THE NEW EU RULES ON VERTICAL RESTRAINTS

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The treatment of vertical agreements[1] under Article 101 TFEU (ex-Article 81 EC) was radically changed with the entry into force in 2000 of Regulation No 2790/1999[2] and the accompanying Vertical Guidelines.[3] Compared to the previous block exemptions on vertical agreements, Regulation No 2790/1999 reflected the view that restrictions imposed in vertical agreements, that is, vertical restraints, may only have significant anti-competitive effects when they are engaged in by firms with market power. Regulation No 2799/1999, however, retained the list of so-called hardcore restrictions that could be found in earlier block exemptions on vertical agreements which prevent the application of the exemption even when engaged in by firms whose market shares are sufficiently low to benefit from the *De Minimis* Notice.[4]

The practical importance of Regulation No 2790/1999 and the Vertical Guidelines increased as a result of the entry into force on 1 May 2004 of Regulation No 1/2003[5] which implemented the "modernisation" policy introduced by the Commission following the publication of its 2000 White Paper[6]. Under the "modernisation" enforcement regime in place since 1 May 2004, undertakings are responsible for the self-assessment of their commercial practices in the light of the competition rules. National competition authorities and national courts are empowered to apply Article 101 TFEU in full,

[1] For the purposes of this paper, "vertical agreements" means agreements or concerted practices between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or the distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. The other principal category of vertical agreements (which is not covered in this paper) consists of agreements by which goods are supplied for the purpose of consumption or other use as opposed to resale.

[2] Commission Regulation 2790/1999 on the application of Article [101(3) TFEU] to categories of vertical agreements and concerted practices, OJ 1999 L336/21.

[3] Commission Guidelines on Vertical Restraints, OJ 2000 C291/1.

[4] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article [101(1) TFEU], OJ 2001 C368/13.

[5] OJ 2003 L1/1

[6] White Paper on modernisation of the rules implementing Articles 85 and 86, OJ 1999, C 132, p.1.

including Article 101(3) TFEU), and agreements may no longer be notified to the Commission in order to obtain a negative clearance or an individual exemption under Article 101(3) TFEU. These procedural changes have coincided with a radical shift in enforcement priorities of the Commission which now tends to restrict its direct interventions under Article 101 TFEU to cartels. With the sole exception of the automobile sector, there have been no new cases initiated by the Commission with respect to vertical agreements since the entry into force of Regulation No 1/2003. Enforcement of the rules on vertical restraints has been largely left to Member State competition authorities and courts.

It is in this context that the expiry of the Regulation No 2790/1999 in May 2010 led the Commission to revisit the issue of vertical restraints. Thus, on 21 April 2010, the Commission adopted final versions of the new Vertical Agreements Block Exemption Regulation[7] (the "new VABER") and Vertical Restraints Guidelines[8] (the "new Vertical Guidelines"). The new VABER entered into force on 1 June 2010, and will expire at the end of May 2022. The new VABER provides for a transitional period of one year (until 31 May 2011) for agreements already in force on 31 May 2010 which satisfy the conditions of the old VABER (Regulation 2790/1999) but not the new VABER.

In general, it would appear that the new VABER and Guidelines are unlikely to have a significant effect on existing agreements, as they continue to reflect the same fundamental Commission policies. Although the new VABER is in several respects stricter than the old VABER, for instance, in that it introduces a new buyer market share threshold, the list of hardcore restrictions has been largely left untouched. Moreover, the new Guidelines appear to reflect a more liberal approach to hardcore restrictions in certain circumstances and include a new section expressly clarifying that hardcore restrictions should not be seen as *per se* prohibitions in all cases.

[7] Commission Regulation 330/2010 on the application of Article 101(3 TFEU to categories of vertical agreements and concerted practices, OJ 2010 L102/1.
[8] Commission Guidelines on Vertical Restraints, OJ 2010 C130/1.

Among the most interesting changes in the VABER and Guidelines are the following:

(i) the market share threshold;

(ii) Internet sales;

(iii) exclusive distribution;

(iv) location clauses;

(v) mixed distribution systems;

(vi) potential justifications for hardcore restrictions (including resale price maintenance);

(vii) agency agreements;

(viii) upfront access payments; and

(ix) category management.

1. The market share threshold

Under the old VABER, for the exemption to apply only the market share of the supplier would normally be considered, except in the event of an exclusive supply obligation in which case the market share of the buyer would be taken into account. In either case, the market share threshold was set at 30% (i.e. respectively 30% on the market on which the supplier sells the contract good or services or 30% on the market on which the buyer purchases the contract goods or services).

This 30% market share threshold reflected the idea that only vertical restraints engaged in by firms with some degree of market power may pose a significant threat to competition. The reason for considering the market share of the buyer in the case of exclusive supply obligations was that such obligations mainly affect competitors of the buyer, whose access to the goods or services of the supplier may be foreclosed, thus restricting their ability to compete downstream with the buyer. Competitors of the supplier, in contrast, were seen as not being generally affected.

However, the definition of exclusive supply obligations was narrowly drafted.[9] It was only met if the supplier granted exclusivity for the whole EU to the same buyer, either for resale in general or for the purposes of a specific use. Thus, the applicability of the exemption to an exclusive supply obligation which was limited to an individual Member State would depend on the market share of the supplier and not that of the buyer. Moreover, the definition would not be met if the supplier granted exclusivity for the whole EU except for one Member State (the so-called "Maltese exception"). In such situation, the applicability of the exemption would also depend on the market share of the supplier and not that of the buyer.

Under the new VABER, for the exemption to apply, both the market share of the supplier and that of the buyer are now relevant. The market share of the supplier should not exceed 30% of the relevant market on which it sells the contract goods or services, and the market share of the buyer should not exceed 30% of the relevant market on which it purchases the contract goods or services..

Apparently, one of the main reasons for the introduction of the double market share threshold was that the Commission wanted to avoid situations such as the so-called "Maltese exception". It is unclear, however, how often this type of situation arose in practice under the old VABER.

Interestingly, the final version of the new VABER differs from previous drafts circulated for consultation, which required that the market share held by each of the undertakings must not exceed 30% on "any of the relevant markets affected by the agreement". Thus, the previous draft could have been interpreted as requiring the market share of buyers on downstream selling markets not to exceed 30%. This reading may have reflected the view expressed sometimes by Commission officials that market power may exist at all levels in the production and distribution chain. However, if maintained, this provision would have led to considerable legal uncertainty due to the difficulty for suppliers to have data concerning the market share of its buyers in the downstream markets, which may often be much narrower in geographic scope than the market in which the supplier sells its products and the market in which the buyer purchases the products. For instance, to take a simplistic example, in the case of the sale of carbonated drinks to supermarkets,

[9] Article 1(c) of the old VABER.

the supplier of carbonated drinks will very likely have data concerning its market share in the market for the supply of carbonated drinks to supermarkets, which will likely be national in scope. However, although the market for the purchase of carbonated drinks by supermarkets will likely be national in scope, the market for the sale of carbonated drinks by supermarkets to end customers may well be local. In this context, it may be very difficult for the supplier to obtain data concerning the market shares of supermarkets in the various local markets for the sale of carbonated drinks to end customers.

It appears that, following the comments received from interested parties during the consultation process, the Commission decided that, as far as the buyer was concerned, the market share threshold should focus only on the market in which it purchases the contract goods or services.

Nevertheless, the final version of the new VABER does not eliminate all problems for the supplier. It may indeed be difficult in many instances for a supplier to assess whether the exemption applies as information concerning the purchase market(s) on which its buyers operate may not be readily available. In order to determine the market share of the buyer on a purchasing market, one must know how much the buyer purchases from competitors. Taking the above example, in order for the supplier of carbonated drinks to know whether the new VABER would apply to an agreement with a supermarket, it should know how much that supermarket purchases from competing suppliers of carbonated drinks.

In addition, this provision could even discourage the use of multi-brand distributors/dealers, given that such distributors will generally have higher shares on the purchasing markets than single-brand distributors. For instance, if supplier X has a market share of 25% in the relevant market for the supply of machine A and deals with an exclusive distributor (distributor Y), supplier X may have an incentive not to deal with a multi-brand distributor as it is likely that a multi-brand distributor may have a market share exceeding 30% on the purchase market. In fact, supplier X may have an incentive to impose a non-compete obligation on its distributor Y just to ensure that the agreement benefits from the new VABER (in that case, supplier X will be sure that distributor Y will not have a market share exceeding 30% on the purchase market since distributor Y is not allowed to buy competing machines from other suppliers).

2. Internet sales

The increasingly common use of Internet to advertise and sell products in recent years has given rise to one of the most contentious debates in the review. E-retailers and Internet sales platforms, on the one hand, and luxury brands, on the other hand, lobbied intensely the Commission over the question of whether and to what extent suppliers were entitled to restrict Internet sales. Overall, the new rules largely confirm the Commission's traditional approach to Internet sales, with some relatively minor changes.

Thus, as a matter of principle, a supplier cannot prohibit Internet sales by its distributors in general and cannot exclusively reserve to itself this form of sales and promotion. According to the Commission, every distributor must be allowed to use Internet to sell products. Although, in principle, it may be possible to put forward arguments relating to product safety and the protection of consumer health in order to justify a restriction of Internet sales, it will be very difficult to substantiate these arguments in practice (in all likelihood, there may be less restrictive means to ensure product safety and consumer health than prohibiting Internet sales). In addition, to the extent that an argument relating to product safety or consumer health is put forward to justify an Internet restriction, the restriction should apply equally to all distributors, including the supplier (unless the supplier can justify that it is in a position to ensure product safety and consumer health through Internet sales and that its distributors are not).

In relation to Internet sales, the general position adopted in the Vertical Guidelines is that a restriction of a buyer's right to advertise and sell over the internet will be considered to be a hardcore passive sales restriction, even in a selective distribution system. Indeed, according to the Vertical Guidelines, "active sales" mean actively approaching individual customers by, for instance, direct mail or visits, advertisement in the media which is specifically targeted at that customer group or customers in a specific territory.[10] In contrast, "passive sales" means responding to unsolicited requests from individual customers, including general advertising or promotion that reaches customers

[10] Vertical Guidelines, recital 51.

in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers in one's own territory

The Commission's view that Internet sales restrictions constitute in principle a hardcore restriction on passive sales is based on the notion that it is the customer that initiates the contact by visiting the website of the distributor. It is only in situations where the Internet is used specifically to target customers in another distributor's territory that it will be considered to be a form of active selling there (which can under certain circumstances be restricted).

Although, as indicated above, it will not be possible in principle to ban Internet sales by distributors, it may be possible to exclude pure e-retailers and Internet sales platforms in some circumstances. Thus, a requirement on distributors to have bricks and mortar premises will be exempted by the new VABER provided they are also permitted to make Internet sales subject to criteria which are "equivalent" to those applied to bricks and mortar sales. According to the new Vertical Guidelines, both sets of criteria must pursue the same objectives and achieve comparable results, and the difference between the criteria must be justified. Moreover, the Vertical Guidelines confirm that, if the distributor uses a third party platform to host its website, the supplier may require that the logo or name of the third party be invisible to customers.

In addition, the Commission clarified in the new Vertical Guidelines a number of obligations that will be treated as hardcore passive sales restrictions. These include an obligation on a distributor to limit, or reroute, access to its website by customers outside its territory, as well as an obligation on a distributor to terminate a transaction if credit card details reveal a customer's address outside the distributor's territory. Although requiring a distributor to limit the proportion of its overall sales over the internet will be regarded as a hardcore restriction of passive sales, the supplier may oblige the distributor to sell at least a certain absolute amount of the products from its brick and mortar shops (in order to ensure that the shops are realistically viable). It will also be regarded as a hardcore restriction of passive sales where a supplier charges a higher price to a distributor for products intended for resale over the internet than for products intended for off-line sales, unless on-line sales entail higher costs for the supplier (e.g. where more complaints and warranty claims are made to a supplier concerning the contract products by end users because on-line resellers do not provide home installation services for the products). However, a supplier may pay a fixed (but not a variable) fee to support off-line sales' efforts by its distributors.

In contrast, a supplier will not be considered to restrict passive sales where it prohibits the use by a distributor of the following types of on-line promotion: online advertisements specifically targeted at certain customers; territory-based banners placed on third party websites; or advertisements displayed by search engine providers or online advertisement providers to users in a particular territory. Therefore, these latter restrictions will be exempted by the new VABER in the context of exclusive distribution systems in which active sales restrictions are exempted.

Finally, it should be noted that the European Court of Justice ("ECJ") will have the opportunity to examine some of these questions in the context of a preliminary reference which is currently pending (Case C-439/09, *Pierre Fabre Dermo-Cosmétique vs. Président de l'Autorité de la Concurrence*; this case concerns an appeal by a French cosmetics and perfume manufacturer, Pierre Fabre Dermo-Cosmétique, against an infringement decision of the French Competition Authority relating to Internet sales restrictions).[11] This preliminary reference gives the ECJ the opportunity to rule for the

[11] On 29 October 2009, the Paris Court of Appeal made a preliminary reference to the ECJ concerning restrictions on Internet sales in the context of the litigation in the Pierre Fabre Dermo-Cosmétique case. In this case, the French Competition Authority found that a manufacturer of cosmetics, Pierre Fabre Dermo-Cosmétique, breached Article 101 TFEU and the equivalent provision of French law by prohibiting its distributors in a selective distribution system from selling cosmetic products over the Internet. The French Competition Authority found that the total ban on Internet sales imposed by Pierre Fabre Dermo-Cosmétique amounted to a restriction of active and passive sales which constituted a hard-core restriction within the meaning of the VABER and which could not be exempted through an individual assessment under Article 101(3) TFEU. Pierre Fabre Dermo-Cosmétique brought an action for annulment against this decision before the Paris Court of Appeal and obtained the suspension of the obligation imposed by the decision to amend its selective distribution contracts pending its appeal on the merits.

The European Commission intervened as *amicus curiae* in the proceedings before the Paris Court of Appeal in support of the French Competition Authority's decision. The European Commission argued that a total ban on Internet sales by selective distributors amounts to a hardcore restriction within the meaning of the VABER, unless it is objectively justified in exceptional circumstances (for instance, on public security or public health grounds). The European Commission also argued that a hardcore restriction constitutes a restriction of competition by object, although this does not exclude the possibility for the restriction to qualify for an exemption under Article 101(3) TFEU following an individual analysis.

first time on the controversial issue of Internet resale restrictions. It remains to be seen whether the ECJ will endorse the Commission's approach in this respect.

3. Exclusive distribution

Traditionally, exclusive distribution is a form of distribution in which the supplier agrees to sell its products only to one distributor for resale in a particular territory or customer group.[12] Moreover, in an exclusive distribution agreement, the distributor is normally restricted in its ability to actively sell into other territories or customer groups exclusively allocated to other distributors. As a result of the imposition of this same restriction on other distributors, each exclusive distributor will be protected from active sales by other distributors into its exclusively allocated territory or customer group. The new Vertical Guidelines do not significantly change the Commission's approach towards exclusive distribution.

However, the new Vertical Guidelines now make it clear that a supplier can itself actively sell into an "exclusive" territory or customer group without this territory ceasing to be considered to be exclusively allocated to a distributor.[13] In contrast, the old Vertical Guidelines explicitly indicated that a territory or customer group is exclusively allocated when the supplier agrees to sell his product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into his territory or customer group by the supplier and all the other buyers of the supplier inside the EU. Thus, it seems that the Commission was persuaded that its previous position as reflected in the Vertical Guidelines was unnecessarily restrictive insofar as it excluded the possibility to conduct "dual

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Both Pierre Fabre and the European Commission suggested that, should the Paris Court of Appeal have doubts as regards the interpretation of the EU competition rules, it should stay the proceedings and make a preliminary reference to the ECJ. Thus, in view of (i) the compelling arguments put forward by the parties, which interpreted very differently the relevant competition rules, (ii) the silence of the VABER as regards Internet restrictions and (iii) the non-binding character of the European Commission's Vertical Guidelines (which indicate that a total ban on Internet sales amounts to a hard-core restriction), the Paris Court of Appeal has asked the ECJ to rule on whether a ban on Internet sales would be a hardcore restriction by object within the meaning of Article 101(1) TFEU and the VABER.

On 3 March 2011, Advocate General Mazak issued an Opinion in which he recommends to the Court to give replies to the questions put by the Paris Court of Appeal that largely endorse the Commission's approach.

[12] Vertical Guidelines, recital 151.

[13] Vertical Guidelines, recital 51.

distribution", which is quite common in practice, under the protection of the VABER ("dual distribution" means that the supplier sells to a distributor but at the same time sells to end customers directly through its own sales force).

However, the notion of exclusive distribution still requires that (i) the supplier does not appoint other distributors in the territory and (ii) distributors appointed elsewhere by the supplier cannot actively sell in the territory. In practice, this change will permit a supplier to actively sell to end customers in a territory in which it appoints one distributor without that distributor losing the protection from active sales there by other distributors.

4. Location clauses

A location clause is a restriction preventing a distributor from operating out of an unauthorized place of business. With respect to location clauses, the new VABER exempts a prohibition on a buyer from operating from an unauthorized place of business in the context of any type of distribution system, including non-exclusive distribution (under the old VABER it was already possible to impose location clauses in the context of both selective and exclusive distribution). Thus, although the new VABER retains the approach of the old VABER to active sales restrictions (which can only be imposed with respect to exclusively allocated, or reserved, territories or customer groups), the new more liberal approach to location clauses will allow suppliers to grant some territorial protection even in non-exclusive distribution systems. Therefore, for instance, even if a supplier operates a system that is neither selective nor exclusive in a given territory, the supplier may nevertheless impose a location clause on each distributor (i.e. the supplier may prevent the distributors from opening a secondary outlet and from transferring their retail outlet to a different location).

5. Mixed distribution systems

For the purposes of this paper, "mixed distribution systems" mean situations in which a supplier uses selective distribution in one territory and exclusive distribution in another territory.

As regards selective distribution, the new VABER expressly confirms that a prohibition on sales by members of a selective distribution system to unauthorized resellers is not covered by the block exemption if those unauthorized resellers are located in areas of the EU where the supplier does not operate a selective distribution system (unless the areas are reserved for the creation of a selective distribution system in the future). Therefore, selective distributors in one territory cannot be prevented from making sales to unauthorized distributors in another territory where the supplier uses exclusive distribution.

However, as under the old VABER, a supplier can prohibit members of a selective distribution system from making active sales into an exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer (in areas where selective distribution is not used). However, there still is no provision that exempts obligations imposed on buyers located in areas of the EU where the supplier does not operate a selective distribution system from selling to unauthorized resellers in areas where a selective distribution system is in operation. Thus, although a selective distributor may be prevented from making active sales into the territories or customer groups exclusively allocated to other distributors (in areas where the supplier operates exclusive distribution), the latter may not be prevented from making sales to unauthorized distributors (in areas where the supplier operates selective distribution). This situation may therefore undermine the viability of mixed distribution systems.

6. Potential justifications for hardcore restrictions

In the Commission's view, hardcore restrictions are restrictions by object[14] (restrictions which are presumed to be anti-competitive and for which there is no need to demonstrate anti-competitive effects). As under the old VABER, the inclusion of a hardcore restriction in a vertical agreement or concerted practice will lead to the exclusion of the benefit of the block exemption for the entire agreement.[15] However, the Commission has now explicitly stated in the Vertical Guidelines that, even in the context of hardcore restrictions, undertakings may in principle demonstrate pro-competitive

[14] Vertical Guidelines, recital 23.
[15] Article 4 of the new VABER.

effects under Article 101(3) TFEU in an individual analysis.[16] Therefore, the Commission has clarified that the inclusion of a hardcore restriction in a vertical agreement will not lead to a *per se* finding of infringement.[17]

Thus, the new Vertical Guidelines expressly recognize that hardcore restrictions may "exceptionally be objectively necessary for the existence of an agreement of a particular type or nature" and fall outside Article 101(1) TFEU or qualify for individual exemption under Article 101(3) TFEU.[18] The new Vertical Guidelines cite a number of examples in which this outcome may be justified, including the following two scenarios:

(a) Two year absolute territorial protection for first distributors of a brand

In recognition of the need to give an incentive for the significant investments likely to be required by a distributor to launch a new brand, or an existing brand in a new market, the new Vertical Guidelines clarify that preventing distributors located elsewhere from making both active and passive sales in such a distributor's territory for a period of two years will normally not be regarded as falling within Article 101(1) TFEU.[19] This wording is slightly different from that of the previous Vertical Guidelines, which referred to the introduction of "new products", but perhaps no special significance should be attached to this.

(b) Test products or staggered introduction of new products

According to the new Vertical Guidelines, in the case of testing of a new product in a territory or with a limited customer group and that of a staggered introduction of a new product, the distributors appointed to sell the new product in the test market or to participate in the first rounds of the staggered introduction can be restricted in their active selling outside the market in question for the period necessary for the

[16] Vertical Guidelines, recital 47.
[17] This welcome clarification appears to be a consequence of the controversial debate that arose in the context of the *Leegin* judgment by the US Supreme Court, in which the Supreme Court abandoned a *per se* prohibition of resale price maintenance and adopted a rule of reason. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).
[18] Vertical Guidelines, recital 60.
[19] Vertical Guidelines, recital 61.

testing or for the introduction of the product.[20] The rationale behind this exception is that, in the absence of this restriction, the testing or the introduction of the product may be jeopardized if the distributor does not concentrate its sales efforts in the territory or customer group in question.

(c) Dual pricing for off-line and online sales

As indicated above, the new Vertical Guidelines indicate that, in principle, charging a higher price to distributors for online sales than for off-line sales is a hardcore restriction.[21] However, it may be possible for the supplier to charge higher prices for sales to be made online if these entail substantially higher costs for the supplier (e.g. more customer complaints or warranty claims due to incorrect installation).

(d) Resale price maintenance (RPM)

Resale price maintenance remains a hardcore restriction that prevents the application of the block exemption. However, whilst listing various negative effects of RPM, the new Vertical Guidelines also for the first time recognize the types of efficiencies that may in certain circumstances be generated by RPM and could, in principle, justify an exemption under Article 101(3) TFEU in an individual assessment.[22]. In particular, as regards the potential efficiencies arising from RPM, the new Vertical Guidelines mention the following:

- On the launch by a manufacturer of a new product, RPM may cause distributors in a competitive market to increase promotional efforts and develop demand, i.e., by preventing free-riding among distributors (these are the factual circumstances which also normally justify a prohibition on both passive and active sales into the distributor's territory for an initial period of two years following the launch of a new brand or entry into a new market; discussed above).

[20] Vertical Guidelines, recital 62.
[21] Vertical Guidelines, recital 64.
[22] Vertical Guidelines, recital 223.

- RPM may be necessary in a franchise or similar distribution system applying a uniform distribution format for a coordinated short term low price campaign (i.e., of two to six weeks duration).

- The extra margin provided by RPM may sometimes allow retailers to provide additional pre-sale services (in particular in case of experience or complex products) and prevent free-riding by distributors not offering these services and hence being able to sell at a lower price. On the other hand, elsewhere in the new Vertical Guidelines, the Commission reiterates the general observation that the avoidance of free riding among distributors is <u>not</u> a justification for vertical restraints where it is practical for a manufacturer to impose by contract effective promotion and/or service obligations on all distributors; an approach which, until now, has made the use of selective distribution very much the preferred method of addressing free-riding.

Thus, as far as RPM is concerned, although in principle the Commission has recognized the theoretical possibility to substantiate efficiencies, it is likely that in practice it will be very difficult to provide the necessary evidence. Therefore, it is questionable to what extent this new more liberal language in the new Vertical Guidelines will have a significant impact in practice.

7. Agency

Agency agreements are agreements by which a legal or physical person (the agent) is empowered to negotiate and/or conclude contracts on behalf of another person (the principal). Agency agreements can involve either the purchase or the sale of goods or services on behalf of the principal. According to well-established case-law, Article 101 TFEU only applies to agreements between two economically independent operators. Thus, the restrictions imposed by a principal on an agent in relation to the sale (or purchase) of the principal’s goods fall outside Article 101(1) TFEU where the agent is considered to be so dependent on the principal that the two form part of the same economic unit. It is a precondition of a finding of economic unity that the agent should not bear financial or commercial risks in relation to the activities for which it has been appointed by the principal. This will be determined on the basis of the economic reality of the relationship and not on the basis of the legal form used by the parties. According to the case-law and as the old Vertical Guidelines indicated, the determining factor in assessing whether Article 101(1) TFEU is applicable is whether the financial and commercial risk borne by the agent in relation to the activities for which he has been appointed as an agent by the principal. In this respect, it is not material for the assessment whether the agent acts for one or several principals.

However, in relation to this issue, the new Vertical Guidelines recognize that the only commercial or financial risks borne by an agent which are relevant in order to establish whether restrictions on the sale of the principal's goods by the agent fall within the scope of Article 101 TFEU are risks incurred in the same product market as that to which the goods subject to the agency relationship belong.[23] Therefore, restrictions on the agent may escape Article 101 TFEU in one market in which it does not bear significant risks (e.g., the sale of new motor vehicles) whilst being subject to Article 101 TFEU in another related market in which it is required to bear risks by the same principal (e.g., the vehicle repair market). The latter risks do not make Article 101 TFEU applicable to restrictions in the former market. This more liberal approach seems to have been introduced as a result of the *DaimlerChrysler* judgment of the General Court.[24]

[23] Vertical Guidelines, recitals 14-15.

[24] See *DaimlerChrysler* v. *Commission*, [2005] ECR II-3319. In this case, the General Court suggested that the categorization as an agent in respect of the sale of the principal's goods or services in one market will not be compromised by an obligation placed on the agent by the same principal to bear risk in other (even closely related) markets. Agents appointed by DaimlerChrysler to sell motor vehicles were also required to carry out after-sales services and stock spare parts. The fact that the agents were required to bear risks associated with after-sales services and spare parts (including the cost of a workshop) did not affect the analysis of whether Article 101(1) TFEU applied to restrictions on the agents imposed in relation to the sale of vehicles. This appeared to directly contradict the contrary position of the Commission as set out in the old Vertical Guidelines. Furthermore, it is questionable whether this approach is consistent with the Court of Justice's approach in *VAG Leasing*, [1995] ECR I-3477. In deciding that Article 101 TFEU applied to restrictions imposed on Volkswagen dealers when they acted as agents in respect of the leasing of Volkswagen vehicles, the Court of Justice considered it relevant that these same dealers were required by Volkswagen to act largely independently in their principal business of selling and servicing Volkswagen vehicles.

8. Upfront access payments

The new Vertical Guidelines analyze for the first time upfront access payments, which is the increasingly common practice whereby suppliers pay distributors (e.g., supermarkets) in order to obtain access to their distribution networks.[25] These various arrangements are in principle block exempted. Outside the block exemption, the Guidelines indicate that they may possibly have negative effects similar to exclusive supply or non-compete obligations, or facilitate collusion among distributors. They may, however, also have compensating efficiencies such as, for instance, efficient allocation of shelf space for new products. One the one hand, distributors may often have less information than suppliers on the potential success of new products and that a supplier would normally agree to pay an upfront access fee if it has indications that the probability of failure is low. On the other hand, suppliers may have incentives to free-ride on distributors' promotional efforts in order to introduce sub-optimal products since if a product is not successful the distributors will pay part of the costs of the failure. However, upfront access fees may prevent such free-riding by making suppliers bear the full risk of product failure and contributing to an optimal product introduction. However, as it seems apparent from the foregoing discussion, upfront access payments are likely to be less relevant in many economic sectors.

9. Category management

Finally, the new Vertical Guidelines also analyze for the first time the practice whereby one supplier is appointed by a distributor to be responsible for the marketing of all products of a certain type sold by the distributor, including products of competing suppliers (category management agreements). These arrangements are in principle block exempted. Outside the block exemption, according to the Guidelines they may possibly have negative effects including, among others, foreclosure of competing suppliers or collusion between distributors, although there may be compensating efficiencies.[26] Similarly, category management agreements are also likely to be less relevant in many sectors.

[25] Vertical Guidelines, recitals 203-208.
[26] Vertical Guidelines, recitals 209-213.

10. Conclusion

In view of the foregoing, it is possible to conclude that the new VABER and the new Vertical Guidelines have largely preserved the essence of the previously applicable rules. In general, the amendments introduced have been relatively modest. Moreover, most of these amendments should probably be welcome, except perhaps the amendments concerning the market share threshold which may lead to legal uncertainty and added complexity in many cases. The stability of this corpus of rules should ultimately be beneficial to undertakings, national competition authorities and national courts, which have become the main actors responsible for the interpretation and implementation of these rules in the "post-modernisation" era.