European Commission adopts new Vertical Block Exemption Regulation

The European Commission published the new Vertical Block Exemption Regulation, together with an updated version of the Vertical Restraints Guidelines.

Competition and EU Law Legal Flash
May 12, 2022

Key points

Regulation (EU) 2022/720, of May 10, introduces several changes that affect companies as regards distribution agreements and their relations with suppliers and B2B customers.

We highlight the following changes:

- The exchange of information in dual distribution systems is no longer fully exempted by the regulation.
- Wide parity obligations are excluded from the scope of the regulation.
- Provisions on exclusive and selective distribution systems are now clearer and include more exceptions that will benefit from the regulation's exemption.
- Online sales are now regulated in a way that the previous regulation did not foresee.
- Dual pricing is no longer considered a hardcore restriction, as the regulation enables different prices to be set depending on the sales channel.

New Vertical Block Exemption Regulation

After a thorough review, followed by a public consultation that took place during 2021, this week, the European Commission (the "**Commission**") published the new version of the Vertical Block Exemption Regulation (the "**VBER**"). The new VBER will enter into force on June 1, 2022. On that same date, the Commission will publish the new Vertical Restraints Guidelines (the "**Guidelines**").

> The VBER exempts certain agreements between companies at different levels in the supply chain from the general prohibition of anti-competition practices under Article 101.1 of the Treaty on the Functioning of the European Union (the "**TFEU**"), provided their individual market shares are below 30%.

> With the VBER update, the Commission considers that certain practices should not be covered by the block exemption ("safe harbor"), but instead that their damaging nature to the market should be examined on a case-by-case basis under Article 101 of the TFEU. These practices include the following:

- **Dual distribution**

(a) Dual distribution is a distribution system in which a supplier sells its goods or services to independent distributors or directly to end customers (i.e., directly competing against its distributors).

(b) Under the previous VBER (which will remain in force until May 31, 2022), the dual distribution system is exempt from the prohibition set out in Article 101 of the TFEU.

(c) However, due to the increasing use of this type of system, any exchange of information between the supplier and the distributor that does not relate to the supply relationship will be excluded from the scope of the exemption.

(d) In the Guidelines, the Commission provides a non-exhaustive list of information that may be exchanged between the parties because it is "necessary to improve the production or distribution of the contract good for services."

(e) The Commission also clarifies that the exemption will extend to companies that, in the dual distribution scenario, act as wholesalers and importers, and that it is not limited to manufacturers.

(f) The new VBER also establishes that companies that have a hybrid function (i.e., that sell products to end customers while simultaneously acting as intermediary platforms for the sale of competitors' products) are not included in the exemption.

- **Parity obligations**

(a) Parity obligations or most-favored-nation ("**MFN**") clauses require that a company offer its counterpart similar or better conditions than those offered in other sales channels such as online platforms (wide MFN clauses) or on the company's own direct sales channels (narrow MFN clauses).

(b) Under the previous VBER, all types of parity clauses were included in the block exemption. With the new wording, only wide MFN clauses are included in the list of excluded restrictions.

(c) By contrast, narrow MFN clauses will continue to benefit from the exemption.

(d) According to the recent amendment to the Portuguese Competition Act in late 2021, all types of parity clauses—whether wide or narrow—are prohibited when it comes to the Portuguese tourism and local accommodation sector.

(e) Questions are expected to arise regarding the compatibility between European and Portuguese legislation, which the courts will ultimately have to settle.

> The VBER also clarifies certain concepts relating to distribution systems and responds to the exponential growth of e-commerce, establishing new agreement categories that may benefit from the exemption, such as the following:

- **Restriction of active sales**

(a) Restriction of active sales consists of companies being restricted in actively approaching certain groups of customers or certain territories.

(b) The VBER now includes in the exemption scope the possibility of sharing the exclusive distribution system, allowing suppliers to designate up to five exclusive distributors in a given territory or for a given customer group.

(c) The Commission also includes the possibility for suppliers to require that their exclusive distributors pass on the restriction of active sales to their own customers, who will also be prevented from actively selling in certain territories or to certain customer groups.

(d) By contrast, in selective distribution systems, suppliers can now prohibit their distributors and customers—direct or indirect—from selling—actively or passively—to unauthorized distributors across the territory where that distribution system is implemented.

- **Restriction of online sales**

(a) The Commission sought to update its approach to online sales restrictions by generally establishing that any practices that limit the use of the internet as a sales channel are hardcore restrictions that are not covered by the exemption.

(b) However, the Commission clarifies in the Guidelines that, in certain conditions, limiting sales on specific platforms or “marketplaces” may benefit from the exemption, provided online sales are not prevented entirely.

(c) The VBER focuses on dual pricing (i.e., the agreement under which a distributor pays a higher price for products or services to be resold online than for products or services to be resold by traditional means).

(d) Whereas the previous VBER considered this practice a hardcore restriction on competition (which was not included in the exemption), the new VBER completely changes this paradigm, allowing suppliers to establish different prices depending on the sales channels used, based in particular on the different costs associated with the use of each channel.

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