



Vertical Restraints and Block Exemptions

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Block Exemption Regulations

- ❖ Commission Regulation 1217/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of **research and development agreements (R&D BER)**.
- ❖ Commission Regulation 1218/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of **specialisation agreements**.
- ❖ Commission Regulation 267/2010/EU of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the **insurance sector**.
- ❖ Commission Regulation 330/2010/EU of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of **vertical agreements** and concerted practices (**VBER**).
- ❖ Commission Regulation 461/2010/EU of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the **motor vehicle sector**.
- ❖ Commission Regulation 772/2004/EU of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of **technology transfer agreements (TTBER)**.

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Why a Block Exemption Regulation?

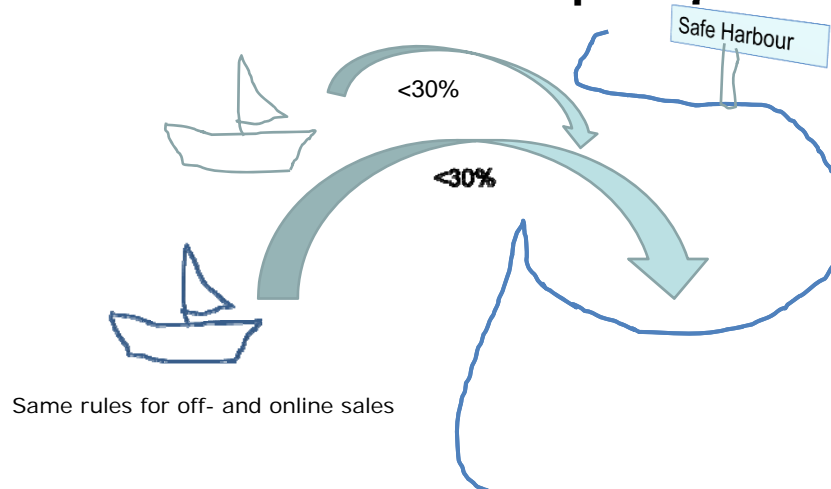
- ❖ Block-exemption regulations are used by the European Commission to exclude from the scope of application of Article 101(1) TFEU a class of similar agreements whose pro-competitive benefits outweigh their anti-competitive effects.
- ❖ These Regulations identify clearly-defined categories of agreements which automatically benefit from the exemption provision of Article 101(3) TFEU.
- ❖ BERs relieve contracting parties and competition authorities from the need to analyse on a case-by-case basis whether those agreements can benefit from the 101(3) TFEU exemption.
- ❖ BERs thus contribute to **legal certainty** and to the **coherent application** of competition rules across the EU, and **administrative efficiency**

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Vertical BER – General principles



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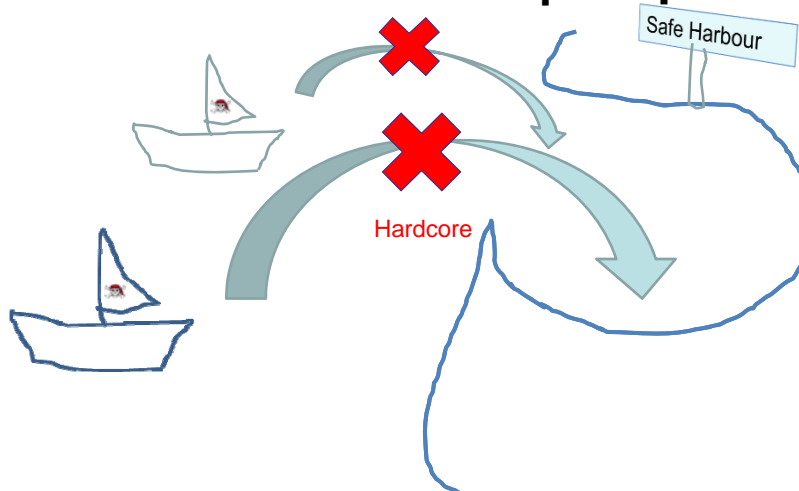
How does the VBER work?

❖ **Double market share cap** (*Article 3*) → the block exemption applies provided that:

- Market share held by the supplier ≤ **30%**
- Market share held by the buyer ≤ **30%**

However → **above** the market share of **30%**, there is no presumption that vertical agreements fail to meet the conditions set out in article 101(3) TFEU → agreements require **individual analysis** (see Recital 9)

Vertical BER – General principles





❖ **Hard core restrictions** (*Article 4*) → vertical agreements containing the following restrictions are **presumed to restrict competition** and **excluded altogether** from the benefit of the VBER, irrespective of the market share of the undertakings concerned:

- Resale price maintenance (*Article 4.a*)
- Territorial and customer restrictions (*Article 4.b*) → Exception: restrictions on active sales to protect exclusive distribution are permissible. However, **the use of a website to sell products amounts to passive selling and cannot be restricted.**
- Restrictions of active or passive sales to end users by members of a selective distribution system (*Article 4.c*) → however, the distributor may be prohibited from operating out of an 'unauthorised place of establishment'.
- Restrictions on cross-supplies within a selective distribution system (*Article 4.d*)
- Restrictions on the supplier's ability to supply components to third parties (*Article 4.e*)



❖ **Excluded restrictions** (*Article 5*) → clauses containing the following restrictions are normally excluded from the application of the VBER:

- Non-compete obligations above 5 years
- Post-term non-compete obligations
- Prohibitions of selling competing goods in a selective distribution system

However, the VBER applies to the remaining parts of the agreement if they are 'severable' from the non-exempted obligation



❖ **Withdrawal and disapplication of the VBER** →

- **Withdrawal by the Commission** (Article 29(1) of Regulation 1/2003) → the Commission can withdraw the benefit of the block exemption in an **individual case** where an agreement has effects that are incompatible with Article 101(3) TFEU;
- **Withdrawal by a Member State** (Article 29(2) of Regulation 1/2003) → competition authorities of Member States have the power to withdraw the benefit of the block exemption where agreements have effects incompatible with Article 101(3) 'in the territory of a Member state' or in part of it;
- **Disapplication by Commission Regulation** (Article 6 VBER) → the Commission may, by regulation, declare that the block exemption does not apply to agreements in a given market when:
 - **Parallel networks** of similar vertical restraints exist
 - Such networks cover **more than 50%** of the relevant **market**



Internet sales restrictions

- ❖ **Not all contractual provisions** that (negatively) affect internet sales are hardcore restrictions (Art. 4 VBER: "object of market partitioning")
- ❖ **Absolute internet sales bans** (Pierre Fabre)
 - Hardcore restriction under Article 4 b) and 4 c) VBER
- ❖ **Marketplace bans**
 - **No de facto prohibition** of internet sales (Pierre Fabre)
 - No effective restriction of the use of the internet as a sales channel irrespective of markets concerned – **own online shops remain most important online channel**
 - **Relevance of marketplaces differs** per Member State and product
 - VBER withdrawal possible if problematic

Relevance of Marketplaces



B. 54: Proportion of retailers using different sales channels for selling online

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C-439/09 Pierre Fabre

FACTS

- ❖ The company Pierre Fabre manufactures and markets cosmetics and personal care products.
- ❖ Selective distribution contract for certain brands stipulating that **sales** must be made **exclusively in a physical space**, in which a qualified pharmacist must be present → **de facto ban on Internet sales**.

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ASSESSMENT BY THE CJEU

- ❖ Selective distribution systems are not prohibited by Article 101(1) TFEU, to the extent that:
 - Resellers are chosen on the basis of objective criteria of a qualitative nature;
 - Such criteria are applied in a non-discriminatory fashion;
 - The characteristics of the product necessitate such a network in order to preserve its quality;
 - The criteria do not go beyond what is necessary
- ❖ A contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a **restriction by object** within the meaning of Article 101(1) TFEU.

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APPLICABILITY OF THE VBER

- ❖ Article 4(c) VBER must be interpreted as meaning that the block exemption does not apply to a selective distribution contract which contains a clause prohibiting *de facto* the internet as a method of marketing the contractual products.
- ❖ The place from which Internet sales services are provided cannot be considered as 'place of establishment' within the meaning of Article 4(c) of the Block Exemption → the internet cannot be understood as a 'virtual' place of business, but rather as a *method* of selling and marketing goods → **the VBER does not apply**.
- ❖ However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

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C-230/16 Coty

- ❖ The dispute involves perfume maker Coty and Akzente, which is one of its authorised distributors.
- ❖ In 2012, Coty introduced new terms and conditions for its selective distribution system → distributors are prohibited from selling Coty products on online platforms.
- ❖ Coty claims that Akzente breached its contractual obligations by selling perfume products through 'Amazon.de'.
- ❖ The Higher Regional Court of Frankfurt referred a preliminary ruling to the CJEU to know whether a prohibition on the members of a selective distribution system to sell via online marketplaces amounts to a restriction of competition by object within the meaning of Article 101 TFEU.

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AG Wahl in Coty (C-230/16)

- ❖ Selective distribution systems may be considered, generally, to have neutral, or indeed beneficial, effects (inter-brand competition, market penetration)
- ❖ *Pierre Fabre* (C-439/09) must not be interpreted as overturning the previous case-law on luxury image
- ❖ Unlike the absolute ban, a prohibition on the use of third-party platforms does not — at least at this stage of the development of e-commerce, which may undergo changes in the shorter or longer term — have *sufficient degree of harm* to competition to render an examination of effects unnecessary
- ❖ The prohibition on the authorised distributors making use of third-party platforms in a discernible manner does not on the face of it have as its object to partition the market by limiting the territory into which, or the customers to whom, the authorised distributor(s) are permitted to sell.

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Relevance of Marketplaces



B. 54: Proportion of retailers using different sales channels for selling online

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Enforcement

- ❖ Increased **focus on vertical online restrictions in the Single Market**
- ❖ **Resale price maintenance cases (RPM)**
 - Separate cases opened in February 2017 against 4 manufacturers of consumer electronics (Philips, Pioneer, Asus, Denon & Marantz)
- ❖ **Territorial/online sales restrictions cases**
 - Holiday pricing: agreements between hotels and tour operators to differentiate based on nationality or country of residence (February 2012)
 - Guess investigation: passive sales, cross supply restrictions in a selective distribution system concerning clothing, shoes and accessories
 - Pay-TV cases
 - PC video games cases

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