VBER – Exclusive Distribution Agreements

16th EU-China Competition Week
Beijing, 15 March 2018

Prof. Dr. Stephan Simon¹
Senior Expert Mergers/
Case Manager
Directorate F- Services
DG Competition

¹ The views expressed are those of the author and cannot be regarded as stating an official position of the European Commission. These slides are part of a presentation and cannot be fully understood separately from that presentation. Ideas presented here are intended to promote further discussion and analysis. They may not represent a complete or well-articulated picture of the author’s view.
Block Exemptions – Legal framework

Legal basis: Art. 103 TFEU + Council empowerment regulations

Concept

- Block exemption regulations (BER) determine in general terms for certain kinds of agreements under what circumstances these agreements will generally qualify for exemption under Art. 101 para. 3 TFEU.
- The block exemptions create a more or less safe harbour for companies. As long as they can bring their agreements under the provisions of a block exemption they can be certain that their agreements are valid and do not trigger fines.
- Oversimplified, the block exemptions are a combination of market share thresholds and the specification of hard core restraints, so called black clauses, which make the entire contract void.

Do not define a particular contractual model or regulate contractual relations between parties

There is no such thing as breaking the law if BER is not complied with
Block Exemptions – No more work for us?

➢ Self-assessment is the rule
  - Companies do a self-assessment whether
    1) Agreement not caught by Art. 101
    2) A BER applies
    3) No BER applies but 4 cumulative conditions of 101(3) are fulfilled

➢ Commission still active, either ex-officio or through a complaint
  - Example: Airline Alliances (oneworld, STAR, SkyTeam JVs)

➢ Art. 10 of Reg. 1/2003: Inapplicability
Block Exemptions – VBER

➢ Relevant BER for Distribution agreements
  - BER 330/2010 Vertical Agreements, plus Guidelines

➢ Market share threshold of 30%: benefit of BER depends not only on the supplier’s market share, but also the buyer’s market share:
  - Not only suppliers, but also distributors may have market power (e.g. supermarkets) => coverage by the BER should also depend on buyer’s market share
  - For supplier: share on the market where supplier sells contract products to the buyer
  - For buyer: share on the market where buyer purchases the contract products from the supplier
VBER – Exclusive Distribution

➢ Suppliers grants exclusivity to distributor in a particular territory

- Exempted if market share of both supplier and distributor does not exceed 30%
- Can also be combined with single branding
- Other retailers barred from actively selling in exclusive territory
- Loss of intra-brand competition

➢ Becomes hardcore if combined with passive sales ban

- So-called absolute territorial protection (ATP), Article 4 (b)
- Outside 101(1) for first 2 years if otherwise new entry not possible (Para. 61 Guidelines)
VBER – Dealer Exclusivity

➢ Dealer must only carry suppliers brand

❑ Also called non-compete obligations, single branding, or exclusive dealing
❑ Risk for competition: Customer foreclosure of competing brands
❑ Accepted for up to 5 years if market shares do not exceed 30% (Art. 5 (1)a)
❑ Up to 80% not considered dealer exclusivity (Art.1 (1) d)
❑ Single Branding can fall outside the safe haven also if network effects leading to foreclosure (Delimitis-judgment)
Single Branding as an Art. 102 problem

➢ Obliging/enticing the customer to exclusively source from one supplier against special rebates has led to an array of cases under Art. 102

❑ Prokent/Tomra
❑ Intel
❑ Qualcomm

➢ In all these cases market share of supplier well beyond 30%