

Position Paper

on the draft Commission regulation on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices and on the draft Commission notice on guidelines on vertical restraints

Wettbewerb,
Öffentliche Aufträge
und Verbraucher

Registration number of the Bundesverband der Deutschen Industrie e.V. in the European Commission's register: 1771817758-48

Dokumenten Nr.
D 0296

Date
28 September 2009

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A) Introduction

On 28 July 2009 the European Commission published a draft new block exemption regulation for categories of vertical agreements and concerted practices (VBER) as well as a draft new notice on guidelines on vertical restraints (GVR). The Federation of German Industries (BDI) thanks the European Commission for the opportunity to take a position on the proposals.

The current VBER no. 2790/1999 ushered in an important structural change in the European Commission's competition policy. It is highly significant because its cross-sectoral approach means that it concerns broad swathes of purchasing and sales by companies. As BDI already pointed out when the VBER and GVR were introduced, German industry is in favour of rules which offer companies practical guidance on how to assess their plans and contracts in the light of competition law.

The approach currently followed by the European Commission and the concept of the existing VBER have proved their worth. Accordingly, BDI is pleased that the European Commission leaves this concept in principle unchanged. However, some of the proposed modifications and adjustments prompt criticism. Furthermore, the European Commission should revisit a few of the points which remain unchanged in its reform proposals to assess their effects on competition.

More economic approach

In the draft GVR, the European Commission takes a markedly more open and basic stance based even more strongly on an effects-based approach to restraints in vertical agreements. This is most clearly seen in paragraph 47 GVR which expressly states that the efficiency defence can now also be pleaded for hardcore restrictions in an individual case. BDI looks positively on this *more economic approach* taken by the European Commission in the assessment of vertical restraints. Only practices which are objectively proven to restrict competition should be forbidden under antitrust law. A strong effects-based approach leads to greater fairness in individual cases, especially when they are complex.

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However, in practice – in particular in less complex cases considered on a day-to-day basis – the more economic approach sometimes also raises significant problems. Objective proof of competition restrictions as well as any potentially justified efficiency advantages can only be demonstrated through economic analyses, evaluations and calculations. In this regard, difficulties can arise in particular with the quantification and balancing of competition disadvantages and efficiencies. Whereas it may well be possible to collect the data needed for this analysis and if necessary to call on the services of economic consultancies in individual prominent cases which may be subjected to an administrative or court procedure, this is not as a rule an option in the day-to-day decisions of an operational business. Therefore, for a practical solution, there must be ground rules which are relatively simple to manage and unbureaucratic (including *safe harbours*) and which lead to robust results and hence to legal certainty for the companies concerned.

The VBER – which is particularly important for day-to-day practice – must offer such a safe harbour with the widest possible reach. Against this background, it is regrettable that the European Commission intends to withdraw the safe harbour advantage completely from a range of vertical agreements which have hitherto been regarded as harmless through the introduction of a second market share threshold. This means unnecessary additional bureaucracy for the companies concerned and substantially reduces the value of the VBER as a tool for legally safe self-assessments (*see also under B. 3.*).

Strong focus on the distribution sector and retail trade

It is our perception the draft VBER and GVR address principally pure distribution or acquisition for the purpose of direct onward distribution of the goods covered by the contract – usually in unchanged form without further value creation – to the end consumer. This can be seen in particular in the explanations in the GVR on online sales but also in the proposal for a second market share threshold which, the European Commission says in its press release, is particularly targeted on retailers with market power. A priority of the European Commission's reform is therefore consumer protection. The extent to which consumer protection really corresponds to the protective intent of antitrust law could be debated at this point. However, in our view, the European Commission's considerations regarding the distribution sector cannot be fully transposed to manufacturing industry's procurement and distribution operations for goods and services which are then processed, used, incorporated or integrated in other goods or services or become components of total systems or solutions as part of the subsequent value creation process. In the case of such value creation or processing subsequent to manufacturing industry's procurement and distribution operations, the end consumer is only very indirectly affected – if at all – by vertical restraints in these distribution or procurement relationships. This is particularly the case for businesses in Germany, a large proportion of which are small or medium-sized and involved in processing operations. Against this background, we believe that a clearer differentiation and less critical assessment of individual restraints in such distribution and procurement relationships would be appropriate.

B) Draft new VBER

1. Definitions, article 1 VBER

In the German translation of the new VBER, the terminology has changed from “Lieferant” to “Anbieter” and from “Käufer” to “Abnehmer”. Insofar as no change of meaning is intended – which does not seem to be the case – we recommend that the old terminology is used, for reasons of legal certainty.

We would also like to see a further clarification in article 1 a) VBER. The definition “competing undertakings” should refer not only to the product market but also to the territorial market. This would correspond to the common definition of “competing undertaking”.

In the definition of the “non-compete obligation”, it is problematic to refer to purchases by the buyer in the preceding year, since needs in the current calendar year can differ considerably from needs in the preceding year. This circumstance has taken on a particular meaning given the current economic crisis. It therefore seems sensible to make a link with the needs for the current calendar year and to take the date on which the contract was concluded as the reference date. However, any associated forecasting uncertainty should not be interpreted to the detriment of the contracting partners; a range of tolerance should be included.

2. Exemption, article 2 VBER

BDI is against deletion of the EUR 100 million threshold for exemption of vertical agreements between competing undertakings in article 2 paragraph 4 VBER. This disproportionately narrows the scope of the directive for small and medium-sized companies. The reason for this limitation of block exemptions is not obvious.

3. Market share threshold, article 3 VBER

a) Concept of market share thresholds

As BDI pointed out when the 1999 VBER was introduced, the concept of market share thresholds is encumbered by great uncertainties in practical application. Companies find it very difficult to calculate market shares, and can seldom do so with legal certainty. All too often, there are disputes about the correct market demarcation. The Commission’s 1997 notice on the definition of relevant market is too abstract and is of little help to companies. Even a robust determination of total market volume is frequently problematic. The reason for this could be non-existent or outdated statistics, but also different assessments of the product and territorial market demarcation. Furthermore, the weakness of market share thresholds can also be seen on innovation markets, where a new provider

can have high market shares because of the nature of the market and in some cases only offers his product to individual buyers. In such cases, he could not benefit from the advantages of the VBER. Ultimately, the risks of an incorrect market share determination lie with the companies concerned.

Since vertical competition restraints can have a stimulating effect in particular on *inter-brand* competition (see also paragraph 102 et seq. GVR), BDI once more argues for vertical competition restraints to be in principle subject to the abuse principle in article 82 EC and not the prohibition principle in article 81 EC. Accordingly, only a company's dominant market position should serve as the limit for an exemption. However, if the European Commission were to retain the principle of market share thresholds, the threshold should at least be increased. A market share threshold of 40% would be more manageable in practical terms and more appropriate from the angle of competition policy. In addition, it would be helpful if the European Commission could provide companies with more specific guidance for determination of market share thresholds.

b) Introduction of a second market share threshold

In order to take account of the increased market power of distributors, the European Commission proposes the introduction of a second market share threshold. Accordingly, an agreement would only be exempted under the VBER if not only the market share of the supplier but also that of the buyer does not exceed 30%.

This constitutes the most significant change to the VBER and, in BDI's view, at the same time the one most deserving of criticism. The provision represents a clear tightening for buyers which have larger market shares than 30% on downstream markets. Hitherto, the advantage of the block exemption could only be withdrawn if the seller had "considerable market power" on the downstream market according to article 6 VBER.

The provision on the double market share threshold reduces the value of the VBER as an aid to self-assessment and runs counter to the need for the greatest possible legal certainty. Through the introduction of a second market share threshold, the exemptions from antitrust rules are restricted, which will make the new VBER unattractive in the long term. It is often impossible in practice for suppliers to determine the market shares of their buyers on downstream markets – and already problematic under antitrust law in cases of dual distribution. This is particularly the case where the contract products are further processed or reused. Inasmuch, a joint determination of the market shares by suppliers and buyers is often not possible without problems. This is especially true in negotiating situations and if competition restraints only benefit one party. The introduction of a second market share threshold adds considerably to bureaucracy, since substantially more consideration will have to be given not only to new contracts but also to existing ones. It can be deduced from the public debate around the amendment proposals that the European Commission wants to react to a supposed increase in the market power of large retail businesses, e.g. supermarkets,

with the introduction of the double market share threshold. However, the problematic aspect of the approach chosen by the European Commission is that it completely fails to take account of market power, since the provision is aligned only on the market share on the corresponding downstream market – instead of on the buyer’s market share on the purchase market (paragraph 83 GVR). A competition relevance for the downstream market can however regularly only be endorsed if the products in question are pure trade goods and are not further processed or reused. In the case of *commodities*, indirect goods/consumables and pre-products/intermediate products, the market share on the buyer’s downstream market regularly has no consequences on the market for the products in question.

Examples:

- *A manufacturer of machine tools with a strong market position acquires simple rivets, bolts, screws and nuts.*
- *A manufacturer of machine tools with a strong market position acquires indirect goods such as office materials and plane journeys.*

Against this background, a second market share threshold should not be included in the VBER as a condition for application of the block exemption. Given the objective of the amendment proposals, it seems that separate, sector-specific rules for supermarket and retail chains would be more suitable than rules which unnecessarily remove the legal certainty of the group exemption from wide swathes of industry and incriminate existing and future agreements that are irreproachable from the angle of competition.

Alternatively, it should at least be clarified in the guidelines that a buyer’s downstream market does not constitute a “market affected by the agreement” within the meaning of article 3 VBER. Furthermore, in view of the “affected market”, only the product market under consideration between the contracting parties should be taken as the reference for determination of the market share threshold. Market shares on other product markets should not be included in the calculation if the scope for application of the VBER is not to be unnecessarily narrowed. A clarification on this point is missing.

4. Hardcore restrictions, article 4 VBER

BDI is in favour of the clarification in paragraph 47 GVR according to which the European Commission only presumes that in case of hardcore restrictions article 81 paragraph 1 EC is applicable and the conditions of article 81 paragraph 3 EC do not obtain, and according to which this presumption can be refuted with a substantiated defence of efficiency. As a result, the affected companies have clearly greater leeway for action in individual cases than they do under the current version of the guidelines.

Nevertheless, it would have been desirable for some of the hardcore restrictions addressed in the current VBER to have been verified for their workability and adjusted accordingly. Moreover, the European Commission should clarify that companies can in any event apply for individual exemp-

tions for those parts of agreements with hardcore restrictions which do not themselves comprise a hardcore restriction.

a) Price-setting, article 4 a) VBER

The ban in article 4 a) VBER on setting fixed or minimum selling prices is set out in more concrete terms in the guidelines (paragraphs 48 and 219 et seq.). Departing from the current practice, the guidelines also explain the conditions under which price-setting can enable efficiency gains in exceptional cases and as such are compatible with article 81 paragraph 3 EC. BDI is in favour of the European Commission moving closer to the US approach (*Leegin*) and setting out specific examples of efficiency defences for price-setting. As the European Commission establishes (paragraph 221 GVR), such price-setting can be helpful in individual cases for marketing new products or intensifying sales promotion measures.

b) Territorial restrictions – “white spot” problem, article 4 b) VBER

According to the wording of the VBER, territorial restrictions are exempted only insofar as they serve to protect the (exclusive) distribution of the manufacturer or an exclusive dealer. A growing EEA and the fact that exclusive and non-exclusive forms of distribution are often chosen alongside each other mean that most territorial restrictions are disallowed.

This is particularly the case for internationally active manufacturers with products distributed globally or EEA-wide. The requirements that the European Commission places on permissible exclusive distribution are far removed from the practical situation. They make it difficult to build up an exclusive dealership. It should be possible, for instance, to determine an exclusive distribution partner for Spain and to work with different, non-exclusive distribution partners elsewhere in Europe.

Under the provisions of the current VBER, a distribution system inevitably becomes a straitjacket. In order to avoid a hardcore restriction a clause has to be formulated in the following way:

“Distribution territory is country X; no active distribution outside that distribution territory with the following exceptions:

- *Country group A (distribution by the supplier and non-exclusive dealers)*
- *Country group B (distribution by non-exclusive dealers)”*.

Every small change in the distribution system, e.g. any distribution by a manufacturer to or via further non-exclusive dealers (possibly also as part of their own distribution) in an individual Member State requires a contract modification with all dealers.

For companies which are active globally or EEA-wide with a large, varied product range and which distribute their products themselves but also use exclusive and non-exclusive dealers, it is almost impossible to build up a distribution network which is always in conformity with the VBER. In prac-

tice, the standard situation is a mixture of different forms of distribution, e.g. direct distribution by the manufacturer alongside indirect distribution via wholesalers and retailers as well as businesses which process or incorporate the contract products. In our view, buyer interests and the common market are sufficiently protected by an absolute ban on passive distribution restrictions. Too much emphasis on intra-brand competition can lead to it no longer being possible for a distribution partner to focus its marketing and sales efforts on a particular distribution territory to an adequate extent. However, for a manufacturer in competition with other manufacturers, it is of the greatest importance that its distribution partners can in the first instance concentrate on their distribution territory in order to distribute the manufacturer's products optimally. Restrictions on active distribution can support this focus and hence also stimulate competition between different brands in the distribution territory. However, by contrast, giving priority to intra-brand competition wrongly pushes competition between different brands in the distribution territory into the background. In this case, the rules fall short if the admissibility of exclusive distribution under competition law is assessed solely on the need to find a solution to the free-rider problem.

c) Buyer restrictions – “on-processing” problem, article 4 b) VBER

The ban on buyer restrictions set out in article 4 b) VBER is often interpreted to mean that it simultaneously comprises a ban on obliging the buyer to further process or reuse the contract goods and not to distribute them on their own without further value creation.

In practice, this leads to the result that certain strategic products cannot be sold to system suppliers at all, to the detriment of the buyer.

Example:

A supplier has produced a new generation of a high-performance drive with substantial R&D expenditure. The supplier has so far distributed this product itself, but would make it available to a manufacturer of special conveyor belts for system distribution (drive plus conveyor belt) if it were possible for the supplier to forbid stand-alone distribution. Absent this condition, the supplier would decline the opportunity with the result that no competition is generated at system level and that further dissemination and the development of new products is restricted.

In particular in areas where there is generally no dealer level (e.g. OEM markets), a manufacturer should be able to require its buyer to incorporate the contract goods in its own products and not to sell them on as they are. In addition, there is a contradiction regarding acceptable reprocessing bans (the buyer may not integrate the products in its own products), since the VBER regards these as pure limitations on use. Here, too, a clarification is desirable in the guidelines that it is compatible with the VBER to ban certain uses by the buyer.

Furthermore, article 4 b) second indent VBER stipulates that restrictions on sales to end users by wholesalers are permissible. However, the conse-

quences of such restrictions do not differ materially from restrictions on pure on-processing by on-processing buyers. This restriction can even promote innovation, because the customer receives a special product for on-processing of its own product, to which it would have no access under other circumstances. A clarification that such constellations are permissible would be desirable.

d) Customer restrictions – concept of “customer group”, article 4 b) VBER

The possibility of restricting sales to customer groups which the supplier has reserved for itself or assigned exclusively to another buyer needs to be specified in greater detail. For instance, as already recognised in the literature, it should be clarified that customer groups must not be defined in an abstract fashion but that the parties must also be able to agree concrete customer lists with specific customer names.

e) Selective distribution, article 4 b) VBER

According to the new article 4 b) third indent VBER the restriction of sales by the members of a selective distribution system to unauthorised distributors is only admissible on markets where such a selective distribution system is operated. Does this mean, conversely, that selling-on by selective distributors to unauthorised traders on markets without such a selective system in place cannot be restricted anymore ?

In this case, we urge the Commission to maintain the current version of article 4 b) third indent VBER. An interdiction to restrict selling-on to unauthorised distributors on other markets would be inconsistent with the whole purpose of the selective distribution system, which enables the supplier to keep a certain control over the distribution of its products and services. The definition of selective distribution systems in article 1 (I) c) VBER, according to which a selective distribution system exists, if (among other conditions) the “distributors undertake not to sell such goods or services to unauthorised distributors” would also run counter to such a modification.

f) Online selling, article 4 b) VBER in conjunction with the draft guidelines

In principle, the European Commission does not characterise Internet selling as a form of active selling. The draft guidelines regard a visit to a dealer’s website and the following contact leading to a product sale as passive distribution (paragraph 52 GVR). This approach can be accepted in general. However, it still leaves many open questions which need to be clarified so that companies can reliably organise their own practices in accordance with European antitrust law. Similarly, BDI cannot accept some points of the European Commission’s view that particular cases constitute cases of hardcore restrictions of passive selling.

First of all, the concept of “Internet” needs to be defined more clearly. Most importantly, the European Commission should distinguish clearly between different manifestations of Internet applications, e.g. the use of e-mails and how websites are structured, and outline categories which should be regarded as forms of passive or active selling. First indications to this end are contained in the current guidelines but are missing from the draft now on the table.

According to the guidelines, it appears to be possible, also outside selective distribution, for manufacturers to require their dealers which would also like to sell online to run a physical outlet. On this point, a clarification is desirable as to what quality requirements the supplier can impose on transactions or advertising and sales promotion measures without being obliged to choose a selective form of distribution. Also desirable is a clarification on what quality requirements the supplier can impose on use of the Internet for on-selling of its goods. Here, too, companies still need clearer guidance. To give just one example: what requirements are acceptable or would be unacceptable in relation to distribution via Internet auction platforms? This question needs to be clarified not least because product manufacturers and consumers alike have a great interest in curbing the sale of counterfeit goods (product piracy). Quality requirements should be such as to rule out the possibilities for abuse from the outset.

In the newly formulated hardcore restrictions of passive selling (paragraph 52 GVR), it is striking that the European Commission confuses rule and exception: it presents online selling as a standard form of distribution and wrongly concludes from this observation that every discriminatory and general preference given to offline distribution constitutes a restriction of online selling. Yet insofar as there is no dominant market position, the manufacturer is free to choose its distribution partners and setting its selling prices for the different distribution channels. A differentiation between distribution partners which operate online and those which operate offline is an expression of the manufacturer’s commercial freedom of action and does not in itself constitute a restriction of online selling.

The European Commission’s essentially legitimate thinking on protection of online selling goes too far on this point and ultimately leads to detrimental results for market and consumer. Distribution via Internet undeniably requires much lower distribution costs than offline selling. A bricks-and-mortar dealer has to maintain warehouses, pay employees, deploy different and sometimes more expensive promotion measures, etc., and is therefore not able to offer the prices that are possible for an Internet dealer. Nevertheless, even in today’s environment, it is generally important and necessary for a manufacturer to have at least a few offline distribution points which have traditionally been the backbone of every distribution system (product appearance, customer guidance, etc.). However, the possibilities that the European Commission makes available to a supplier in order to protect a competitive offline distribution system in paragraph 52 GVR are insufficient. The consequence is that a short-term advantage for the consumer (lower prices) can lead to considerable disadvantages for the market in the medium to long term:

- A manufacturer is unable to maintain a competitive offline distribution channel and is limited to an online distribution channel (reduction of intra-brand competition; an end to better prices for the final consumer who has consciously chosen an online purchase without seeing the product or receiving guidance);
- Insolvencies in the offline distribution sector, disappearance of high-street shops.

In order to prevent these medium- and long-term competition disadvantages, it must continue to be acceptable to treat online and offline distribution differently, for instance by offering different discounts on purchases. This is particularly important because not every promotion or advantage given to offline distribution constitutes or is intended to be a restriction of online selling. From the vantage point of the manufacturer, offline and online selling perform different functions, which in and of itself justifies different treatment. Footnote 30 to paragraph 52 GVR which only offers the possibility of a fixed fee fails to do justice to these requirements. Higher requirements on the justification of different treatment may be called for at most if a dominant market position exists.

Also problematic is the ban on quantitative restrictions, since manufacturers otherwise have no possibilities to set incentives for offline distribution, and to rule out a lack of efforts by offline dealers and circumvention possibilities. In order to encourage efforts by offline dealers, turnover requirements may be necessary.

BDI supports the fact that the European Commission declares an exclusion of active and passive selling to be permissible in certain exceptional cases (paragraph 56 GVR). This takes account of considerable investments by a distribution partner on the introduction of a new product. Nevertheless, recognition of the need for an exclusion of passive selling should also be extended to the benefit of the manufacturer/supplier, which should also be able to protect its own investments against distribution measures by its distribution partners. In addition, it is possible to conceive further cases where an on-selling ban is sensible. This is the case, for instance, for a delivery for personal requirements (e.g. in the form of utilisation rights for technical infrastructures) if an on-sale to a third party would lead to a need for additional capacities or resources on the part of the supplier. In such cases, too, a restriction to cover internal needs should be possible and a supplier should be able to prohibit an on-sale.

5. Excluded restrictions, article 5 VBER

a) Evergreen clause

The VBER only exempts non-compete obligations from antitrust rules if their agreed duration does not exceed five years (article 5 a) VBER). By contrast, a non-compete obligation which is renewed automatically for a given period if not terminated by the buyer (known as an *evergreen* clause) expressly does not meet the requirements of the VBER.

This approach is detached from practice, in particular if the following options are compared:

- (i) **Covered by VBER:** *the duration of the contract (with non-compete obligation) is five years. The buyer has the option of extending the duration by a further five years via a unilateral declaration.*
- (ii) **Not covered by VBER:** *the duration of the contract (with non-compete obligation) is one year. The contract is extended automatically by one more year unless the buyer terminates it.*

An evergreen clause with a simple termination option (*termination without cause*) is regarded in practice as equivalent to expiry of the contract with extension option. The requirement to exercise a simple termination right does not constitute a particular obstacle in day-to-day business which requires special consideration under antitrust law. Accordingly, article 5 a) VBER should no longer insist on an absolute duration limited to five years for a non-compete obligation insofar as the agreement comprises a simple termination provision.

b) High investments by the supplier / long-term contracts

Moreover, there is also a justified need in many areas of economic life to conclude agreements with long durations if this is associated with efficiency gains or as an underpinning for long-term investments. The exemption in accordance with article 5 a) VBER for a five-year period is granted because longer non-compete obligations are not necessary to achieve pro-competitive effects for a large section of typical goods.

The European Commission should include a flexibility clause for cases involving high investments. In these cases, a duration of ten years should be allowed. Investments are in principle only sensible if they can be amortised in line with economic criteria. As a rule, high investments cannot be recouped in a short period and therefore often have to be flanked by non-compete obligations which last longer than five years.

For these reasons, a ten-year exemption should also be possible if the contract goods or services are sold by the buyer on the basis of substantial use of technical facilities such as storage tanks, saleroom fittings or promotion and sales aids which are owned or largely financed by the supplier.

Also for other sectors it would be desirable to have a clarification in the guidelines that longer non-compete obligations in certain cases should not fall under article 81 paragraph 1 EC

Examples:

- *The customer issues a tender call for the construction of a production facility (e.g. foundry, chemical plant, power station, etc.) including a service contract for a duration of ten years. The manufacturer makes a bid accordingly.*

- *The banks financing a solar energy park require as a guarantee for providing finance a guarantee of uninterrupted operation for the duration of the financing (15 years). This presupposes that the customer as operator of the park has cost certainty for all necessary maintenance work, repairs, spare parts, etc., or can provide an uptime guarantee from a service provider. The manufacturer/service provider makes the customer a corresponding offer for a service contract with uptime guarantee.*

or are eligible for an exemption in accordance with article 81 paragraph 3 EC

Example:

- *A service provider can offer the service for a product at a much better price as a ten-year package (planning certainty, lower costs for personnel and spare parts, risk-spreading, etc.) than on an annual basis or in the form of sporadic maintenance and repair as needed. The customer therefore takes the decision to tie itself to this service provider for ten years.*

Where long-term contracts are in play, it would be of great interest not only for the manufacturer or service provider but also for the customer to have greater certainty regarding the effectiveness of these clauses, for instance in the form of examples in the guidelines. An exhaustive list of criteria is not necessary.

With regard to high investments, it should also be clarified that non-compete obligations do not in any event raise objections if the investments represent irrecoverable and brand-specific costs, if the investments are long-term and cannot be recouped in the short term or if the investments are asymmetrical, i.e. if one party invests a larger amount than the other contracting party.

Whereas the European Commission indicates in paragraph 142 GVR that a non-compete obligation lasting longer than five years can be justified in exceptional cases where the supplier makes very large investments specific to the contract, this on its own is insufficient to ensure legal certainty for the cases outlined above. The limitation to customer-specific investments (see paragraph 103 (4) GVR) is also too narrow in certain cases. In practice, outsourcing transactions in particular are not customer-specific, since the personnel and capital assets transferred can often also be used for other customers. Yet the transfer of personnel and capital assets lead to a capacity extension which has to be refinanced through longer contract durations and exclusive purchasing agreements or minimum purchasing quantities. Against this background, the guidelines should take account of the fact that investments which can be proven to be occasioned by conclusion of a contract – as in the case of outsourcing – can also justify multi-year non-compete obligations/minimum purchasing quantities.

c) Need for clarification: premises or land

In addition, it should be clarified in article 5 a) VBER that a time limitation has no consequences if the contract goods or services are sold by the buyer on premises **or** land owned by the supplier or rented or leased by the supplier from a third party. This also reflected the rules in the exclusive purchasing agreements regulation 1984/83 (EEC). The current limitation to premises **and** land excludes a large number of contracts from the outset, e.g. petrol station lease contracts.

d) Post-contract non-compete obligations

Furthermore, it should also be possible in exchange for appropriate compensation to agree post-contract non-compete obligations for dealers for a duration of **two** years if they relate to goods or services which compete with the contract goods or services, and they are limited to the premises **or** land from which the buyer has operated during the contract period, and if they are indispensable to protect know-how transferred from the supplier to the buyer (article 5 b) VBER). The increase of the one-year period to two years corresponds to customary post-contract non-compete obligations for commercial agents and co-proprietors, at least in Germany.

6. Withdrawal and non-application, articles 6 and 7 VBER

Companies suffer great legal uncertainty as a result of the possibility provided for in article 6 VBER for the European Commission and member states' competition authorities to withdraw the benefit of the exemption in individual cases. The withdrawal of the exemption is possible if the agreement is incompatible with article 81 paragraph 3 EC, if in particular access to the market is restricted by the cumulative effect of parallel networks. However, individual companies cannot influence the distribution channels of other companies and should therefore also not be exposed to the risk of withdrawal of the exemption. This provision makes business planning difficult for companies.

For similar reasons, we are critical of the provision in article 7 VBER. In practice, distribution agreements are exposed to the constant risk of withdrawal of the exemption in markets with a high density of similar distribution networks. It is not clear what criteria the European Commission applies for withdrawal of the exemption. Here, too, companies have hardly any possibilities to influence the market and the distribution channels of other companies.

7. Application of the market share threshold, article 8 VBER

Insofar as the Commission wants to stick to the concept of market share thresholds, it would be desirable if a clarification could be included in article 8 VBER that a re-application of the exemption is possible if the 30% threshold is exceeded in one calendar year but once more falls below the 30% threshold within the transition period provided for in article 8 (d) or (e).

8. Period of validity, article 10 VBER

BDI urgently calls for a transition period, in particular if a second market share threshold is in fact introduced. We propose that exemptions in accordance with regulation 2790/1999 should continue to apply at least until 31 December 2011 (eighteen months), at least insofar as agreements were already in force on 31 May 2010.

C) Draft new guidelines on vertical restraints

Agency agreements, paragraphs 12-21 GVR

In future, the European Commission intends to include agency agreements more widely than hitherto in the scope of article 81 paragraph 1 EC and in this regard goes partly beyond the scope of the jurisprudence of the European courts. The jurisprudence is based on the concept of an undertaking as defined in the ECJ rulings in the 2005 DaimlerChrysler case and the 2007 and 2008 Cepsa cases. This means that when the business owner and his commercial agent form a unit whereby the latter is an integrated auxiliary component of the former, it should be regarded as a single undertaking in antitrust law and as a result the agency agreement no longer constitutes an agreement between two undertakings. However, this should only apply with respect to obligations transferred to the commercial agent whereby he sells or buys the contract goods or services to or from third parties, but not to the actual relationship between the commercial agent and the principal.

The question of whether the commercial agent is or is not an integrated auxiliary component is decided by the European courts on the basis of an examination of the division of risk. Under this principle, a typical agency agreement exists if the commercial agent bears no or only insignificant risks in relation to the negotiated contracts and to the investments specific to the business. To this end, the jurisprudence has worked out a few categories of cases. However, the European Commission does not limit itself to these categories of cases but unnecessarily further narrows the scope for what has hitherto been regarded as a genuine commercial agency relationship without any obvious objective reasons. By so doing, it fails to take due account of different forms of activity by commercial agents, in particular that many commercial agents operate at the same time on another market on their own account. Non-compete obligations in particular are inherent to commercial agency relationships.

The list of harmless activities set out in paragraph 16 GVR (and the harmful activities that can be deduced in the opposite case) should be modified to do greater justice to practical needs and situations.

1) Liability, paragraph 16 fourth indent GVR

The liability clause is not necessary. However, if the European Commission does not want to dispense with the clause, it should be expanded. It should be clarified that liability is only transferred if the principal pays an appropriate and separate provision for the transfer of liability.

2) Investments, paragraph 16 sixth indent GVR

The investment clause does not refer to the possibility that the commercial agent could have become the owner of the equipment, as often happens in practice. In that case, an exemption can only be considered for the maintenance and investment obligations of the owner. The clause should therefore be formulated as follows:

“- does not make market-specific investments in equipment or bear the costs of premises or training of personnel, such as for example the petrol storage tank in the case of petrol retailing or specific software to sell insurance policies in the case of insurance agents unless an agreement is reached between the principal and the commercial agent which largely exempts the commercial agent from the risks of such investments and costs;”

3) Own business, paragraph 16 eight indent GVR

This provision should be deleted. The European Commission takes no account of the important cases where the commercial agent also works on his own account. As a result, it mainly disregards the fact that commercial agents increasingly promote sales of the goods covered in the agency agreement by simultaneously working in a separate goods market on their own account. This is the case, for instance, of petrol stations which, besides selling petrol, also have a shop or a carwash, possibly operate a repair service, or of car dealerships which also sell second-hand cars alongside new cars, or run a repair or service workshop.

It is clear from this practice that commercial agents have a strong personal interest in selling the product for which they are agents by promoting particular selling strategies. It is not obvious why dealers engaged in such selling practices should not be treated as commercial agents for the products covered in the agency agreement. Nor can this approach be deduced from ECJ jurisprudence. Furthermore, there is no clarification in the guidelines of when an activity is “indispensable” for selling or purchasing contract goods or services on behalf of the principal. The provision should therefore be deleted.

From the angle of competition policy, there is no need for a more restrictive assessment of agency agreements that goes beyond the requirements set out in jurisprudence. Commercial agents continue to ensure the market penetration necessary for intensive *inter-brand* competition. In many sectors, commercial agents are better suited for distribution than employed “dealers”. Neither can dealers for their own account take the place of commercial agents. This is because the competition restraints regularly contained in agency agreements safeguard the business owner’s market-specific investments and prevent exploitation of the commercial agent’s selling strategy by free riders.

4) Facilitation of collusion, paragraph 20 GVR

Paragraph 20 GVR should also be deleted. It is not apparent why an agency agreement under which the commercial agent accepts no risk should fall under article 81 paragraph 1 EC if it “facilitates collusion”. This is said to be the case when a number of principals use the same agent while collectively excluding others from using this agent or if principals use the commercial agent to engage in collusion. However, collusion as described here relates only to the relationship between the principals themselves and the question of how much the commercial agent’s activity can be counted as behaviour of the principals. For this, the agency agreement does not need to be included in the scope of article 81 paragraph 1 EC. The forms of cooperation between principals are covered by article 81 paragraph 1 EC. Paragraph 20 GVR holds potential for considerable legal uncertainties and has already the effect that commercial agents will no longer act for more than one principal, which considerably narrows the sales possibilities for manufacturers.



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