. 221 which is explicitly limited to selective distribution systems (and does not make reference to any comparable systems as in the current VGL) that in all other distribution systems that do not qualify as selective distribution within the meaning of Art. 1(1) (f), the equivalence test is abolished without any limitations. A corresponding clarification by the Commission in the VGL would be helpful.

3. Price comparison tools and online search engines

The BRAK also respectfully opposes the Commission's view that complete restrictions on the use of specific online advertising channels, such as price comparison tools and online search engines, should generally be viewed as having the objective to prevent the effective use of the internet (Para. 192(f)). Like the use of online marketplace (platform) restrictions (cf. *Coty* decision) they could equally be exempted by the VBER, provided that the distributor remains free to us other forms of online advertising and/or online sales channels. Given that the Commission does not consider the restriction of the use of one specific price comparison tool or one specific search engine as hard-core, the same considerations can be applied if the distributor is prohibited from the use of all price comparison tools but remains free to advertise

online via search engines (or vice versa), or alternatively remains free to sell on third party online platforms. In the former scenario, the distributor continues to be able to raise awareness of its online activities via the use of an alternative advertising tool, in the latter scenario, he is still free to sell on online marketplaces and therefore able to attract potential customers via this sales channel. In the context of online marketplace sales bans (Para. 317 sentence 2), the Commission acknowledges itself that restrictions on certain “modalities” of online sales do not constitute a hardcore restriction and are thus exempted by VBER if the distributor remains free to reach potential customers via the internet by other means.

As online selling goes beyond mere online advertising, there is no justification to assess restrictions on online advertising differently or stricter (Para. 197(f)) than restrictions on online sales (Para. 194(a)). Both types of restrictions are mere modalities of online marketing (cf. *Coty* decision) and do not constitute a direct or *de facto* online sales restriction (cf. *Pierre Fabre* decision), provided that the distributor has alternative, equally effective ways of marketing the products online.

4. Active and passive sales restrictions

As regards the differentiation between active and passive sales restrictions (Art. 1(1) (m), (n), Para. 197 et seqq.) which is decisive for whether online or offline sales restrictions are exempted by the VBER or non-exempted hardcore restrictions (Art. 4 (b)-(d)), the BRAK takes the view that, contrary to the Commission’s position in Para. 198 sentences 4 and 5, the use of search engine optimisation techniques on a website in order to improve the ranking of that website on search engines, does not necessary qualify as passive selling. As opposed to the Commission’s suggestion, this measure is not comparable with cases where the customer itself opts to be kept automatically informed by the distributor (Para. 198 sentence 3). Rather, similar to targeted advertising via price comparison tools or search engines which the Commission qualifies as active sales (Art. 1(l), Para. 327), the use of search engine optimisation techniques can be a form of targeting advertising (i.e. active sales), if the improved ranking of that website is targeted to customers in a specific territory or customer group. This should be clarified by the Commission in the VGL correspondingly.

5. Online Marketplaces

The Draft VGL (Para. 192(a), 313-317) now fully reflects the *Coty* decision in that sales bans on online marketplaces in any type of distribution agreement regarding any products are exempted under the VBER, i.e. within the 30% market share thresholds.

In the VGL section focusing on the individual assessment of online marketplace sales restrictions under Article 101(3) TFEU (Para. 318 et seqq.), the Commission rightly states that in cases where the supplier of a selective distribution system (i) includes the operator of an online marketplace as an authorised distributor (this fact scenario involving Amazon Marketplace was assessed by the German Federal Cartel Office in the *Sennheiser* case, B 7-1/13-35), (ii) restricts the use of online marketplaces by some authorised distributors but not others, or (iii) restricts the use of an online marketplace, but uses that marketplace itself to distribute the contract products, an individual exemption under Art. 101(3) TFEU, lacking the requirements of appropriateness and necessity, is unlikely (Para. 319 sentence 4, 322 sentence 2).

However, the Commission does not provide guidance on how these three fact scenarios which in the distribution of branded consumer goods are highly relevant in practice, would be assessed

within the scope of the VBER, i.e. within the 30% market share thresholds, be it in the context of selective distribution or regular distribution systems. Unless they would run counter of the obligations imposed on the seller and its authorized distributors in selective distribution systems with the meaning of Art. 1(1) (f), these fact scenarios now appear to be exempted by the VBER according to the BRAK's understanding. Clarifying guidance by the Commission in the VGL would be helpful to increase legal certainty.

V. Parity Obligations (MFNs)

With the new provision in Art. 5(1) (d) it is clear that the so-called wide MFNs imposed by OIS providers in relation to the conditions under which products are offered to end users (therefore also referred to as across-platform retail parity obligations in the Draft VGL) are not exempted under the VBER, whereas (i) narrow MFNs in the OIS context as well as (ii) all other MFN that are unrelated to OIS are exempted (Para. 336). The BRAK considers this provision in the VBER an important step toward a convergent assessment of (wide and narrow) MFNs in the OIS context by the national competition authorities throughout the EU.

Nevertheless, the explanations in the VGL (Para 333 et seq.) are not entirely clear and partially ambiguous and should therefore be revisited and adjusted by the Commission:

First, it is partially not clear whether the individual assessment (outside the VBER) of (i) non-exempted across-platform retail parity obligations within the meaning of Art. 5(1) (d) (Para. 337-345), and (ii) other types of parity obligations which are generally exempted under the VBER within the 30% market share thresholds (Par. 346-350) relates to their assessment of restricting competition pursuant to Art. 101(1) TFEU or a potential exemption under Art. 101(3) TFEU. This lack of clarity is increased by the separate section on the assessment under Art. 101(3) TFEU (Para. 351-353) which appears to apply to all types of parity clauses. The BRAK suggests that with respect to all types of parity obligations a clear distinction is made between (i) their analysis under Art. 101(1) on the one hand, and (ii) the potential fulfillment of the exemption requirements of Art. 101(3) TFEU on the other hand.

Second, the specific wording in Para. 345 sentence 3 is misleading as it appears to suggest that retail parity obligations (wide MFNs) which are not exempted pursuant to Art. 5(1) (d) are indeed exempted when they are in compliance with the RPM rules. This wording should be modified by the Commission to exclude potential misunderstandings.

VI. Resale Price Maintenance (RPM)

1. Dual Pricing

The BRAK appreciates that dual pricing strategies for online and offline sales will at least under certain circumstances no longer be considered as hardcore restrictions and thus benefit from the block exemption (Para. 195). However, the Commission's reference to the "limiting principle" regarding internet restrictions discussed before (see comments in I. and IV.1. above), namely that the supplier's wholesale price difference for online and offline sales qualifies as hardcore restriction where it *"has as its object to prevent the effective use of the internet"* (Para. 195 sentence 4), neither provides the sought-for legal certainty for businesses nor reduces their compliance costs.

Further, by suggesting that the wholesale price difference requires an objective costs-based justification (Para. 195) to be exempted under the VBER, the Commission takes a stricter

approach in determining whether dual pricing prevents a distributor from effectively selling over the internet than it applies to online marketplaces and online advertising restrictions. In the latter cases, this determination appears to depend on the extent of the effect of the type of restriction (e.g. price comparison tools and search engines) and not on whether it is objectively justified (based on costs). The BRAK submits that this differentiated treatment without discernible reason should be reconsidered by the Commission.

In light of the past divergent approaches to dual pricing strategies by the national competition authorities in the EU, it is also questionable if the assessment criteria proposed by the Commission in the Draft VGL will be sufficient to ensure a uniform application of EU competition law in this area across all Member States.

2. Fulfillment agreements and similar three party scenarios

The BRAK submits that the Commission's reasoning in Para. 178 against RPM in the case of "fulfillment contracts" likewise applies to other three party scenarios involving two supply/purchasing agreements in which the pricing between two of these parties is no longer subject to competition. The Commission's guidance in Para. 178 should therefore be extended to such parallel scenarios.

This applies, for example, to cases where the purchase price of the buyer, e.g. a processor, is set in a prior agreement between the supplier, e.g. an input material supplier, and the end user, i.e. the buyer's customer, and that is then executed upstream between buyer and supplier. If such prior agreement sets not only the price of the supplier's products vis-à-vis the buyer but also the identity of the specific buyer (processor), this does not constitute to RPM since the purchasing price of the supplier's products (e.g. input materials) is no longer subject to competition in relation to the buyer concerned. This scenario is particularly common in industries where large end user purchase products from smaller processors which require large amounts of a certain input material and therefore of high practical importance.

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