

Vertical rules | novelties and challenges

On-line sale and MFN clauses

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Main objectives and key takeaways in relations to on-line sale

Main objectives:

- to simply and clarify;
- to provide flexibility;
- to address development of e-commerce and platforms that took place in last 10 years.

Key takeaway:

- The Commission concluded that online sales have become a well-functioning sales channel no longer requiring special protection.

Article 4e of VBER

new hard-core restriction concerning on-line sales

- Any restriction which prevents **“the effective use of the internet”** by the buyer or its customers to sell the contract goods or services **qualifies as a hardcore territorial restriction** (Article 4(e) of VBER).
- A vertical agreement containing one or more restrictions of online sales or online advertising which *de facto* prohibit the buyer from using the internet to sell the contract goods **has at the very least the object of restricting passive sales to end users wishing to purchase online and located outside the buyer’s physical trading area.**
- The same applies to agreements which do not directly prohibit, but have the object of preventing the effective use **of the internet to sell the contract goods to particular territories or customers (e.g. significantly diminishing the aggregate volume of online sales).**

Restrictions in relation to on-line sales

that can benefit from exemption

- On-line sales restrictions generally **do not have an object of preventing “effective use of the internet” where the buyer remains free to operate its own online store and to advertise online.**
- On-line advertising restrictions can benefit from the exemption, **provided that they do not have the object of preventing the use of an entire advertising channel by the buyer.**
- **Quality standards.**
- **Dual pricing** – charging the same distributor a higher wholesale price for products intended to be sold online than products to be sold in brick and mortar shop.
- **Equivalence principle** – imposing criteria for online sales that are not overall equivalent to the criteria imposed for offline sales.

Most Favoured Nation (MFN) clauses

- Retail “across-platform” parity obligations imposed by online intermediation service providers with respect to sales to end users are now classified as **excluded restrictions**.
 - such obligations will be subject to individual self-assessment of their compatibility with Article 101 TFEU.
- However, the analysis of parity obligations **needs to be conducted on a country by country basis**, since, at national level, (e.g. in France or Germany), there may already be rules prohibiting certain types of parity obligations.
 - In the UK wide MFN clauses have have been classified within the new Vertical Block Exemption Order as **hard-core restriction**.

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| Thank you!



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