

Award in Competition Law

Lecture Title: Article 101 TFEU (Agreements)

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Diploma in Law (Malta)



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Recap: What does Article 101 TFEU cover?

EU Comp. law applies to anti-competitive agreements or business practices between:

- competitors (**horizontal agreements**) and/or
- Trading parties at different levels of the distribution chain(**vertical agreements**) (NB not consumers)

The TEXT of Article 101(1) READS “all [(**horizontal**) or **vertical**] agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”

1. WHO? An agreement (decision or concerted practice) between two or more Undertakings (an economic activity)
2. WHAT? Which has the “*object*” or “*effect*” of restricting or preventing competition
3. WHERE? Having an effect on trade between MS (jurisdictional element for application of TFEU)

The Concepts Simply Put



Recap: What does Article 101 TFEU cover?

In other words:

The EU has a set of rules that say businesses must compete fairly. These rules cover two types of deals that can harm fair competition:

- Horizontal deals — where companies at the same level gang up (e.g., two supermarkets agreeing to charge the same prices)
- Vertical deals — where a supplier and its distributor make arrangements that restrict competition (e.g., a supplier forcing a supermarket to purchase tied/bundled products)



Legal Element: What does Article 101 TFEU cover?

“Undertaking” in practice — does this apply to us?

A bank offering retail loans, mortgages, or credit cards = undertaking. It is competing with other banks for customers.

A hotel competing for bookings, corporate contracts, or event business = undertaking.

An HR department is not itself an undertaking — but the company it works for is. HR professionals need to know the rules because they may be involved in hiring, salary-benchmarking, and information-sharing with competitors.

Key point: If your organisation charges for goods or services and competes in a market, it is an undertaking and Article 101 can apply to it.



Legal Element: What does Article 101 TFEU cover?

Agreement

Any meeting of minds between two or more undertakings — does not need to be written, signed, or legally binding. An email, a handshake, or even a verbal understanding at a conference is enough.

- Banking: Two bank managers meet at an industry dinner and agree they will both raise mortgage arrangement fees next quarter. No contract signed — but this is an agreement.
- Hotels: A WhatsApp message between two competing hotel revenue managers saying "we won't go below Eur 120 per night this weekend" — agreement, even if informal.
- HR: Two competing employers exchange emails agreeing not to make job offers to each other's staff above a certain salary. Written, but still unlawful — and still an agreement.
- Key point: Courts look for a common intention to behave in a certain way on the market.

Legal Element: What does Article 101 TFEU cover?

Concerted Practice

A looser form of coordination that falls short of a formal agreement but goes beyond each company independently deciding its own commercial strategy. Companies substitute cooperation for the risks of competition — even without any explicit deal.

- **Banking:** Banks attend a trade association seminar where one bank's representative announces "we plan to increase personal loan rates by 0.5% in January." The others say nothing but all raise their rates accordingly —a concerted practice.
- **Hotels:** A hotel shares its forward occupancy rates and pricing strategy with a rival hotel "just to benchmark." The rival adjusts its own pricing in response. The exchange itself can constitute a concerted practice.
- **HR:** HR directors from competing firms attend an industry roundtable where salary bands for certain roles are informally discussed. Even without any explicit deal, subsequent alignment of pay offers across those firms could indicate a concerted practice.

Key point: Sharing commercially sensitive information with a competitor — even once, even passively — can be enough. You do not need to agree on anything explicitly



Legal Element: What does Article 101 TFEU cover?

Decision by an Association of Undertakings

A recommendation, resolution, rule, or guidance issued by a trade association, industry body, or professional organisation that coordinates the behaviour of its members on the market.

- **Banking:** A banking federation publishes a circular recommending that all member banks charge a standard fee for pension-schemes. Even framed as a "guideline," this is a decision by an association of undertakings.
- **Hotels:** A hotel association issues a "recommended minimum rate" for peak season bookings in the area. Members following the recommendation are engaged in a prohibited practice — and the association is liable.
- **HR:** An HR industry body circulates a "salary guide" that, in practice, sets a ceiling on wages for certain roles across member companies — this goes beyond neutral benchmarking and risks constituting a decision by an association of undertakings.

Key point: It does not need to be legally binding on members. A non-binding recommendation that members follow in practice is sufficient. The association itself can be fined, and so can its members.



Competition Element: What does Article 101 TFEU cover?

Object (banned outright — no need to prove harm):

- Banking: Two competing banks agreeing at a the annual Xmas drinks that neither will offer fixed-rate mortgages below 3% — classic price-fixing by object.
- Hotels: A group of hotels in a city agreeing that none of them will discount room rates on a particular booking platform — restricts price competition by object.
- HR: Competing employers agreeing not to poach each other's staff or to cap salary offers — a form of market-sharing/bid-rigging for labour.

Competition Element: What does Article 101 TFEU cover?

Effect (requires case-by-case analysis):

- Banking: Banks sharing a credit register showing borrower default history — not obviously harmful; must examine actual market impact.
- Hotels: A hotel chain agreeing with its booking platform that prices will be the same across all channels (parity clause) — may or may not restrict competition depending on the platform's market share and the clause's scope.
- HR: Two companies agreeing to share anonymised salary benchmarking data through a third-party provider — could be pro-competitive (improves market transparency) or restrictive (if it coordinates pay levels). Needs analysis.



Jurisdiction: What does Article 101 TFEU cover?

A simple test: Does this arrangement reach across borders — or could it?

It does not require that the agreement was deliberately international. It is enough that it is capable of affecting cross-border trade.

- Banking: A group of Maltese banks agreeing to fix interest rates on euro-denominated loans. Even if customers are all local, the agreement affects the conditions under which cross-border lenders could enter the Maltese market — jurisdictional element satisfied.
- Hotels: A group of hotels in a tourist destination agreeing to fix rack rates. Foreign tourists and international booking platforms are affected — clearly cross-border.
- HR: Competing multinationals agreeing not to recruit each other's staff across EU offices — directly cross-border by nature.

Purely local deals with no cross-border dimension fall outside Article 101 TFEU and are instead governed by national competition law (e.g., Maltese Competition Act).



Object OR Effect?



Competition Element: The Concept of Object/Effect

- The words "object" or "effect" are to be read disjunctively. It is, therefore, sufficient that an agreement has either an "object" or an "effect" that is anti-competitive
- By Object: "certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition." : it is not necessary for the authority or the court to prove that the restriction had anti-competitive effects.
- For "by object" agreements regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms part"
- The former EU DG for Competition Alexander Italianer has stated (in my words):

Some business deals are like drunk driving — we know from experience they almost always cause harm, so we ban them outright without needing to prove the harm happened (object). Other deals are more like speeding — it depends on the road and conditions; we need to look at the actual consequences (effect).

Competition Element: The Concept of Object/Effect

- On the other hand, where the analysis of the object of the agreement does not reveal an obvious anti-competitive objective, the next question is whether it restricts competition by effect.
- Classification: “non per-se” – not necessarily harmful to competition, their effect depends on particular circumstances as the nature of the agreement and market conditions
- This means that, for an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or at least be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation.
- Because: under certain conditions, agreements are likely to help realise efficiencies and the entry of new markets in a way which may offset possible negative effects. In general, vertical restraints will be viewed more favourably if they are of limited duration and assist in the introduction of new and complex products or the protection of specific investments.

Case Example: The Concept of Object/Effect

The ECJ (C-345/14)

- Maxima Latvija the largest chains of supermarkets in Latvia, was party to several commercial lease agreements with shopping centres that granted Maxima Latvija, the anchor tenant in these shopping centres, the legal right to agree to the allocation of commercial premises to other tenants.
- This provision effectively enabled Maxima Latvija to block potential retail food competition in the shopping centres concerned.
- It was held that Maxima Latvija's market power rendered the purpose of the agreements the prevention of competition, and therefore that the test for restriction "**by object**".
- The ECJ did not, however, consider the non-compete restrictions in the Maxima Latvija agreements to be among the categories of agreement **considered harmful by their nature to competition**.
- The ECJ responded that it was necessary for the national court to consider the full legal and economic context of the agreement to assess whether a lease restriction may close-off the relevant market and competition, such that it has the effect of preventing, restricting or distorting competition within the meaning of Article 101(1).

Competition Element: The Concept of Object/Effect

The Story in Plain Language

- Maxima Latvija as the anchor tenant — the big, dominant shop that drives footfall — was given a contractual right to approve or veto which other retailers could take up space in those shopping centres.
- In practice, this meant Maxima could block potential rival food retailers from setting up in the same shopping centre as it.

The Object Question — Was This Obviously Anti-Competitive?

- The national competition authority in Latvia concluded that Maxima Latvija's market power meant the purpose of the agreements was to prevent competition — and therefore classified the restriction as one "by object."
- In other words, the Latvian authority said: "This is so obviously bad that we do not need to prove harm — the deal speaks for itself."

Competition Element: The Concept of Object/Effect

The ECJ disagreed

- The ECJ held that the non-compete restrictions in the Maxima Latvija agreements did not fall within the categories of agreements considered harmful by their very nature to competition.

Why?

- Because a tenant negotiating certain rights over how a shopping centre is managed is not, on its face, the same as a price-fixing cartel or a market-sharing agreement. There could be legitimate commercial reasons for such a clause. You cannot simply look at it and say "this is always harmful" — unlike, say, two supermarkets agreeing to charge the same prices.

The Effect Question — What Must Be Analysed Instead?

- The ECJ said the national court must instead consider the full legal and economic context of the agreement to assess whether the lease restriction may close off the relevant market and competition — such that it has the effect of preventing, restricting or distorting competition within the meaning of Article 101(1).

Competition Element: The Concept of Object/Effect

The ECJ gave a checklist of factors to examine:

- The relevant retail market and size of the catchment area covered by the agreements
- The level of real, concrete possibilities for a new competitor to establish itself elsewhere in the relevant catchment area, for example in other shopping centres, or outside the shopping centre area
- The number and size of the operators on the relevant market in the catchment area and levels of concentration
- The nature of customer habits and loyalty to existing brands
- The degree of any other economic, administrative and regulatory barriers to entry, as well as the nature and duration of the restriction
- The existence of any other agreements which may create a cumulative effect on competition

Competition Element: The Concept of Object/Effect

	Object	Effect
Standard	Obvious harm — no need to prove consequences	Must analyse actual market impact
Analogy	Drunk driving — always banned	Speeding — depends on context
Maxima Latvija	ECJ said: NO — this is not obviously harmful	ECJ said: YES — go back and analyse the real world impact on competition in each catchment area

The key lesson: Just because a supermarket uses its lease to block rivals does not automatically make it a competition law infringement "by object." The harm has to be assessed in context. If every shopping centre in a city has a Maxima veto clause, and there is nowhere else for a rival food retailer to open, then you may find a restriction by effect. But that conclusion requires evidence — it cannot simply be assumed.

Object OR Effect: Horizontal



Object Restrictions: Horizontal Agreements

Article 101 TFEU - Horizontal

- There are 4 key cartel agreements that incur the highest penalties and should never be entered into:
 - ✓ **Price Fixing** – when firms agree to sell items at a price higher than they normally would if they were competing against each other.
 - ✓ **Restricting Supply** – When firms restrict the quantity of goods/services supplied with the intention of raising prices.
 - ✓ **Market Sharing** – When firms agree to operate only within agreed areas in the country.
 - ✓ **Bid Rigging** - When businesses agree, when bidding for a contract, which one will win that contract and at what price.

Object Restrictions: Information Exchange

Article 101 TFEU - Horizontal

▪ A word on Exchange of Information among Competitors:

- ✓ **Exchange of Information** – Exchanges of information are interactions among competitors that, from a competition law perspective, fall between hard-core “naked” cartels and cooperation, which leads to increased transparency in the market which can both bolster allocative and productive efficiencies.

For example, competing firms often exchange information in order to make more informed market decisions which can help to overcome market inefficiencies. However, case law has shown that information exchange may also enable firms to engage in collusion more readily and sustain it longer.

- The main competition law concern arises when the nature of the information exchanged between current or potential competitors makes it easier for them to predict each others' behaviour and adjust their own accordingly. This in its most severe form may ultimately enable participants to fix prices or allocate customers or markets, in other words to participate in a cartel.

Object Restrictions: Information Exchange

Article 101 TFEU - Horizontal

- Irrespective of whether a meeting is held in a formal or informal setting, or under the guise/guidance of a trade association, legal advice should be obtained before businesses share any current information relating to the following areas:
 - prices and pricing strategy including discounts, rebates, etc.;
 - methods by which prices are calculated;
 - terms and conditions of business, promotions and special offers;
 - general market strategy; or
 - other information which a competitor would not normally be able to discover.

The golden rule is that any exchange or disclosure of information should not enable you to reduce uncertainty, that is, in a way that enables you to forecast more precisely the competitive conduct of your competitors or reduce the degree of uncertainty about the operation of the market which would have existed in the absence of such an exchange of information.

Object Restrictions: Information Exchange

Article 101 TFEU - Horizontal

Example (Object) – Bananas (2015) In Case COMP/39188 –(upheld in Case C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission). The Commission fined Dole, Weichert and Chiquita for engaging in **bilateral pre-pricing communications about price-setting factors for bananas**.

- First, the parties discussed (ahead of the quotation price setting and announcement to customers) factors relevant to quotation prices, discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week.
- The Commission found that this **reduced the uncertainty** between the parties as regards their price quotations.
- Second, after the prices were set, the parties exchanged their quotation prices bilaterally. The Commission found that **this enabled the companies to monitor individual pricing decisions** in light of pre-pricing communications.

Object Restrictions: Information Exchange

The Banana Case

What Was It?

The Banana case (COMP/39188, upheld in Case C-286/13 P Dole Food and Dole Fresh Fruit Europe v Commission) involved the Commission fining Dole, Weichert and Chiquita for engaging in bilateral pre-pricing communications about price-setting factors for bananas

What Did They Actually Do?

There were two separate pieces of conduct:

- Step 1 — Before prices were set:

First, the parties discussed (ahead of the quotation price setting and announcement to customers) factors relevant to quotation prices, *"Shipping costs are up this week — we will probably be adjusting our quotation price upwards"*, *"The weather in the Caribbean has been bad — we are expecting prices to firm up"*, *"We are thinking of going a bit higher next week — things are tight on supply"*. In plain language: Before any of them told their customers what bananas would cost that week, they were quietly chatting to each other — This gave each company a sneak preview of where its rivals' prices were heading.

Object Restrictions: Information Exchange

- **Step 2 — After prices were set:**

After the prices were set, the parties exchanged their quotation prices bilaterally. The Commission found that this enabled the companies to monitor individual pricing decisions in light of pre-pricing communications.

In plain language: Once they had each set their prices, they told each other what those prices were. This allowed them to check whether everyone had "stuck to the script" from their earlier conversations.

Why Was This "By Object"?

The Commission found that this reduced the uncertainty between the parties as regards their price quotations. This is the key. In a healthy market, competitors should not know what price their rivals intend to charge. That uncertainty is what drives them to compete and offer better deals to customers.

By sharing this information:

Before pricing → they removed the uncertainty about where prices were going

After pricing → they could check and reinforce the "understanding"

Object Restrictions: Information Exchange

	The Banana Case
Who	Dole, Weichert, Chiquita
What	Pre-pricing chats and post-pricing exchanges
Why it is "by object"	It removed competitive uncertainty — the very thing that drives rivalry
No need to prove	That prices actually rose or that consumers paid more
The analogy	Like texting during driving — illegal before anything bad happens

This is classic by object conduct. You do not need to prove banana prices actually went up or that consumers were harmed — the very act of sharing this pricing information is, by its nature, harmful to competition, in the same way that drunk driving is illegal regardless of whether an accident actually occurs.

Object or Effect: Horizontal Agreements

Article 101 TFEU - Horizontal

Example (Effect) – Asnef-Equifax Case C-238/05

- The CJEU was asked to review the compatibility with the European competition rules of an online register set up by the Spanish association of financial institutions.
- The register contained sensitive information on existing and potential borrowers, such as past credit history, failures to pay, outstanding credit balances etc.
- The purpose of the register was to better inform lenders as to risks connected with granting loans, leading to greater and more efficient availability of credit.
- The CJEU concluded that the information exchanged on the creditworthiness of potential borrowers served to reduce the risk of lending by reducing the disparity between the information available to credit institutions and that held by potential borrowers.
- Therefore, the information exchange was capable of reducing the number of borrowers who default on repayments, and hence improved the functioning of the credit supply system as a whole, leading to a more efficient market outcome.
- As the credit register was **designed to limit risks of credit institutions** in granting loans, the Court concluded that the exchange of information **did not have the object** of restricting competition.

Object or Effect: Horizontal Agreements

What Was It?

- The CJEU was asked to review the compatibility with European competition rules of an online register set up by the Spanish association of financial institutions. In other words: a group of Spanish banks and lenders had created a shared database. Before deciding whether to give someone a loan, a lender could check this register to find out whether that person was a good or bad credit risk.

What Was in the Register?

- The register contained sensitive information on existing and potential borrowers, such as past credit history, failures to pay, outstanding credit balances, etc. Think of it like a shared "naughty list" — if you had defaulted on a loan with Bank A, Bank B could look you up in the register and discover this before deciding to lend to you.

What Was the Stated Purpose?

The purpose of the register was to better inform lenders as to risks connected with granting loans, leading to greater and more efficient availability of credit. In plain English: the banks said "this register helps us lend more responsibly and more efficiently — it is good for the market."

Object or Effect: Horizontal Agreements

Why Was This NOT "By Object"?

As the credit register was designed to limit risks of credit institutions in granting loans, the Court concluded that the exchange of information did not have the object of restricting competition.

Compare this to the Banana case. In the Banana case, competitors were sharing future pricing intentions — information that only serves to coordinate behaviour and has no legitimate purpose. Here, the banks were sharing credit risk information about borrowers — information with a plausible, pro-competitive rationale. You cannot look at this and say "this is obviously harmful by its very nature." So it cannot be "by object."

So What Did the CJEU Examine Instead?

Because there was no obvious anti-competitive object, the Court moved on to assess whether the register restricted competition by effect — looking at the actual consequences it had on the market. The CJEU concluded that the information exchanged on the creditworthiness of potential borrowers served to reduce the risk of lending by reducing the disparity between the information available to credit institutions and that held by potential borrowers.

Therefore, the information exchange was capable of reducing the number of borrowers who default on repayments, and hence improved the functioning of the credit supply system as a whole, leading to a more efficient market outcome.

In other words, after examining the actual effects, the Court found that the register was pro-competitive, not anti-competitive — it made the credit market work better, not worse.

Object or Effect: Horizontal Agreements

	Banana Case (Object)	ASNEF-Equifax (Effect)
What was shared	Future banana prices between competitors	Borrower credit history
Purpose	No legitimate purpose — pure coordination	Legitimate: reduce lending risk
By object?	Yes — obviously harmful	No — requires analysis
Outcome	Infringement found without needing to prove harm	Effect assessed — found to be pro-competitive
The analogy	Drunk driving — always banned	Speeding — need to look at the circumstances

The key lesson: Not all information sharing between competitors is automatically harmful. Where there is a plausible, legitimate reason for sharing the information — such as reducing information asymmetry in a credit market — the competition authority must roll up its sleeves and examine the actual effects on competition. And sometimes, when they do that analysis, the answer comes back: this arrangement actually helps the market function better.

Object OR Effect: Vertical



Object or Effect: **Vertical Agreements**

Article 101 TFEU - Vertical

➤ The categories of vertical agreements that are typically treated by the Commission as having the **object** of restricting competition are those that are deemed to be "hardcore" agreements for the purposes of the vertical agreements block exemption for example:

- Imposition of fixed or minimum resale prices.
- Restrictions of passive sales (including sales over the internet) in exclusive distribution agreements.
- Restrictions of cross-supplies between members of a selective distribution arrangement.
- Restrictions of sales to end-users by buyers operating at the retail level of trade.

Object or Effect: **Vertical Agreements**

Article 101 TFEU - Vertical

▪ **Example – Supplier and Distributor Arrangement**

White Clauses

- (i) technical information relating to the products or services,
- (ii) logistical information, including information on production processes, inventory or stocks,
- (iii) customer information, for ex in terms of preferences or feedback on the products,
- (iv) but also information on resale prices, provided however that such information is not used by the supplier to engage in resale price maintenance.

Grey clauses

- (i) Information relating to the actual future prices at which the supplier or buyer would sell the contract goods or services downstream
- (ii) Customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers (unless necessary to enable the adaption of contract goods/services to the consumers' requirements or to provide guarantee or after-sales services, or to allocate customers under an exclusive distribution agreement).

Article 101 - Moving on to Vertical Agreements



Article 101 - Vertical Agreements

- "Vertical agreements" are defined as agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and which relate to the conditions under which the parties may purchase, sell or resell certain goods or services
- "Vertical restraints" are restrictions of competition contained in vertical agreements (Article 1(1)(b)).
- There are three elements to this definition:
 - i. The agreement must be between two or more undertakings.
 - ii. Each undertaking must operate, for the purposes of the agreement, at a different level of the production or distribution chain.
 - iii. The agreement must relate to the conditions of purchase, sale or resale of services or goods. This means that vertical agreements relating to goods and services, final and intermediate, are all covered.

Single Branding

Buyer is obliged/forced/induced/incentivised to purchase all or most of its requirements from only one supplier, that is, not to buy and resell competing goods/services.

Exclusive Distribution

Where the supplier agrees to sell its products only to one distributor for resale in a particular territory (and where usually the distributor is restricted from active selling into other exclusively allocated territories)

Exclusive Customer Allocation

Where the supplier limits sales to only one buyer for a certain class of customer

Selective Distribution

Where the supplier agrees to sell the contract goods/services, directly or indirectly, only to dealers selected on the basis of certain pre-defined qualitative or quantitative criteria and where those dealers agree not to sell to unauthorised dealers

Exclusive Supply

Where the supplier agrees, or is incentivised, to sell only or mainly to one buyer

Resale Restrictions

Buyer is obliged/induced not to resell the contract goods below certain price levels: minimum resale prices, fixed resale prices, recommended or maximum resale prices

Restraint	Plain English	Real-World Example
Single Branding	You can only sell our products, not rivals'	A petrol station that can only sell Shell fuel
Exclusive Distribution	Only one shop gets to sell our product in an area	Only one dealer in Malta sells a particular car brand
Selective Distribution	We only sell to shops that meet our standards	Chanel only sells through approved luxury boutiques
Exclusive Supply	You can only supply to us	A baker who makes bread exclusively for one supermarket chain
Resale Restrictions	You must charge at least this price	A publisher telling bookshops not to discount below €15

Sample Distribution Agreement

Diploma in Law (Malta)

DRAFT FOR DISCUSSION PURPOSES ONLY

DISTRIBUTION AGREEMENT

Between

[_____]

and

[_____]

Draft 1- for discussion purposes only



The Vertical Block Exemption Regulation (VBER)



Article 101 – Introducing the VBER

Commission Regulations

Commission Regulation (EU) 2022/720 of 10 May 2022 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). This Regulation entered into force on 1 June 2022.

- [Official Journal L 134, 11.5.2022, p. 4–13](#)

Commission Regulation (EU) No 461/2010 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 (MVBER), as amended by **Regulation (EU) 2023/822** of 17 April 2023.

- [Official Journal L 129, 28.5.2010, p. 52–57](#)
- [Official Journal L 102I, 17.4.2023, p. 1–2](#)

Guidelines on Vertical Restraints

Guidelines on Vertical Restraints (2022/C 248/01) setting out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union

Article 101 – Introducing the VBER

What is the VBER and Why does it Exist?

- Think of the VBER as a safe harbour for small-to-medium businesses. If your company and your distributor each have less than a 30% share of the market, and you avoid the worst types of restrictions, the EU assumes your deal is fine and does not investigate it. Above 30%, you are on your own and need to justify your deal.
- Where the market share of both the supplier and the buyer **falls below 30%**, and there are no **severe restrictions** on competition (such as fixed resale prices), it is presumed that the agreement will lead to an improvement in the market, with consumers ultimately benefiting.
- If the market share **exceeds the 30% threshold**, there is no automatic presumption of illegality, but companies must carry out their own assessment to determine whether the agreement restricts competition.
- ✓ Hotel: A hotel chain with a 20% share of the Maltese market signs an exclusive supply agreement with a local linen supplier who also has under 30% market share — likely within the safe harbour.
- ✓ Banking: A bank with a 25% share of the personal loans market agrees distribution terms with a broker network — potentially within the safe harbour, provided no hardcore restrictions apply.



Methodology for Assessment for Verticals

First, the companies involved need to **define the relevant market (RM)** in order to establish the market shares of the supplier and the buyer



If the MS of the supplier and the buyer are **each below** the 30% threshold, the vertical agreement is covered by the VBER subject to the **hardcore restrictions** and the conditions set out in the BER



If the relevant market shares of the supplier and the buyer are **above the 30%** threshold, it is necessary to assess whether the vertical agreement falls within Article 101(1).



If the vertical agreement falls within Article 101(1), it is necessary to examine whether it fulfils the conditions for legal exception under Article 101(3)

Hardcore Restrictions – The 4 Never Do Restrictions

- The VBER contains a "**blacklist**" of vertical restraints which, if included in a vertical agreement, will mean that the block exemption cannot apply (despite the fact that the market share threshold is not exceeded) (Article 4).
- There are certain things you must never put in a distribution agreement — no matter how small your company is, no matter how good your justification sounds. If you include even one of these, your **entire contract loses its legal protection**: there is no severability for hardcore restrictions for the purposes of the block exemption.
- Exemption: If a vertical agreement does not conform to the VBER criteria, it will not benefit from the block exemption — but it **does not necessarily follow that the agreement is automatically void or unenforceable**. The parties must first assess whether the agreement is likely to breach Article 101(1). If analysis shows it does not breach the prohibition, no further steps are needed. If it does fall within the prohibition, the parties must evaluate whether the benefits of the agreement justify the restrictions and whether it satisfies the conditions for individual exemption under Article 101(3).

Key Point: If you are involved in drafting, reviewing, or signing supply, distribution, franchise, or agency agreements — always flag any clause that fixes prices, restricts territories, or limits online sales to your legal team before the agreement is signed.



Hardcore Restrictions – The 4 Never Do Restrictions

Hardcore Restriction	Plain English	Sector Example
Resale Price Maintenance (RPM)	Telling your distributor what price to charge end customers	A hotel brand telling its franchisee it must charge exactly €180/night — illegal
Absolute territorial restrictions	Blocking a distributor from selling to customers who approach them from another country	A bank product provider telling its broker it cannot accept enquiries from customers in other EU states
Restrictions in selective distribution	Blocking authorised dealers from selling to each other	A hotel booking platform blocking one authorised travel agent from supplying another
Total online sales bans	Banning a distributor from selling on the internet altogether	A supplier telling its HR software reseller it cannot sell via its website or any online platform

The HARD CORE RESTRICTIONS (VBER)

Hard Core (1) – Resale Price Maintenance

Category	Allowed or Not Allowed?	What it Means in Practice	Sector Example
Fixed resale prices	NOT allowed	A supplier tells its distributor "you must charge exactly this price — no more, no less"	A hotel brand tells its franchisee it must charge exactly €150/night — illegal
Minimum resale prices	NOT allowed	A supplier tells its distributor "you must charge at least this price — you cannot go below it"	A bank product provider tells its broker network it cannot offer a loan arrangement fee below €200 — illegal
Maximum resale prices	Allowed	A supplier sets a ceiling — "you cannot charge the customer more than this" — but the distributor is free to charge less	A hotel chain caps the nightly rate at €300 to protect its brand reputation for value — permitted
Recommended resale prices	Allowed in principle — but watch out	A supplier suggests a price but the distributor is genuinely free to deviate from it without consequences	An HR software provider suggests a licence fee of €500/user but its resellers may discount freely — permitted
Recommended prices backed by threats or incentives	NOT allowed	A "recommendation" becomes illegal the moment the supplier punishes distributors who deviate or rewards those who comply	A supplier cuts off supply to any hotel booking platform that advertises below the "recommended" rate — illegal (this is what ASUS did)
Fixing a distributor's margin	NOT allowed	Controlling how much profit the distributor can make is equivalent to fixing the resale price	A bank tells its mortgage broker "your margin cannot exceed 0.5% — and no less either" — illegal
Setting a maximum discount	NOT allowed	Telling a distributor "you can only offer up to 5% off — no more" prevents genuine price competition	A hotel supplier tells its travel agent it cannot discount room packages by more than 10% — illegal
Minimum advertised prices (MAPs)	Risky — likely NOT allowed	Policies preventing retailers from advertising below a set price — even if the final sale price is lower — can infringe competition law if backed by sanctions	A banking product provider tells comparison websites they cannot display rates below a set figure — likely illegal if sanctions apply for non-compliance
Rebates conditional on price compliance	NOT allowed	Offering better supply terms, bonuses, or rebates only to distributors who stick to the supplier's preferred price level	A hotel chain gives preferred platform access or better commission rates only to booking sites that maintain its "floor" room rate — illegal
Monitoring distributor prices	NOT allowed (if used to enforce compliance)	Using pricing software or algorithms to track what distributors charge and then intervening to push prices back up —	A bank product provider uses price-monitoring software to identify brokers offering below the recommended fee



Imagine you find a laptop at Scan for €50 less than in every other shop. That is competition working for you. Now imagine the laptop manufacturer secretly threatened Scan with cutting off their supply unless they raised the price back up. That is illegal — and that is exactly what ASUS did.

The Commission found Asus, Denon & Marantz, Philips and Pioneer to have engaged in so-called **fixed or minimum resale** RPM by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products — such as kitchen appliances, notebooks, and hi-fi products.

- The manufacturers put pressure on ecommerce outlets who offered their products at low prices, writing, *“If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies.”*
- The Commission specifically pointed to the fact that the companies had **used sophisticated algorithms** to monitor the prices set by distributors, thereby allowing them to intervene quickly when there were price decreases.
- Asus in particular had **monitored retailers' resale prices** for certain computer hardware and electronics products and had intervened with retailers in two EU Member States (Germany and France) that were **selling their products below Asus's recommended resale prices**, and had asked them to increase their prices.
- The Commission concluded that this practice had had the effect of limiting effective competition, thus leading to higher prices for consumers.

Hard Core (2) Territorial or Customer Restrictions

First Things First: An Important Definition of Sales

Active sales involve some form of active targeting of a particular customer group or territory.

Passive sales consist of transactions in response to unsolicited requests from individual customers without having initiated the sales by means of active targeting of such customers.

Ex., Active selling = you went looking for the customer (e.g., you sent them an email, you paid for a Google ad targeting people in their city). Passive selling = the customer came to you (e.g., they Googled your product, found your website, and placed an order).

The EU says: a supplier can stop a distributor from actively hunting for customers in another distributor's territory. But it cannot stop the distributor from accepting an order that just landed in their inbox.

Active sales

- Actively approaching individual customers
- Sending direct mail
- Sending unsolicited e-mails
- Sales visits
- Actively approaching a specific customer in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer in that territory
- Online advertisement specifically addressed to certain customers
- Territory-based banners on third party websites
- Paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory

Passive Sales

- Responding to unsolicited requests from individual customers
- General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups, but which is a reasonable way to reach customers outside those territories (including customers in one's own territory)
- Using a website to sell products (in general, that is, unless it is specifically targeted at particular customers)
- A customer visiting the website of a distributor and contacting the distributor, leading to a sale, including delivery
- A customer visiting the website of a distributor and opting to be kept (automatically) informed by the distributor, leading to a sale. (Even if a distributor's website offers different language options, this does not change the passive character of such selling)



Hard Core (2) – Territorial or Customer Restrictions

Category	Allowed or Not Allowed?	What It Means in Practice	Sector Example
Banning all sales outside a territory (active AND passive)	NOT allowed — hardcore	An outright export ban is a direct territorial restriction and is prohibited	A hotel brand telling its Maltese franchisee it cannot under any circumstances sell to customers based in Italy — including those who find the website and enquire directly — is illegal
Restricting active sales outside an exclusively allocated territory	Allowed — under strict conditions	To protect efforts and investments made by exclusive distributors, the VBER accepts under strict conditions that other distributors may be obliged to refrain from active selling into the territory allocated to an exclusive distributor	A bank product provider appoints one exclusive broker for Malta and can prevent its other EU brokers from running targeted Maltese advertising campaigns — permitted
Restricting passive sales outside a territory	NOT allowed — hardcore	A supplier may not prohibit a distributor from filling unsolicited ("passive") orders requested by customers outside its territory	A hotel chain cannot tell its Sicilian partner to ignore or redirect booking enquiries it receives organically from Maltese customers — illegal
Up to 5 exclusive distributors per territory	Allowed	The VBER enables suppliers to appoint up to 5 distributors per exclusive territory or customer group	A bank product provider can appoint up to 5 exclusive brokers for the Maltese market — permitted under the VBER
Parallel imposition of active sales ban	Required for protection to work	The supplier must impose the active sales restriction on all its other buyers — not just some of them	If a hotel brand gives Malta exclusively to one franchisee, it must ban all other EU franchisees from actively targeting Malta — not just the German one
Roll-over of active sales ban to sub-distributors	Allowed	The supplier can oblige its exclusive distributors to pass their active sales ban on to their direct customers	A bank product provider's exclusive Maltese broker can be required to ensure its own sub-agents also do not actively target territories allocated to others
Reserving a customer group exclusively to the supplier	Allowed — but passive orders cannot be blocked	A supplier is permitted to reserve a customer group to itself (or to another distributor) consistent with the VBER, but a supplier cannot prohibit a distributor from filling unsolicited (passive) orders sought by customers in that group	A bank can reserve "global corporate" clients to its own direct sales team, but cannot stop its broker network from accepting an unsolicited enquiry from a global corporate that contacts the broker directly

Types of Territorial Restrictions

Direct obligations

- Obligation not to sell or supply certain customers or territories
- Obligation to refer orders from those customers to other distributors
- Export bans

Indirect measures aimed at inducing compliance/monitoring

- Refusal or reduction of bonuses or discounts
- Termination of supply
- Price discrimination – higher price for exported products
- Failure to provide EU-wide guarantee service

Quick Ex of Restrictions on Out of Territory Sales

“Football fans often cherish branded products from their favourite teams, such as jerseys or scarves. Nike prevented many of its licensees from selling these branded products in a different country, leading to less choice and higher prices for consumers. This is illegal under EU antitrust rules”

Margrethe Vestager, EU Commissioner

Commission fines **Nike** €12.5 million for restricting cross-border sales of merchandising products



Quick Ex of Restrictions on Out of Territory Sales

What Nike did wrong — applicable to any sector:

Nike's Practice	Why It Was Illegal
Contract clauses prohibiting out-of-territory passive (including online) and active sales; obligations to refer out-of-territory orders to Nike; clawing back royalties from out-of-territory sales ³¹	Absolute territorial restrictions covering both active and passive sales — hardcore
Threats to end agreements with licensees selling outside their allocated territories ³²	Indirect enforcement of territorial restrictions — equally illegal
From 2012, Nike began to restrict licensed merchandise from being marketed on websites accessible outside of the relevant licensee's allocated territory ³³	Online passive sales ban — hardcore

The Golden Rule: You can protect your exclusive distributor from being actively targeted by rivals. You can never build a wall around a territory that stops customers from the other side reaching out to you voluntarily.

An example of a French supplier and a Dutch distributor

The assignment of territory protection in a distribution agreement is not deemed to be a 'hardcore' restriction provided that 4 conditions are met. In that case a benefit can be obtained from the VBER. The cumulative conditions are:

1. Both the supplier and the distributor may not have a **market share** that exceeds 30%;
2. A geographic territory or block of customers must be **assigned exclusively** to a distributor(s);
3. **Active selling** may be prohibited, **passive selling** must be permitted;
4. The distributor must be protected against active selling by others (**parallel imposition**)

- i. a French supplier that distributes its products directly in France but that wishes to distribute its products in the rest of the EU via distributors, and
 - ii. a Dutch distributor that is assigned the Netherlands as an exclusive territory by the French supplier
-
- You have a vertical agreement between supplier and distributor;
 - So the VBER may apply depending on **market share**;
 - The VBER may apply provided there are no **Hard Core Restrictions**;
 - In this case one would have to assess the restriction by territory

I. The 1st condition for the VBER to apply: market threshold of 30% for supplier and distributor

- Firstly, the application of the block exemption requires that both the supplier and the distributor do not have a market share that exceeds 30%. If those market shares are exceeded, it will not be possible to benefit from the block exemption.

I. The 2nd Condition: Exclusive Assignment

- This means that the French supplier assigns the territory of the Netherlands exclusively to the (in this case Dutch) distributor (but up to five distributors)

III. The 3rd condition: active selling ✓ but passive selling ✗

- The French supplier must impose a prohibition on its other buyers other than the Dutch distributor with regard to preventing them from **actively selling** to customers in the Netherlands.
- E.g., If German distributor sells products via a website it is also prohibited from, for e.g., paying search engines to display its website when searches are made from the Netherlands (these are targeted forms of advertising)
- But the exclusive Dutch distributor will have to accept the **passive selling** by other distributors in its territory to Dutch customers or to its block of customers, since the French supplier is only able to restrict the active selling

IV. The 4th Condition: Parallel Imposition –

- This means that if the French supplier fails to prohibit active selling in the Netherlands by its other (European) distributors, the Dutch distributor is not protected against active selling in the Netherlands and the other distributors can simply acquire customers in the Netherlands. In effect and from a legal perspective, the Dutch distributor therefore has no exclusive territory, while this is what was agreed between the French supplier and the Dutch distributor
- In this example therefore, on the one hand, when for instance the French supplier prohibits the active selling in the Netherlands by German distributors, while that ban is not imposed on distributors from other MS, the competition between the German and all other distributors is restricted. German distributors are the only party specifically refused access to the Dutch market
- The French supplier will therefore do well to ensure that all agreements with distributors contain a parallel imposition or a prohibition on active selling in the Netherlands. If not, it runs the risk of being faced with a claim for compensation from the Dutch distributor, because the French supplier has not fulfilled what it should have done on the basis of the block exemption and the agreement: protect the Dutch distributor.

Hard Core (3) Selective Distribution System

Why does Chanel not sell its handbags in Lidl? Because they run a selective distribution system. Only boutiques that meet Chanel's standards (trained staff, appropriate store environment, luxury presentation) are allowed to sell Chanel products. This protects the brand's image — and the EU generally allows it, as long as the criteria are objective and applied equally to everyone who applies.

First things First – what is a SDS?

- **Why?** An SDS will typically be used by a supplier to achieve a consistent standard and quality of service in the outlets where the products are sold
- **What is an SDS?** In such a system, the supplier agrees to supply only those distributors who meet certain minimum (qualitative or quantitative) criteria. The distributors, in return, agree to supply only other “selected” or authorised distributors who are within the approved SDS OR end users
- **What products are eligible?** These systems are often used for the distribution of complex/technical consumer products or luxury/branded goods where there is a brand image to protect or where there is a need to preserve quality or to explain its use.

The Selection Criteria for an SDS

Examples of permitted qualitative criteria:

- Suitably trained staff
- To sell the products in a specialised shop or display
- Providing an after-sales service which is compliant with the product warranty

Examples of quantitative criteria which would be permitted:

- Buying a minimum quantity of goods
- Achieving a particular turnover
- Maintaining minimum stock

Hard Core (3) Resale by members of a SDS

Category	Allowed or Not Allowed?	What It Means in Practice	Sector Example
Restricting supply to authorised distributors and end users only	Allowed	In an SDS the supplier undertakes to sell the contract products, either directly or indirectly, only to distributors who satisfy certain objective criteria. ☐ Authorised distributors may not sell to unauthorised dealers	A luxury hotel brand can refuse to supply its branded amenities or loyalty programme access to any travel agent that has not been vetted and approved under its SDS
Restricting active and passive sales to unauthorised distributors	Allowed	Restriction on active and passive sales to unauthorised distributors ☐ is permitted	A bank product provider running an SDS can prevent its authorised brokers from supplying unvetted comparison website operators who are not part of the network
Restricting cross-supplies between members of the SDS	NOT allowed — hardcore	The supplier cannot restrict cross-supplies between the members of the SDS operating at the same or different levels of trade.	A hotel brand cannot stop one authorised travel agent from supplying another authorised travel agent within the same SDS — illegal, as confirmed in the Guess case
Restricting sales to end users by authorised retailers	NOT allowed — hardcore	The dealers in a selective distribution system cannot therefore be restricted as to the users to whom they sell, including via internet sales.	An HR software provider running an SDS cannot tell its authorised resellers they can only sell to certain types of end customers — the reseller must be free to sell to any end user
Restricting active sales by SDS members into an exclusively allocated territory	Allowed	Restriction of active sales by members of the SDS into a territory or to a customer group allocated by the supplier exclusively to a maximum of five exclusive distributors ☐ is permitted	A bank product provider can prevent its Maltese authorised broker from running targeted advertising campaigns in a territory it has allocated exclusively to another broker
Banning all internet sales by authorised distributors	NOT allowed — hardcore	The prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold, is prohibited.	A hotel brand cannot tell its authorised travel agents they may not sell its packages online at all — this is a total internet ban and cannot be remedied
Banning sales on specific third-party online marketplaces (e.g. Amazon, Booking.com)	Allowed in principle — subject to conditions	A marketplace ban neither restricts the customers to whom authorised distributors can sell, nor restricts	A luxury hotel brand can ban its authorised agents from listing on Booking.com, provided those agents

Guess and its SDS



- Guess, a US-based company active in the clothing, shoes and accessories sector, employed a selective distribution system at the wholesale and retail level of trade. It also sold its products online directly through its own online shop and as a seller on online marketplaces.
- Guess Europe sold the contract products only to distributors selected on the basis of specified selection criteria and, second, the selected distributors are prohibited from selling the contract products to other distributors not belonging to the selective distribution network = Guess Europe's distribution network fulfilled the criteria to qualify as a selective distribution system
- Guess had imposed various restrictions, including **restrictions on cross-border sales and online advertising**, which enabled the company to maintain artificially high retail prices, particularly in Central and Eastern Europe
- Cross network sales must not be restricted either among **authorised wholesalers, or among authorised retailers and wholesalers**

Guess and its SDS

The Commission fined Guess EUR 39.8 million for anti-competitive practices in its European selective distribution system

What Guess Did	Why It Was Illegal
Prevented wholesalers and retailers from cross-selling to each other by imposing outright sales restrictions, including obligations on wholesalers to ensure products "remained" within their territory, and restrictions on retailers on purchases across the selective distribution network ¹⁸	Restriction of cross-supplies between authorised SDS members — hardcore
Banned retailers from using or bidding on Guess brand names and trademarks as keywords in Google Ads — systematically applied whenever an authorised retailer asked for permission to use any of the Guess brand names or trademarks as keywords ¹⁹	Restricted findability and viability of online retailers — restriction of competition by object
Required authorised retailers to obtain explicit authorisation from Guess to conduct online sales, with no specified quality criteria and full discretion in deciding whether retailers were allowed to sell online ¹³	Used to protect Guess' own online sales and limit intra-brand competition — restriction by object
Imposed restrictions on active and passive sales by retailers to end users located outside their allocated territory ¹⁵	Created national market divisions — restriction by object

Hard Core (4) Online Sales

Category	Allowed or Not Allowed?	What It Means in Practice	Sector Example
Total ban on all internet sales	NOT allowed — hardcore and cannot be fixed	The internet must be available to all distributors, and a total restriction on the use of the internet is unlikely to be compliant with EU competition law. There is no fix for this restriction.	A hotel chain telling its franchise partners they cannot sell rooms online under any circumstances — this is a hardcore channel restriction. As seen in the AirCo hypothetical: there is no fix for this restriction, but a supplier can create guidelines for internet use.
Total ban on selling via third-party online marketplaces (e.g. Amazon, Booking.com)	Allowed in principle — subject to conditions	A marketplace ban neither restricts the customers to whom authorised distributors can sell, nor restricts passive sales to end users. A marketplace ban differs from an outright prohibition of the use of internet sales.	Third-party platform customers are not a definable customer group in terms of the VBER, so the ban did not exclude sales to a certain category of customers as a whole. Nor does it exclude passive online sales entirely, given that distributors could still sell through their own web shops or non-discernible third-party platforms such as price comparison websites. A luxury hotel brand can ban Booking.com listings — provided agents can still sell via their own websites.
Requiring prior authorisation for online sales with no clear criteria	NOT allowed	Guess favoured its own online shop by limiting the number of independent operators selling Guess products online. Authorised retailers were contractually obliged to first obtain explicit authorisation from Guess to conduct online sales. In addition, Guess did not specify quality criteria for online sales and had full discretion in deciding whether retailers were allowed to sell online.	A bank product provider requiring brokers to seek individual approval for every online sale with no clear standards and refusing approval at will — illegal.
Using the online approval process to protect the supplier's own online sales	NOT allowed	The Commission found that Guess sought to protect its online sales activities from intra-brand competition and to limit the retailers' ability to sell outside their territory and concluded	A hotel brand using its approval process to ensure its own website dominates online bookings, while making it difficult for authorised agents to sell online — illegal.

You have been requested to advise a client – Coty Germany GmbH (“Coty”), a supplier of cosmetic luxury products which operates a SD system;

It has a dispute with one of its authorized retailers in Germany Akzente

Akzente may:

- Sell via its own internet platform
- Sub-contract internet platform design to 3rd party
- But It cannot sell via Amazon.de

Can client impose a 3rd PARTY PLATFORM BAN?
Does client have any objective justifications?



Coty's Restriction	Allowed?	Why
Ban on selling via Amazon.de	Yes	Third-party platform customers are not a definable customer group in terms of the VBER, so the ban did not exclude sales to a certain category of customers as a whole. Nor does it exclude passive online sales entirely, given that distributors could still sell through their own web shops or non-discernible third-party platforms.
Selling via own website	Must be permitted	The ban on marketplaces is only lawful if the authorised distributor retains the ability to sell online through its own channels
Selling via price comparison websites (non-discernible platforms)	Must be permitted	Customers must still be able to find and access the authorised distributor's offer online

The Golden Rule: The EU allows a supplier to build a quality-controlled distribution network and protect it from being undermined by unauthorised dealers. What it will not allow is using the SDS as a tool to carve up markets, block online competition, or shield the supplier's own sales from rivalry within its own network.

If you are reviewing a distribution, franchise, or supply agreement and it contains clauses about who the distributor may or may not sell to, or how it may use the internet, flag it immediately for legal review before signing.

Issue	Coty (Allowed)	Guess (Not Allowed)
What the supplier did	Akzente could sell via its own internet platform, sub-contract internet platform design to a third party, but could not sell via Amazon.de.	Guess banned retailers from using or bidding on Guess brand names and trademarks as keywords in Google Ads, systematically applied whenever an authorised retailer asked for permission.
Was the internet still usable?	Yes — distributors could still sell through their own web shops or non-discernible third-party platforms.	No — this restricted the findability and ultimately the viability of the online retailers in Guess' selective distribution system.
Was this a hardcore restriction?	No — marketplace bans are not hardcore under the VBER.	Yes — the Commission concluded this constituted a restriction of competition by object within the meaning of Article 101(1) TFEU.
The key test	Did the distributor retain effective access to the internet as a sales channel?	Was the restriction designed to protect the supplier's own online sales at the expense of intra-brand competition?

Hotels: A luxury hotel brand can tell its authorised agents they may not list properties on Booking.com or Expedia — provided those agents retain the right to sell via their own branded websites.

An HR software provider can require its authorised resellers to meet quality standards in how products are presented and demonstrated online. What it cannot do is use those standards as a mechanism to shut resellers out of the internet altogether or to protect its own direct sales from intra-brand competition.

Outside the VBER

- If the vertical agreement does not conform to the criteria set out in the VBER, it will not benefit from the block exemption, **but it does not necessarily follow that the agreement is automatically void or unenforceable**
- In this situation, the parties must first legally assess whether the agreement is likely **to breach Article 101(1)**. If an analysis determines, on balance, that the agreement does not breach the prohibition, then the parties do not need to consider the matter any further
- If the agreement does fall within the prohibition however, the parties must go on to evaluate whether the benefits of the agreement justify imposing such restrictions on competition and whether the agreement satisfies the criteria for individual exemption as **set in Article 101(3)**

RECAP Quiz

Q1. May a supplier control the prices at which its distributor resells its products?

Q2. May a supplier influence resale prices in other ways, such as suggesting a minimum advertised price policy?

Q3. May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells?

Q4. Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Q5. May a supplier restrict or prohibit e-commerce sales by its distribution partners?



Applying the Competition Rules in Practice – Hypothetical Case



Hypothetical Case: AirCo Ltd

- AirCo produces basic screws for use in aircraft, which it sells in the US and has a global share of approximately 18%
- AirCo wishes to begin distributing in the EU, beginning with France and Germany only (and with the rest of EU reserved to itself)
- Its distributors will accept significant financial risk
- AirCo has the following initial objectives:
 - appoint one exclusive distributor in each of France and Germany. AirCo wishes to prohibit these distributors from making sales into another territory;
 - Its chosen distributors each have about 20% shares in their respective markets
 - Reserve “global” customers to itself (regardless of order origin)
 - Prohibit its distributors from using the Internet under any circumstances



Analysis of AirCo Strategy

- Article 101 applies: The agreement is between separate firms
- Possible exemptions/exclusions: Agency unavailable distributor accepts risk
- VBER – possible, assessment of market shares and specific restrictions required
- Unavailable if “hardcore” restrictions or if market shares exceeded
- Only limited availability if “excluded” restrictions are present
- If VBER unavailable, a full assessment under Article 101(3) is necessary

Application of the VBER

Market Share

- Market shares within VBER limits ($\leq 30\%$) AirCo has a global share of 18%
- AirCo's distributors each have approximately 20% share

Assessment of specific restrictions required

- Territorial restrictions as each distributor is only permitted to sell in its allocated territory
- Customer restrictions - AirCo reserves "global" customers to itself
- Channel restrictions - Distributors are not permitted to use the Internet under any circumstances

Application: Territorial Restrictions

- **Territorial restrictions under EU competition law - AirCo's territorial restriction is potentially 'hardcore' and would make the VBER unavailable and likely cause the agreement to infringe Art. 101**
- Why is AirCo's restriction potentially "hardcore"? A supplier may prohibit a distributor from "actively" seeking sales outside its territory
- BUT a supplier may not prohibit a distributor from filling unsolicited ("passive") orders requested by customers outside its territory
- Potential fix to enable AirCo to confer maximum exclusivity, while still applying the VBER (or reducing risk of infringing Article 101) AirCo can prohibit its distributors in France and Germany from making "active" sales outside of France and Germany, but not from filling unsolicited orders (including over the Internet)

Application: Customer Restriction

- **Customer restrictions - This restriction is potentially hardcore. A supplier is permitted to reserve a customer group to itself (or to another distributor) consistent with the VBER and, more broadly, EU competition law**
- Why is AirCo's customer restriction potentially hardcore? Because it threatens a distributor's ability to fill passive orders, which creates risks to the single market
- BUT a supplier cannot prohibit a distributor from filling unsolicited (passive) orders sought by customers in that group
- Potential fix to enable AirCo to reserve global customers, while still applying the VBER (or reducing risk of infringing Article 101) - AirCo can reserve to itself global customers, but it cannot prohibit its distributors in the EU from filling unsolicited orders from these customers

Application: Channel Restriction

- **Channel restrictions under EU competition law - This restriction is hardcore**
- Why is AirCo's Internet restriction hardcore? - The Internet must be available to all distributors, consistent with the VBER and a total restriction on use of the Internet is unlikely to be compliant with EU competition law
- There is no fix for this restriction, but AirCo can create guidelines for Internet use. If AirCo wishes to benefit from the VBER (and avoid infringing Article 101) it must not prohibit its distributors from using the Internet
- AirCo can impose reasonable guidelines on how its distributors use the Internet

AirCo Conclusions

- To ensure that the VBER is available, AirCo should amend its restrictions as follows:
 - Territories: AirCo can appoint an exclusive distributor for France and one for Germany. In this context, “exclusive” means that each distributor can be prohibited from making active sales outside of its territory, but not from filling passive (unsolicited) orders
 - Customers: AirCo can reserve global customers to itself, but it cannot prohibit its distributors from filling passive (unsolicited) orders received from these customers
 - Channel: AirCo cannot prohibit its distributors from using the Internet to sell its products, but it can introduce reasonable quality standards



AirCo Conclusions

AirCo's Plan	Is it Allowed?	Why?
Exclusive distributor per country, no sales into other territories	Partly — active sales ban only	Can ban active sales outside territory, but not passive orders
Reserve "global" customers to itself	Partly	Can reserve customers but cannot block passive orders from them
Total ban on internet sales	No	The internet must remain available to all distributors — a total ban is hardcore and cannot be fixed



Diploma in Law (Malta)



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