The new VBER viewed from the perspective of the United Kingdom, Switzerland, and Turkey

Pim Jansen[*]

Kiran Desai[**]

Leonie van der Laag[***]

keywords to be inserted by the indexer

Introduction

EU competition law and policy, including the treatment of "vertical restraints", has an important international dimension.[1] At its core, this is a direct consequence of the fact that many companies operate across borders and, in many cases, are located in multiple countries. This cross-border element means that companies are subject to multiple competition law regimes, which may differ in terms of procedure and substance. It also means that the conditions of competition within a particular jurisdiction can be influenced from abroad. The "doctrine of extraterritorial effect", according to which conduct or practices which occur outside the European Union (EU) may fall within the scope of arts 101 and 102 Treaty on the Functioning of the European Union (TFEU) if they are capable of affecting trade between Member States, has been developed in the EU to take account of this.[2]

The reality of multiple regimes and the extraterritorial effect of EU competition law lead to legal uncertainty and higher transaction costs. Such costs can be reduced through co-operation and co-ordination between competition authorities. As competition policy and trade policy are two of the areas where the EU has exclusive competence, the European Commission (Commission) is in the driving seat when it comes to co-ordination with non-EU countries. In his mission letter to Commissioner for Competition Margrethe Vestager, dated 1 November 2014, the former President of the Commission, Jean Claude Juncker, asked Vestager to focus on "[m]aintaining and strengthening the Commission's reputation worldwide and promoting international cooperation in this area".[3]

This co-operation can first and foremost take the form of bilateral or multilateral agreements.[4] With regard to a number of countries, such as the United States (US), Canada, Japan, South Korea, and Switzerland, the EU has concluded dedicated competition co-operation agreements.[5] Another aspect of the international dimension of EU competition law concerns its role in the EU's relations with its neighbours, in particular in the agreements with candidate countries, such as Turkey, and with the United Kingdom (UK) as a result of Brexit.[6]

Against the background of this international dimension of competition law and policy, this article examines the EU's new Vertical Block Exemption Regulation (new VBER) and the new Vertical Guidelines (new Guidelines), which require companies to (re)assess their distribution contracts, from the perspective of the United Kingdom, Turkey, and Switzerland. We will focus specifically on the questions of what procedural and/or substantive co-ordination has taken place compared to the previous vertical block-exemption regulation and its guidance (the "previous EU rules"). Subsequently, this contribution will discuss some practical consequences of the new VBER and the new Guidelines from the perspective of these countries.

The new VBER viewed from the United Kingdom

Introduction

EU competition law is as of 31 December 2020 no longer a part of the laws of the United Kingdom. However, the old VBER continued to apply because of a combination of the operation of the European Union (Withdrawal) Act 2018 (EUWA) and the Competition (Amendment etc.) (EU Exit) Regulations 2019, as amended by the Competition (Amendment etc.) (EU Exit) Regulations 2020. On 1 June 2022 the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (UK VABEO)

[*] Pim Jansen is Associate Professor at Erasmus School of Law and an attorney at law at Van Doorne.
[**] Kiran Desai is an attorney at law at Shoosmiths where he heads the Brussels office.
[***] Leonie van de Laag is an attorney at law at Van Doorne. We are very grateful to Michael Schmassmann of Swiss law firm Walder Wyss.com for his kind input on Swiss competition law and policy. Similarly, we are very grateful to Togan Turan of the Turkish law firm Paksoy for his kind input on Turkish competition law and policy.
[1] See for a detailed discussion I. van Bael and J. Bellis (eds), *Competition Law of the European Union*, 6th edn (Kluwer, 2021), p.153 and further.
[2] To determine whether the Commission (or a national competition authority) has jurisdiction over behaviour taking place outside the EU, EU authorities take account of three different doctrines: the "economic entity doctrine", the "effects doctrine", and the "implementation doctrine".
[3] Jean-Claude Juncker, "Mission Letter" (1 November 2014), available at: *https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/vestager_en.pdf*.
[4] van Bael and Bellis (eds), *Competition Law of the European Union*, 6th edn (2021), p.154.
[5] For a list of these dedicated competition cooperation agreements, see EC, "Dedicated competition cooperation agreements", available at: *https://competition-policy.ec.europa.eu/international/legislation/dedicated-competition-cooperation-agreements_en*.
[6] van Bael and Bellis (eds), *Competition Law of the European Union*, 6th edn (2021), p.154.

came into force.[7] Below we address the UK VABEO and the associated guidance (Guidance)[8] issued by the Competition and Markets Authority on 12 July 2022.

Retained EU law

The EUWA provides for the retention of most EU law, as it stood on 31 October 2019, by "converting" or "transposing" it into a freestanding body of domestic law, called "retained EU law". Section 60A(2)(b) Competition Act 1998 (CA98) provides that the CMA and UK courts will be bound by an obligation to ensure consistency with EU competition case law that pre-dates the end of the Transition Period. In accordance with s.6(3) to 6(6) EUWA, any question as to the validity, meaning or effect of unmodified retained EU law is to be decided, so far as they are relevant to it, in accordance with any case law and general principles of the Court of Justice of the EU established by 31 December 2020. In accordance with s.60A(3) CA98, in determining any such question, the CMA must also have regard to any relevant decision or statement of the European Commission prior to 31 December 2020 unless it has been withdrawn. The UK VABEO and EU's new VBER and their respective guidance documents are to a large extent similar. As set out above, it is also the case that the EU's new VBER and the new Guidelines are largely similar to the previous EU rules. Consequently, in interpreting the UK VABEO and the Guidance, considerable reliance can be placed on interpretation of the previous EU rules, namely, on retained EU law. This statement is underlined by the CMA's own view, as expressed in its draft of the Guidance:

> "Recognising that the EU Guidelines on Vertical Restraints (and their previous versions) have applied in the UK for a significant period of time, the Draft Guidance broadly reflects the guidance set out in the EU Guidelines on Vertical Restraints, amended as necessary in the light of differences between the UK and the EU and between the Block Exemption and the European Commission's proposed new Vertical Agreements Block Exemption Regulation. The CMA has taken this position to avoid so far as possible creating legal uncertainty for businesses, particularly those which operate in both the UK and the EU".[9]

This quotation from the CMA suggests the CMA will in its interpretation of the UK VABEO take account of interpretive developments of the new VBER. This is underlined by the fact that the Guidance has to a large extent the same wording as the new Guidelines.

This section of the article addresses the differences between the UK VABEO and the Guidance, compared to the new VBER and new Guidelines. Unless otherwise stated, the reader may assume the EU rules are the same or similar. Consequently, this section does not address new aspects that are common to both the UK VABEO and the new VBER. For example, the new VBER contains a new hardcore restriction provision such that the new VBER does not apply to an agreement that has as its object the prevention of the effective use of the internet by a buyer (new VBER art.4(e)). In the UK VABEO there is a very similar provision.[10]

Scope

The UK VABEO applies to agreements that fall within the scope of s.2 of the CA98 (that is, agreements etc. preventing, restricting or distorting competition (Chapter 1 prohibition)). The UK VABEO applies from 1 June 2022 to 1 June 2028.[11] A transitional provision ensures that the Chapter 1 prohibition of anti-competitive agreements does not apply for 12 months (so not before 1 June 2023) to pre-existing agreements which satisfied the conditions for exemption provided for in the previous EU rules.[12] Like the EU rules, the UK VABEO does not apply if the conditions relating to market share or inclusion of hardcore restrictions are not met, or if the vertical agreement contains an excluded restriction which is not severable from the agreement.[13] Additionally, unlike the new VBER, under the UK VABEO where the market share of a party increases and subsequently exceeds 35%, exemption will continue to apply for only one year from the date this threshold was passed.[14]

Dual distribution and information exchange

Like the EU rules, the UK VABEO does not apply to vertical agreements between competitors. Also, like the EU rules, by way of exception the UK VABEO does apply if the buyer does not compete with the supplier at the (upstream) level of trade at which the buyer acquired the goods. Thus, for example, a supplier might import and sell product X at the wholesale and retail levels. Its agreement with the buyer which operates at the retail level could benefit from the block exemption. Such agreements are referred to as dual distribution agreements.

It may be that information is exchanged between the supplier and the buyer in a dual distribution agreement for the operation of the agreement. Under the EU rules this exchange of information is only permitted under the new VBER to the extent the information is directly related to the implementation of the vertical agreement and is

[7] UK Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022/516).
[8] CMA, "Vertical Agreements Block Exemption Order Guidance".
[9] CMA, "Vertical Agreements Block Exemption Order Guidance", para.1.3.
[10] UK Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 art.8(6)(a).
[11] By contrast, the VBER expires 31 May 2034.
[12] Commission Regulation No. 330/2010 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 [2010] OJ L102/1.
[13] UK Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 arts 6, 8 and 10.
[14] UK Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 art.7(3).

necessary to improve the production or distribution of goods or services. The new Guidelines provide non-exhaustive lists of the types of information that are likely to fall within or outside the new VBER. The UK VABEO does not expressly reference information exchange in the context of dual distribution agreements. However, the Guidance does describe the topic and, like the new Guidelines, provides non-exhaustive lists of the types of information that are likely to fall within or outside the UK VABEO. The precise words used in the relevant UK and EU documents are slightly different, but it would not seem that in practice there would be an interpretive difference on this point between the UK VABEO and the new VBER.

Parity clauses

As is the case under EU rules, the existence of so-called hardcore restrictions in an agreement means the UK VABEO does not apply. One example of a hardcore restriction in the UK VABEO is a "wide retail parity obligation". A "parity obligation" is a most favoured nation clause or MFN. A "wide retail parity obligation" is any clause which ensures that the prices or other terms and conditions at which the supplier's goods are offered to the buyer are no worse than those offered by the supplier to end users through another sales channel. It follows that from the end user's perspective, there is no guarantee that the online hotel booking platform X has the lowest prices, and the end user may wish to shop-around for a better deal.

It is important to note that a "wide retail parity obligation" is only problematic where one party to the agreement is active at the retail level. An obligation with the same effect imposed, for example, between an importer and a wholesaler would not be regarded as a hardcore restriction.

The qualification of a wide retail parity obligation as a hardcore restriction contrasts with the situation under the new VBER. As already identified, under the latter, only the existence of a so-called across-platform retail parity obligation is an issue. It is then not considered to be hardcore but is excluded from exemption under the VBER.[15]

Non-compete obligations

The exemption provided by the UK VABEO does not apply to any non-compete obligation the duration of which is indefinite or exceeds five years. This includes a non-compete restriction that is tacitly renewable beyond a period of five years.[16]

This contrasts with the situation under the new VBER, where tacitly renewable non-compete clauses are permissible, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable period of notice and at a reasonable cost.[17]

Territorial and customer restrictions

As was the position under the previous EU rules, the UK VABEO provides that where the supplier operates an exclusive distribution system, a restriction on the buyer's ability to sell, actively or passively, into a geographical area or to a defined customer group would be deemed a hardcore restriction and thus the UK VABEO would not apply. As an exception, again as was the position under the previous EU rules, it is permissible to have a restriction on active sales (but not passive sales) by the exclusive distributor, into a geographical area and/or customer group allocated to the supplier or to another exclusive distributor. A new element under both the new VBER and UK VABEO is the concept of shared exclusivity. Namely, the supplier can appoint more than one exclusive distributor to a territory and/or customer group. As set out above, under the new VBER there is a limit of five exclusive distributors. Under the UK VABEO there is not a finite number but instead the expression is a "limited number of buyers". The Guidance requires the number to be "determined in proportion to the allocated geographical area or customer group in such a way as to preserve the incentive of the distributors to invest in promoting and selling the supplier's goods or services, while providing the supplier with sufficient flexibility to design its distribution system".[18]

Under the UK VABEO the supplier may restrict active sales by the distributor and the distributor's customers "that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier" (art.8(3)(a)). Under the new VBER the supplier may restrict active sales by the distributor and the distributor's "direct customers". Between the two expressions there is a difference without a distinction, as the Guidance explains the UK VABEO provision by referring to the distributor's direct customers.

Under the UK VABEO the supplier may combine exclusive distribution and selective distribution in the same territory (in the United Kingdom or part of it). However, this is only the case if they are established at different levels in the supply chain. For example, exclusive distribution at the wholesale level may be combined with selective distribution at the retail level.[19]

[15] Commission Regulation 2022/720 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 [2022] OJ L134/4, art.5(1).
[16] A "non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year, per s.10(5) UK VABEO.
[17] Commission Guidelines on vertical restraints [2022] OJ C248/1, para.248.
[18] CMA, "Vertical Agreements Block Exemption Order Guidance", para.10.59.
[19] CMA, "Vertical Agreements Block Exemption Order Guidance", para.8.71.

This contrasts with the situation under the new VBER, which does not permit the combination of exclusive and selective distribution systems in the same territory.[20]

The new VBER viewed from Switzerland

Introduction

European competition law applies by analogy in Switzerland, taking into account the legal and economic conditions prevailing there. Also, Swiss regulations on vertical agreements are for the most part identical to EU competition law. This is partly due to the fact that EU regulations on vertical agreements have a significant impact on Swiss distributors. Because of Switzerland's relatively small internal market, it relies heavily on exports to the EU. According to the Swiss Competition Commission (COMCO), the alignment of Swiss regulations on vertical agreements with EU law is necessary in order to avoid the isolation of Swiss markets and to create legal certainty. Swiss distributors are thus bound by EU law, including the VBER, when distributing goods or services in the EU.

The influence of EU competition law on Swiss competition law is also underlined in Swiss case law. It follows from a ruling by the Swiss Federal Supreme Court that Swiss antitrust law must be based on EU law in the case of vertical agreements.[21]

Status

In response to the amended VBER and the Vertical Guidelines, Switzerland plans to revise its Verticals Notice. The consultation procedure for the planned revision of the Swiss Verticals Notice and the corresponding Explanatory Note ended on 2 September 2022. On 29 September 2022 COMCO published the position papers it received during the consultation procedure. Once the draft Verticals Notice will be formalised, it will replace the current Verticals Notice which was last revised on 22 May 2017. Similarly, once formalised, the new Explanatory Note is replacing the Explanatory Note from 12 June 2017.[22]

Currently, the draft Verticals Notice and the Explanatory Note largely adopt the changes implemented in the new VBER. However, the draft differs from the VBER on a few points. For example, COMCO refrains from explicitly relaxing the rules on non-compete obligations and further clarifying the exchange of information in dual distribution systems. It remains unclear whether the EU rules are to be applied by analogy in these areas or whether the omission is to be understood as a rejection of the amendments. The proposed revisions also take into account the recent case law and the rules resulting therefrom. Furthermore, it is possible that the draft will be amended as a result of the outcome of consultation procedure. The expected publication of the final Verticals Notice will show whether or not it will further conform to the VBER.

Dual distribution/information exchange

The draft Verticals Notice proposes to amend the rules on dual distribution similarly to the dual distribution rules in the new VBER. In comparison with the old VBER, the new VBER and the draft Verticals Notice both restrict the scope of the information that may be exchanged between a supplier and a buyer that operate in a dual distribution scenario. According to the draft Verticals Notice, information exchange within a dual distribution scenario is unlikely to constitute a significant restraint of competition between competitors if it directly concerns the implementation of the distribution agreement and is necessary to improve the production or distribution of the contractual goods or services. With this, the draft Verticals Notice as well as the new VBER are stricter but also clearer regarding information exchange, as neither the old VBER nor the current Verticals Notice contain any restrictions on information exchange in dual distribution scenarios. The Swiss draft Verticals Notice shall not apply to hybrid online platforms, that is if the provider of an online intermediary service is a competitor on the relevant market for the sale of the intermediated goods or services. This is a newly added exception to the dual distribution exemption, which does not yet exist in the current Verticals Notice.

Online sales and advertising restrictions/parity clauses

For online sales, the draft Verticals Notice defines new criteria for qualitatively serious or significant restraints. Thereby, COMCO closely follows the revised VBER and Vertical Guidelines.

Similarly to the VBER, the Verticals Notice distinguishes between online sales and online advertising. The prevention of the effective use of the internet for online sales to certain customers or in certain territories constitute a qualitatively serious restraint. Restrictions regarding the use of certain online sales channels (that is, marketplace bans), on the other hand, are in principle not problematic.

Bans on entire types of online advertising channels; that is, search engines or price comparison services, constitute qualitatively serious restraints. In addition, the supplier shall be allowed to impose special quality requirements on online advertising channels, which would abolish the so-called equivalence principle.

Dual pricing is no longer considered a hardcore restriction under the Commission's new Vertical Guidelines. Following in the footsteps of the new Vertical Guidelines, dual pricing might no longer be a restriction

[20] Commission Guidelines on vertical restraints [2022] OJ C248/1, para.236.
[21] Swiss Federal Supreme Court, 28 June 2016, 143 II 297 (Gaba).
[22] Last amended on 9 April 2018.

in Switzerland either. Accordingly, dual price systems, might no longer constitute a qualitatively serious restraint if the difference in prices is in a "reasonable" relationship to the differences in the investments and costs of the individual channels.

Similar to art.5(1)(d) of the new VBER, under the draft Verticals Notice and accompanying guidelines wide parity clauses may be qualitatively serious or significant restrictions. COMCO had already decided that wide parity clauses were infringing the Swiss Cartel Act in 2015. It thus appears that the draft Verticals Notice and accompanying guidelines are a codification of the existing decision-making practice of COMCO. It follows from the draft Explanatory Note that wide parity clauses are generally considered a qualitatively serious restraint. However, the draft Explanatory Note stipulates that wide parity obligations do not lead to significant harm to competition if none of the undertakings party to the vertical competition agreement exceeds a market share of 15% on a relevant market affected by the agreement. The Vertical Guidelines do not explicitly refer to the 15% threshold in the relevant paragraphs on wide across platform parity agreements (APPAs). This threshold appears to be derived from the EU de-minimis rules. Similar to the VBER, narrow parity clauses are generally not considered significant or serious restraints of competition in Switzerland. They may, nonetheless, be subject to the rules on unfair competition in the hotel sector.

Non-compete clauses

It is striking that COMCO has refrained from explicitly adopting the rules in the new VBER regarding tacit renewal of non-compete clauses. As a result, vertical non-compete clauses may still need to be limited to a fixed period of five years. Non-compete clauses which are indefinite or exceed a period of five years fall outside the scope of the Verticals Notice. The question is whether COMCO hereby intends to keep tacit renewal out of the scope of the Verticals Notice or whether, in practice, COMCO will still follow the Commission's course.

Territorial and customer restrictions

According to the draft revisions, there shall be more options to design the distribution systems. This extension is similar to that in the new VBER. With the introduction of a definition for exclusive distribution systems, shared exclusive distribution shall become possible, according to which the supplier can exclusively allocate a territory or a customer group to up to five distributors and protect them from active sales by other distributors. In addition, there shall be an extended possibility of protection of exclusive or selective distribution systems: the supplier shall be allowed to prohibit all dealers from active and passive sales to non-authorised dealers in another territory within a selective distribution system as well as active sales to customers in an exclusive territory. These prohibitions can also be imposed on the dealers' (direct) customers.

Finally, based on recent practice, COMCO refers to specific rules in the Explanatory Note. Particularly, to the qualification of a purchase obligation in Switzerland as an absolute territorial restriction and the distinction recently made by the Federal Supreme Court between unproblematic restrictions of passive sales for the manufacturer and problematic restrictions of passive sales for other suppliers, which are subject to fines.

The new VBER viewed from Turkey

Introduction

Turkey has been officially a candidate country for EU membership since 1999.[23] Relations between Turkey and the EU in the field of competition law and policy are governed by Decision 1/95 of the EC-Turkey Association Council (Decision 1/95).[24] Chapter II of Decision 1/95 lays down an ambitious set of rules on competition law and policy that mirror the EU acquis. As regards competition, Decision 1/95 reflects that Turkey is required to adopt and ensure that legislation is made compatible with that of the EU and that it is applied effectively.

To this effect, Turkey had already adopted Act No. 4054 on the Protection of Competition on 7 December 1994 (Act No. 4054).[25] In line with art.101 TFEU, art.4 of Act 4054 prohibits agreements, concerted practices and decisions limiting or eliminating competition. Article 4 of Act 4054 has been implemented in the revised Communiqué No. 2002/2 on the Block Exemption for Vertical Agreements (Communiqué No. 2002/2). To further align this Communiqué with EU regulations, Turkey has amended it in 2021 with the Communiqué No. 2021/04.

Also, to clarify which vertical agreements are prohibited and which ones are allowed under art.4 Act No. 4054, Turkey introduced its Guidelines on Vertical Agreements. The revised Communiqué No. 2002/2 and accompanying Guidelines on Vertical Agreements largely correspond with the old VBER. Since the last amendments to the Communiqué No. 2002/2 predate the entry into force of the new VBER, the Communiqué still diverges from the new VBER.

Dual distribution and information exchange

According to the Communiqué No. 2002/2, agreements between competitors do not profit from the block exemption. However, it follows from the Guidelines on Vertical Agreements that dual distribution, as an exception to that rule, falls within the scope of the

[23] Regulation 257/2001 regarding the implementation of measures to promote economic and social development in Turkey [2001] OJ L039/1.
[24] Decision No. 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union [1995] OJ L13/74.
[25] Turkish Act No. 4054 on the protection of competition. An English version of the Act is available at: *https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054*.

Communiqué No. 2002/2.[26] This broad exemption for dual distribution corresponds to the old VBER. Similarly, there are no additional requirements for information exchange in a dual distribution scenario. On this point, Turkish regulations currently diverge from EU competition law.

Parity clauses

The Communiqué No. 2002/2 exempts all sorts of APPAs from the cartel prohibition—including wide APPAs—as long as the market shares are below 30%. This is still in line with the old VBER, which also exempted all types of parity clauses, including both wide and narrow APPAs. However, the new VBER no longer exempts wide APPAs.[27] The Communiqué No. 2002/2 thus not yet corresponds to the new VBER.

Non-compete obligations

In Turkey, non-compete clauses fall under the safe harbour of the Communiqué No. 2002/2, if they do not exceed a duration of five years or last indefinitely through a tacit renewal. The maximum duration of a non-compete clause is the same as in the EU. However, non-compete clauses which are implicitly renewed are considered to last for an indefinite period and are therefore forbidden. On this point, the Communiqué differs from the EU regulations, since the new Vertical Guidelines explicitly state that tacit renewal now falls within the safe harbour of the VBER.[28]

Territorial and customer restrictions

Like the VBER, the Communiqué No. 2002/2 contains provisions protecting distributors in a selective distribution system. Suppliers within a selective distribution system are allowed to restrict active sales by buyers into exclusive territories or customers allocated to a supplier or another buyer. Also, the supplier can (i) prevent an authorised dealer from selling to unauthorised dealers, and (ii) prevent buyers at the wholesale level from selling to final customers. However, restrictions of passive sales are not exempted under the Communiqué No. 2002/2 under any circumstances. Passive sales include internet sales and advertisements or promotions conducted through general purpose media.

The Guidelines on Vertical Agreements also exempt exclusive distribution systems. Moreover, the combination of selective and exclusive distribution systems falls within the scope of the Communiqué No. 2002/2. Contrary to the new VBER and Vertical Guidelines, in Turkey, exclusive distribution systems only appoint one distributor per territory.[29]

Intermediary services and/or e-commerce platforms

Also, the Communiqué No. 2002/2 and accompanying Guidelines do not yet refer to vertical agreements involving intermediary services and/or e-commerce platforms. Given the digitisation of the economy and the important role platforms play in it, an amendment could be fairly expected in the Communiqué No. 2002/2 and accompanying Guidelines in the near future on this front.

Recent and anticipated developments

In November 2021, Turkey amended the Communiqué No. 2002/2. The amendments, contained in the Communiqué No. 2021/04, lowered the 40% market share threshold to 30%. This brings the market share in Turkey in line with the VBER's 30% market share. Since then, there have not been any amendments to the Communiqué No. 2002/2 or the corresponding Guidelines.[30]

Moreover, there is currently no revision of the Communiqué No. 2002 on the way either. However, the past practice of Turkey's Competition Authority suggests that it usually follows the Commission's legislation. In this regard, reformative steps on this front would be no surprise, as the current legislation will also need revision due to digitalisation and growth of e-commerce at some stage. Moreover, if Turkey wishes to be admitted to the EU as a Member State, it will have to adapt its regulations to European competition law, which includes the new VBER.

Concluding remarks

Many businesses would prefer a single set of rules, as this enables efficiency of operation, even if that single set of rules is regarded as sub-optimal. The cost of sub-optimality will be a function of the degree the in-house legal function is able and willing to have different regimes, given compliance costs, and the business delta (profit margin) to adopting different distribution 'in-house' rules. Therefore, as matters currently stand, it may be postulated that for the vast majority of businesses where the delta is either irrelevant or marginal, the likely result is the mildly more restrictive new EU rules will be followed as a template, meaning that those suppliers that have pan-European (i.e. UK and EEA business), will follow the EU rules.

For some businesses, however, the differences in the rules might suggest some benefits. For example, in the UK, the ability to appoint more than five "exclusive" distributors. For purely domestic UK/Swiss/Turkish businesses, the adoption of the domestic rules will be natural. Whether as businesses compared to their EU counterparts the parties to such

[26] Turkish Guidelines on Vertical Agreements, p.5.
[27] Commission Regulation 2022/720 [2022] OJ L134/4, art.5(1)(d).
[28] Commission Guidelines 2022/C 248/01 on vertical restraints [2022] OJ C248/1, para.248.
[29] Turkish Guidelines on Vertical Agreements, p.40.
[30] Turkish Communiqué No. 2021/04.

"UK/Switzerland/Turkey-only" agreements benefit, and if so which party benefits most, is at this point in time an open question and one that it would be interesting to seek an answer to in, say, five years' time.