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Insights

EUROPEAN COMMISSION ADOPTS NEW VERTICAL BLOCK EXEMPTION REGULATION AND VERTICAL GUIDELINES

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SUMMARY

On May 10 2022, the EU Commission adopted the new Vertical Block Exemption Regulation and Vertical Guidelines. The regulation includes several significant new developments including readjusting the safe harbour and providing stakeholders with clearer rules.

The European Commission (EC) has been reviewing and consulting on its Regulation n° 330/2010 concerning vertical agreements and concerted practices for roughly three years. While adapting to the changing e-commerce landscape has been a huge driver in the review of the rules, the EC also wanted to account for sustainable development in the new rules.

ON MAY 10 2022, THE COMMISSION ADOPTED THE NEW VERTICAL BLOCK EXEMPTION REGULATION (THE "NEW VBER"), AND VERTICAL GUIDELINES.

The new VBER has kept several key provisions from the previous VBER, such as the 30% market share threshold for benefitting from the safe harbour and most of the hard-core restrictions (those provisions in an agreement that prevent it from benefiting from the block exemption). However, the new rules also include some significant developments to readjust the safe harbour and provide stakeholders with less uncertainty.

WHAT IS NEW?

1. Enhanced protection is granted to exclusive and selective distribution networks

Within **exclusive distribution**, the new VBER first introduces the possibility to set up a shared exclusivity, allowing a supplier to select to 5 distributors in a given territory or for a particular group of consumers.

It also grants the possibility to restrict the active or passive sales of the exclusive distributor in another exclusive territory.

Within **selective distribution**, it is now possible to restrict active or passive sales outside the selective distributor's network to unauthorized distributors located in the territory of the selective distribution system.

2. In the case of free distribution, the authorised restrictions are specified

For the first time, the new VBER addresses the situation where the supplier does not operate an exclusive distribution system nor a selective distribution system.

In particular, Article 4(d) of the Regulation grants the possibility to restrict the buyer's establishment location and active or passive sales to end users by a buyer acting as a wholesaler.

3. Rules about dual distribution are more flexible than expected in the Commission's original plan

Dual distribution refers to the situation where a supplier sells its goods or services through independent distributors, but also directly to end customers.

In this respect, the Commission's original plan provided a particularly strict regime, since it stated for an exemption from the agreement (**i**) in the event of market shares below a threshold of 10% on the downstream market, and (**ii**) in the absence of any restriction by object. These two cumulative conditions are abandoned.

The new VBER excludes from the benefit of the exemption any exchange of information that is not directly related to the implementation of the vertical agreement or that is not necessary to improve the production or distribution of the contracted goods or services.

The exemption is extended to wholesalers and importers.

4. Online sales are now taken into account in the same way as physical sales

The new VBER intends to take into account the growth of e-commerce and online sales and thus mitigate the existing border with physical sales.

Thus, an undertaking that provides online intermediation services is qualified as a supplier within the meaning of the Regulation. On the other hand, the Regulation does not apply where the provider of the online intermediation services is a competitor in the relevant market for the sale of the intermediated goods or services.

Certain measures restricting online sales and new markets players are amended in the new VBER, including:

- **Dual pricing** - which occurs when a distributor is charged a higher price for products that are sold online rather than in physical outlets - would no longer be a hard-core restriction, and therefore could be exempted under the new VBER. For the rapidly changing e-commerce ecosystem, this will be a welcome change as it provides businesses with more flexibility to apply different prices to online versus brick-and-mortar channels.

- **Equivalence** - the imposition of criteria for online sales that are not equivalent to the criteria imposed on brick-and-mortar outlets in a selective distribution system would also no longer be a hard-core restriction.

5. Welcome clarification of the rules for the operation of distribution networks is provided

- **“Wide” retail parity clauses become excluded restrictions**

“Wide” retail parity clauses require that a party to an agreement offer goods or services to the other party on terms that are no worse than those offered to third parties. The clauses are considered “wide” obligations when they specify that a product or service may not be offered on better terms on any other channel. These are now excluded restrictions.

By contrast, “narrow” clauses only require that better terms would not be offered on a party’s own sales channels, and would not set out conditions for sales via other channels. “Narrow” retail parity clauses, and all B2B parity clauses, could still benefit from the block exemption.

- **Tacitly renewable non-competition obligations may be agreed under certain conditions**

The new VBER allows such non-competition clauses to be agreed provided that the non-competition obligation does not extend beyond the period of occupation of the premises and land by the buyer.

The current VBER regulation and guidelines expire on 31 May and the new VBER and Vertical Guidelines will enter into force **on 1 June 2022**.

See the final versions of **new Vertical Block Exemption Regulation** and **Vertical Guidelines**.

RELATED PRACTICE AREAS

- Antitrust

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