



Q&A: vertical agreements in European Union

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European Union | August 8 2025

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Vertical agreements

Special rules and exemptions

Do any special rules or exemptions apply to the assessment of anticompetitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

The standard EU competition rules apply to the assessment of such agreements: there are no special rules or exemptions for digital agreements.

Following a comprehensive four-year review and consultation process, the Commission adopted the revised Vertical Block Exemption Regulation (VBER) and Vertical Guidelines, which came into force on 1 June 2022.

Online sales bans

How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

The Commission has not brought any specific enforcement actions with regard to absolute bans of online sales. There is, however, EU Court jurisprudence, primarily *Coty* (2017) and *Pierre Fabre* (2011).

In *Pierre Fabre*, a cosmetics supplier had restricted its distributors to selling its products only in a physical store where a pharmacist was present (ie, it was a de facto absolute ban on online sales). The Court of Justice of the European Union (CJEU) held that such a ban has the object of restricting competition (it was, in effect, a ban on passive sales) and will be in breach of article 101(1) of the Treaty on the Functioning of the European Union (TFEU) unless it can be objectively justified.

Coty concerned a seller of luxury cosmetic goods that prohibited its authorised distributors from selling online other than via the distributor's online store, to ensure that the luxury character of the products was preserved offline and online (it was not an absolute ban). The CJEU held that, in the context of a selective distribution system, a ban on selling through third-party platforms does not infringe article 101(1) TFEU provided that the following conditions are met:

- the objective of the restriction is to preserve the luxury image of the goods concerned;
- it is applied objectively and in a nondiscriminatory manner; and
- the restriction is proportionate and does not go further than necessary.

The CJEU thus treated the ban as a qualitative restriction necessary to protect the image of the goods concerned rather than as a restriction of the customers to whom authorised distributors could sell the luxury goods or as a ban of passive sales to end users, which would be in breach of article 101(1) TFEU and amount to a restriction of

competition by object. The CJEU's references to 'luxury' arise from the facts of *Coty*; however, the judgment provides the framework for analysis of online sales bans for other products (see the Commission's Competition Policy Brief, April 2018).

The above case law is reflected in the Commission's revised VBER and Vertical Guidelines (June 2022). In particular, it recognises that significant developments in e-commerce have taken place since the original VBER and Vertical Guidelines were adopted in 2010, and no longer treats the majority of online sales restrictions as passive sales restrictions and recognises that online sales and brick-and-mortar shops are inherently different in nature.

The revised VBER and Vertical Guidelines reflect the *Coty* and *Pierre Fabre* case law. A new hardcore restriction has been added to article 4(e) VBER for agreements that have the object of preventing the effective use of the internet by the buyer or its customers to sell the contract goods or services, including restrictions that have the object of preventing the use of one or more entire online advertising channels. This is without prejudice to the possibility of imposing other online sales restrictions on the buyer or restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel.

The Vertical Guidelines set out a framework for the assessment of online sales restrictions. The following are examples of restrictions that indirectly prevent the effective use of the internet and will therefore qualify as hardcore restrictions (paragraph 206):

- requiring the buyer to prevent customers located in another territory from viewing its website or online store or to reroute customers to the online store of the manufacturer or another distributor;
- requiring the buyer to reject payments using a credit card address outside its territory;
- requiring sales to be made in a physical space or in the physical presence of specialised personnel; and
- prohibiting the buyer's use of the supplier's trademarks or brand names on its website or online store.

Examples of requirements relating to online sales that can benefit from the safe harbour of the VBER include (paragraph 208):

- quality requirements;
- requirements regarding the display of the contract goods or services in the online store;
- a direct or indirect ban on the use of online marketplaces;
- requirements to operate an offline store; and
- requirements to make a minimum absolute volume of sales offline (but not as a proportion of total sales) to ensure the efficient operation of the offline store.

The new definitions of active and passive sales restrictions set out in article 1(1) VBER and the Vertical Guidelines (paragraphs 202-210) also clarify the type of online restrictions that qualify as active sales restrictions and can therefore be imposed in order to protect exclusive and selective distributors, and passive sales restrictions that should not be imposed. Forms of passive selling include setting up an online store, the use of search engine optimisation to improve visibility or ranking of the online store, and offering an app in an app store are all forms of passive selling. By contrast, offering a language option in an online store that is different from the language commonly used in the territory of the seller, establishing an online store with a top-level domain relating to a territory different from that where the seller is established, and targeted advertising or promotions are all a form of active selling and can be prevented in order to protect exclusive or selective distributors.

Resale price maintenance

How has the competition authority in your jurisdiction addressed online resale price maintenance?

In June 2023, the CJEU set out the framework for analysis of resale price maintenance (RPM) under EU competition law in its *Super Bock* judgment.

Under EU law, RPM practices are generally a hardcore restriction of competition. In its e-commerce sector inquiry and staff working paper evaluating the VBER, the Commission identified that increased price transparency and easier price monitoring online (including the use of automatic software programs), which are increasingly common, have made it easier for manufacturers to monitor and enforce RPM, which may exacerbate the negative effects of RPM.

RPM remains a hardcore restriction under the revised VBER (article 4). The Vertical Guidelines now make it clear that imposing minimum advertised prices (MAPs) prohibiting distributors from advertising prices below a certain amount set by the supplier also qualifies as indirect RPM. Although distributors remain free to sell at prices that are lower than those advertised, the Commission considers that distributors are disincentivised from doing so by restricting their ability to advertise available discounts. However, the guidelines recognise that MAPs may nonetheless meet the conditions of article 101(3) TFEU and benefit from an individual exemption, where they are used to prevent a particular distributor from using the product of a supplier as a loss leader (paragraphs 189 and 197).

Traditionally, national competition authorities (NCAs), rather than the Commission, scrutinised RPM agreements. However, in July 2018, the Commission fined consumer electronic companies Asus, Denon & Marantz, Philips and Pioneer a total of €111 million for imposing fixed or minimum resale prices on online retailers. These companies also used algorithms to monitor price levels and blocked supplies to retailers offering their products at low prices.

Geoblocking and territorial restrictions

How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

The EU Geo-blocking Regulation prohibits unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment. Under the regulation, a supplier cannot contractually prohibit a retailer from responding to unsolicited customer requests (ie, passive sales), in specific situations covered by the regulation.

Territorial restrictions more generally (and not specific to the digital sector) are covered by article 101 TFEU, with the VBER containing a safe harbour for certain territorial restrictions. The Vertical Guidelines provide a framework for the assessment of such restrictions.

In terms of enforcement, this is an area in which the Commission has been increasingly active recently (in particular following its e-commerce sector inquiry). In 2018, it fined Guess for, among other things, restricting retailers in its selective distribution system from certain online selling and advertising activities and from selling cross-border to consumers in other member states. In 2019 and 2020, it fined Nike, Sanrio and NBC Universal for restricting sales of licensed merchandising products consisting of one or more of:

- direct measures restricting out-of-territory sales by licensees (eg, clauses explicitly prohibiting these sales and obligations to notify out-of-territory sales to the licensor);
- direct measures restricting online sales;
- indirect measures to implement or encourage compliance with the sales restrictions (eg, threatening licensees with ending their contract if they sold out-of-territory and carrying out audits);
- an obligation on licensees to pass on the out-of-territory sales restrictions to their customers; and
- direct measures restricting sales beyond allocated customers or customer groups.

In February 2020, the Commission fined Meliá for discriminating between customers based on their place of residence in its hotel accommodation agreements with tour operators.

In January 2021, the Commission fined Valve and five game publishers (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax) €7.8 million for geoblocking practices. The Commission found that Valve and game publishers had restricted cross-border sales of certain PC video games based on the geographical location of users within the European Economic Area (EEA). Valve subsequently appealed the Commission's decision to the General Court, which on 27 September 2023 upheld the Commission's decision. The judgment emphasised the anti-competitive nature of geo-blocking and territorial restrictions used to prevent parallel imports within the European Union and rejected the need for an effects analysis, despite the novelty of the methods used.

In November 2024, the Commission alongside the Consumer Protection Cooperation Network of national consumer authorities notified Apple of several potentially prohibited geo-blocking practices on certain Apple Media Services including on the App Store and iTunes Store. Specifically, with respect to online access, it is alleged that Apple Media Services has a different interface for different EU/EEA countries, and consumers are only allowed to use means of payment issued in the country where they registered their Apple account. Consumers are also not allowed to download the apps offered in other countries. Margrethe Vestager (Executive Vice President for a Europe Fit for the Digital Age) commented that:

We are stepping up the fight against geo-blocking. No company, big or small, should unjustly discriminate customers based on their nationality, place of residence or place of establishment. Preventing geo-blocking helps consumers access the goods and services they want across Europe and strengthens the functioning and integrity of our Single Market.

On 11 February 2025, the Commission launched a review of the Geo-blocking Regulation, publishing a call for evidence. The Commission will launch a public consultation during 2025 and aims to complete its review by the end 2025.

Platform bans

How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

The EU competition law framework for assessing online sales bans has been set out by the CJEU in *Pierre Fabre* (2011) and *Coty* (2017), the latter arising from a supplier's ban on a distributor selling on Amazon's marketplace. Indeed, in *Coty*, the CJEU held that a restriction within a selective distribution system that pursues a legitimate objective is lawful under article 101(1) TFEU only if the quality criteria are laid down 'uniformly' and 'not applied in a discriminatory fashion'.

In 2018, the Commission fined Guess for restricting retailers in its selective distribution system from, inter alia, selling online without a prior specific authorisation by Guess. Guess had full discretion for this authorisation, which was not based on any specified quality criteria. The Commission concluded that this constituted a restriction of competition by object. Bans on online sales, or restricting sales to certain platforms, were included in some of the agreements in Sanrio and NBC Universal, but the Commission analysed those as part of wider restrictions on out-of-territory sales.

The Commission's revised Vertical Guidelines permit wider restrictions than the previous guidelines, including that:

such restrictions may range from a total ban on the use of online marketplaces to restrictions on the use of online marketplaces that do not meet certain qualitative requirements. For instance, suppliers may prohibit the use of marketplaces on which products are sold by auction, or they may require buyers to use specialised marketplaces, in order to ensure certain quality standards regarding the environment in which their goods or services may be sold. The imposition of certain qualitative requirements may de facto ban the use of online marketplaces because no online marketplace is capable of meeting the requirements. This may be the case, for example, where the supplier requires that the logo of the online marketplace is not visible, or it requires that the domain name of any website used by the retailer contains the name of the retailer's business.

However, such restrictions must not amount to a de facto ban on all online sales (see paragraphs 334 and 335 of the Vertical Guidelines).

Targeted online advertising

How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

A part of the conduct for which the Commission fined Guess in 2018 was restricting retailers in its selective distribution system from bidding on the Guess brand name in sponsored search auctions. This helped maximise traffic to Guess' own website. The Commission concluded that, assessed in context, this online search advertising restriction had as its object the reduction of authorised retailers' ability to advertise and ultimately sell the contract products to customers, in particular outside their contractual territory or area of activity, and this limited intra-brand competition. As such it was a restriction of competition by object.

This is reflected in the Commission's revised Vertical Guidelines (paragraphs 206-210), which note that besides a direct prohibition of the use of the internet to sell the contract goods or services, examples of obligations that indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers include:

- 'prohibiting the buyer from using the supplier's trademarks or brand names on its website or in its online store; and
- prohibiting the buyer from using an entire online advertising channel, such as search engines or price comparison services, or restrictions that indirectly prohibit the use of an entire online advertising channel, such as the obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction on providing price-related information to price comparison services'.

However, a seller can require that the buyer does not use the brand name of the supplier in the domain name of its online store.

Most-favoured-nation clauses

How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

The Commission's e-Commerce Inquiry concluded that most-favoured-nation (MFN) clauses are not hardcore restrictions and must be analysed on a case-by-case basis. Its Special Advisers' Report recognised that MFN clauses may have both pro- and anticompetitive consequences and that their effects depend on the particular characteristics of the markets. It noted that, due to the very strong network externalities (especially in multisided platforms), incumbency advantage is important and strict scrutiny is appropriate. It flagged that any practice aimed at protecting the investment of a dominant platform should be minimal and well targeted. While recognising that case-by-case analysis is required, the report suggested that if competition between platforms is

sufficiently vigorous, it could be sufficient to ban 'wide' MFN clauses (those that prevent sellers on a platform from price differentiating between platforms); but if competition between platforms is weak, there could also be a need to ban 'narrow' MFN clauses (those that prevent sellers from offering lower prices on their own websites).

In June 2015, the Commission opened an investigation into Amazon's use of MFN clauses in distribution agreements with e-book publishers in Europe. These required publishers to offer Amazon favourable (or, at the very least, similar) terms and conditions (ie, on price, promotions and distribution models) to those offered to its competitors, and obliged publishers to inform Amazon about more favourable terms given to competitors. In May 2017, the Commission accepted commitments from Amazon not to enforce or introduce these clauses for a five-year period. Shortly before that, in April 2017, the Commission published the results of a monitoring exercise it conducted together with 10 NCAs into the effects of changes to MFN clauses in the online hotel booking sector (where the NCAs have been active).

The Commission's enforcement experience indicated that not all parity clauses can be assumed to generally meet the conditions of article 101(3) TFEU. The revised VBER reflects this by providing that the block exemption will not apply to:

any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions using competing online intermediation services (article 5(1)(d)).

This means that cross-platform (ie, wide) retail parity obligations will now require an individual assessment under article 101 TFEU. The revised Vertical Guidelines provide further guidance on the factors to be considered when carrying out such assessment (paragraphs 356-378).

All other parity obligations, including narrow retail parity clauses and wholesale parity obligations, would generally continue to benefit from the safe harbour provided by the revised VBER. However, under the new article 6 of the revised VBER, the Commission may withdraw the benefit of the exemption where it finds that a vertical agreement is incompatible with article 101(3) TFEU. This means that narrow retail MFN clauses are not entirely risk-free, although they will generally benefit from the safe harbour.

On 19 September 2024, the CJEU issued a preliminary ruling in a referral made by the Amsterdam District Court in the context of a dispute between Booking.com and several German accommodation providers. The CJEU was asked whether wide and narrow price parity clauses in agreements between Booking.com's online hotel platform and accommodation service providers qualify as ancillary restraints and therefore fall outside the scope of article 101(1) TFEU (the German competition authority (upheld by the Federal Court of Justice) had held that Booking.com's wide and narrow parity clauses restricted competition on the market for the provision of hotel accommodation services and were in breach of EU competition rules. The CJEU concluded that price parity clauses (both wide and narrow) are not objectively necessary for the implementation of Booking.com's online hotel booking platform and are not proportionate to the objectives pursued by the platform. The price parity clauses do not qualify as ancillary restraints and are caught under the article 101(1) TFEU prohibition.

Article 5(3) of the Digital Markets Act (DMA) prohibits designated 'gatekeepers' from imposing narrow or wide MFNs on the business users of those 'core platform services' listed in their designation decisions. It is noteworthy that Booking.com has been designated as a gatekeeper under the DMA.

Multisided digital markets

How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

The Commission has considered vertical restraints in multisided digital markets in various reports (eg, the E-commerce Sector Inquiry and Special Advisers' Report), as well as in cases such as *Amazon e-books*. In terms of efficiencies, these can be raised by parties under investigation, in which case they would be assessed by the Commission. However, its Special Advisers' Report acknowledges that:

because of the innovative and dynamic nature of the digital world, and because its economics are not yet completely understood, it is extremely difficult to estimate consumer welfare effects of specific practices.

Other issues

Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

In July 2021, the Commission closed its investigation into exclusivity provisions in agreements of airline booking system providers Amadeus and Sabre without a finding of infringement. It had been concerned that the parties' agreements with their customers (airlines and travel agents) may restrict those customers from using other suppliers of ticket distribution services, in breach of article 101 TFEU. However, it concluded that the evidence it collected was not sufficiently conclusive to justify pursuing the investigation further.

The rapid developments and partnerships in the AI sector have also led to the Commission scrutinising agreements between key players. For example, having concluded that it did not have jurisdiction to review the partnership between Microsoft and OpenAI under the EU Merger Regulation, the Commission is examining the exclusivity arrangements between the parties. To date the Commission has not opened a formal investigation.

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