New Vertical Block Exemption Regulation and new Vertical Guidelines

> **The new Vertical Block Exemption Regulation and new Vertical Guidelines bring to a close the European Commission's three-year long process of assessing and revising the former rules. This reform aims to readjust the Regulation's "safe harbour" to adapt the rules on vertical agreements to the new digital era. Areas such as dual pricing, dual distribution and digital platforms have all been reformed.**

On 10 May 2022, the European Commission passed the new Vertical Block Exemption Regulation ("**VBER**"). Revising the 2010 VBER also entailed re-examining the Vertical Guidelines ("**Guidelines**") to adapt them to a new market reality in which the internet is a well-established sales channel and the digital platform economy is on the rise globally.

The VBER applies to vertical agreements that economic operators execute at different levels of the production or distribution chain. It creates a safe harbour by setting out the requirements for such agreements to fall within the scope of the exemption provided in Article 101(3) of the Treaty on the Functioning of the European Union ("**TFEU**") and thus be compatible with competition rules.

The Guidelines provide guidance on how the VBER should be interpreted and the criteria for individual assessment of contracts that are not automatically exempted by the VBER. Companies and their legal advisors will therefore now be able to assess whether a particular conduct that does not benefit from the automatic exemption can nonetheless be compatible with competition law.

The VBER enters into force on 1 June 2022. However, any agreements that were already in force as at 31 May 2022 and complied with the requirements of the 2010 VBER will continue to benefit from the automatic exemption until 31 May 2023, even if they do not comply with the new VBER. So companies that want to continue benefitting from the safe harbour will have one year to adapt their pre-existing contracts to the new regulatory framework.

The VBER and the Guidelines significantly change the current regulation. The scope of the safe harbour rules has been broadened in certain areas and limited in others.

1. RESTRICTIONS ON USING THE INTERNET AND DUAL PRICING

The VBER qualifies preventing the buyer or its customers from effectively selling contractual goods or services online as a hardcore restriction, regardless of the distribution model in place.

The Guidelines list some direct or indirect restrictions that protect online advertising more than online sales. For instance, while the VBER exempts limiting online sales through a particular internet channel (e.g. selling through a marketplace), a restriction on advertising through a particular internet channel (e.g. price-comparison tools, search-engine advertisements) is a hardcore restriction.

A distributor can be charged different prices for products intended to be resold offline and online (i.e. dual pricing). Nevertheless, these price differences must not *de facto* prevent online sales, and must be reasonably related to the different investments and costs the resellers incur on each channel. In practice, the VBER makes implementing dual pricing more flexible (e.g. through *ex post* price adjustments based on actual sales through both channels).

2. NON-COMPETE CLAUSES

The Guidelines exempt tacit extensions of non-compete clauses. Under the current regime, tacit extensions are treated as indefinite (and thus excluded from the safe harbour). Under the VBER, non-compete clauses that do not exceed five years, but are subject to tacit extensions beyond that period, may also benefit from the exemption as long as the distributor is effectively given the opportunity to renegotiate or effectively terminate the non-compete obligation after five years. The Commission specifies that an effective opportunity entails the possibility do so with a reasonable period of notice and at a reasonable cost.

3. AGENTS

As to agent involvement in the sale of goods, genuine agent status is not lost even if they acquire title over goods for a brief period in order to sell them on behalf of the principal and they do not incur costs or risks related to transferring the title over them. Therefore, some agreements between sellers and agents (e.g. to set sales prices) will continue to be exempted from the prohibitions in the competition rules even if title over the goods is acquired for a brief period.

4. INFORMATION EXCHANGES IN DUAL DISTRIBUTION

Certain exchanges of information between suppliers and distributors in a dual distribution context are excluded from the exemption. Dual distribution gives rise to a competitive relationship between suppliers and distributors at the retail level, given that suppliers sell goods or services both directly to the final customer and through independent distributors.

However, the VBER continues to exempt these exchanges of information if they directly relate to implementing the vertical agreement and are necessary to improve the production or distribution of the contractual goods or services. The Guidelines list information that might *a priori* be shared (white list, para. 99) or not (black list, para. 100), depending on the circumstances.

The Guidelines also cover safeguards that minimise infringement risk, such as holding off on reporting information, or establishing confidentiality measures between the manufacturer's direct sales team and the team collecting information from distributors.

5. DISTINCTION BETWEEN ACTIVE AND PASSIVE SALES

The VBER now defines active and passive selling. The general distinction has not changed: it depends on who is initiating the sale of the product. But the new definitions clarify two important points.

Firstly, the VBER clarifies situations where using advertising leads to active sales. The key is whether advertising is specifically targeted at a certain customer group or territory. Examples of active selling include using price-comparison services or search-engine advertising targeted at customers in particular territories or customer groups, operating a website with a top-level domain related to particular territories or offering website content in languages commonly used in particular territories that are different to those commonly used in the territory where the seller is located. That said, the Guidelines do clarify that offering content in English is not in itself indicative of an active sale, as this language is spoken across the EU.

Secondly, the VBER states that partaking in public or private tenders is considered passive selling, since the initiative is assumed to come from the tendering party. Therefore, an agreement that restricts a distributor's ability to participate in a public tender or accept an invitation to bid in a private tender outside its exclusive area constitutes a hardcore restriction.

6. PARITY CLAUSES AND DIGITAL PLATFORMS

Firstly, "narrow" parity clauses or "most favoured nation clauses" ("**MFNs**") are still exempted. While narrow MFNs are those that require the most favourable terms only in relation to those offered in the business' direct sales channel, broad MFNs are those that require parity across online platforms. A platform imposing broad MFNs on a business is a restriction that is excluded from the scope of application of the VBER.

Secondly, vertical agreements with digital platforms are excluded from the exemption when they are hybrid – i.e. the intermediation service provider also actively sells goods or services on the market, leading to a scenario in which it directly competes with its reseller.

Finally, the VBER defines the concept of an online intermediary service provider ("**OISP**"). An OISP is a "supplier" in any agreement between a vendor and an OISP, and therefore the list of hardcore restrictions that exclude the application of the safe harbour applies to the OISP (but not to the vendor).

7. RESTRICTIONS ON ACTIVE SALES

The VBER allows several exclusive distributors to be appointed per territory or customer group. The 2010 VBER only allowed one exclusive distributor per territory or customer group to benefit from the automatic exemption. The VBER thus extends the scope of the safe harbour to a maximum of five exclusive distributors per territory or customer group.

The Commission believes that this preserves 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 organise its distribution system. When there are more than five distributors, shared exclusivity is excluded from the automatic exemption as exclusivity can no longer be presumed to be efficient for preventing free riding on the promotional efforts of one distributor in relation to the others.

The VBER also exempts pass-on restrictions on exclusive and selective distribution models. As a result, suppliers can impose on buyers the obligation to pass on to their respective direct customers (other distributors) any territorial restrictions that are admissible, depending on the type of distribution model. Therefore, in an exclusive distribution model, the supplier can require that restrictions on active sales of the goods or services in those exclusively reserved territories or customer groups also be applied to direct customers of its exclusive distributors.

The VBER now also exempts restrictions that allow a supplier to put in place an exclusive distribution model in one Member State and a selective distribution model in another, so that they both remain intrinsically consistent. Therefore, a manufacturer might prevent active sales by members of a selective distribution network to territories or customers exclusively allocated to another distributor or to itself. By contrast, the manufacturer may also prevent an exclusive distributor from selling actively and passively to unauthorised distributors in a territory where it operates a selective distribution system. However, combining both models (exclusive and selective) within the same territory or regarding the same group of customers is still a hardcore restriction of competition.

8. SOME IMPORTANT EXCEPTIONS TO RESALE PRICING

The VBER and the Guidelines still consider resale price fixing to be a hardcore restriction. However, two new exceptions apply:

Firstly, minimum advertised prices. In general, they are considered as indirect resale price fixing in that they prevent the distributor from informing its customers of its own discounts (in addition to those the supplier offers). However, para. 197 of the Guidelines clarifies that recurrent resale at a price below the wholesale price may exceptionally be considered to fall within the scope of Article 101(3) TFEU, referring specifically to the damage to both the supplier's brand image and incentive to invest in the brand.

Secondly, fulfilment contracts. The Guidelines explain that resale price fixing in a vertical agreement between a supplier and a buyer fulfilling a prior agreement between the supplier and a specific end-user does not constitute resale price fixing as long as the end-user has waived its right to choose the undertaking that is to fulfil the agreement. In this case, the resale price fixing does not give rise to a restriction under Article 101(1) TFEU, since the resale price is no longer subject to competition in relation to end-user in question.

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