Antitrust

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European Commission Adopts New Rules on Vertical Agreements

On May 10, 2022, the European Commission ("**Commission**") adopted the revised Vertical Block Exemption Regulation ("**VBER**") and Vertical Guidelines ("**VG**"). The new VBER will enter into force on **June 1, 2022** for a period of 12 years and foresees a 1-year transition period for pre-existing agreements, allowing businesses sufficient time to adapt to the new rules.

BACKGROUND

The present VBER (Commission Regulation 330/2010 of 20 April 2010) and accompanying VG exempt certain agreements between businesses at different levels of the supply chain from rules against anticompetitive agreements if their market shares are below 30%. As it was set to expire on 31 May 2022, the Commission launched a review in 2018 to determine whether the present VBER should lapse, be extended, or be revised. Following the evaluation and impact assessment phases, the outcome was that it should be revised.

The new VBER and VG reflect the need to adapt to market developments since 2010 and, in particular, to the rapid growth of e-commerce. The main objectives of the new rules are to readjust the safe harbor to eliminate false positives and false negatives, provide guidance on e-commerce and online platforms and reduce compliance costs for businesses.

WHAT ARE THE MAIN CHANGES?

Throughout the 3-year evaluation of the present VBER, the Commission identified four main areas in which adjustments to the scope of the safe harbor were needed: dual distribution, price parity obligations, restrictions on active sales and restrictions on online sales. In addition, the new VBER introduces various new rules that will impact all businesses operating in the EU, both online and offline. Business across the supply chain will need to make sure that their distribution arrangements comply with the new rules by June 1, 2023.

Dual distribution

Dual distribution relates to scenarios where a supplier sells through distributors as well as directly to customers (*e.g.*, direct sales on the supplier's website). Article 2(4) of the new VBER limits the exemption for dual distribution scenarios to situations where the distributor is not itself competing with the supplier on the upstream market. Article 2(5) of the new VBER exempts dual distribution arrangements where the parties' aggregate market shares do not exceed 30%, except for information exchanges. In this respect, the Commission published additional guidance on information exchanges in dual distribution settings, clarifying permitted and non-permitted exchanges of information, and proposing risk mitigation measures (*e.g.*, firewalls).

The dual distribution exemption does not apply to agreements relating to the provision of online intermediation services where the providers of online intermediation services compete on the relevant market for the sale of the intermediated goods or services (Article 2(6) new VBER). Online intermediation services are defined as information society services which allow businesses to offer goods or services to other businesses or to final consumers with a view to facilitating the initiating of direct transactions, irrespective of whether and where the transactions are concluded (Article 1(1)(e) new VBER).

Price parity obligations/Most-favored nation clauses ("MFN clauses")

Price parity obligations/MFN clauses require a seller of goods or services to offer the goods or services to another party on conditions that are no less favorable than the conditions offered by the seller to certain other parties or via certain other channels. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale.

Article 5(1)(d) of the new VBER removes the exemption for "*across-platform retail parity obligations*" imposed by suppliers of online intermediation services, *i.e.*, direct or indirect obligations which cause buyers of such services not to offer, sell or resell goods or services to end users under more favorable conditions via competing online intermediation services (para 253 new VG). The exemption will still apply to all other types of parity obligations, *e.g.*, MFN clauses relating to direct sales or marketing channels.

Active sales restrictions

Article 1(1)(l) of the new VBER provides a new definition of "*active sales*". For instance, actively targeting customer groups through price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website different languages that are commonly used in particular territories, are considered to be active sales.

Under the new VBER, suppliers can, not only require their distributors to refrain from active sales into exclusive territories or customer groups, but they can also require their distributors to restrict their own direct customers from actively selling into such exclusive territories or customer groups. However, requiring distributors to pass on the active sales restrictions to customers further down the distribution is not block exempted (Article 4(b)(i) new VBER, para 220 new VG).

Online sales restrictions

The new VBER introduces, for the first time, an explicit hardcore restriction relating specifically to online sales (Article 4(e) new VBER). Agreements that have the object of preventing the effective use of the internet to sell goods or services cannot be block exempted. Such hardcore online sales restrictions include, *e.g.*, vertical agreements which have the object of significantly diminishing the aggregate volume of online sales of the contract goods or services or the possibility for end users to buy the contract goods or services online. This new explicit restriction is without prejudice to the possibility of imposing other restrictions of online sales or online advertising on the distributor to the extent that they do not have the object of preventing the use of an entire online advertising channel (*e.g.*, search engines, price comparison services, or own online stores).

Dual pricing/Price discrimination

The new rules mark a U-turn from the Commission's earlier stance that what is illegal offline should also be illegal online, *i.e.*, the equivalence principle. Notably, the Commission mentioned that online sales "*have developed into a well-functioning sales channel that no longer requires special protection relative to offline sales channels*". The new rules make it easier for suppliers to discriminate against online sales channels, notably by recognizing the potential for a supplier to charge different prices to the same distributor depending on whether the products are sold online or through brick-and-mortar channels, a practice that was previously regarded as a hardcore restriction. The aim of this new approach is to allow suppliers to combat free riding concerns from online retailers.

However, dual pricing cannot be exempted when the price differences have the object of restricting sales to particular territories or customers. This would be the case where the difference makes selling online unprofitable or financially unsustainable (para 209 new VG). Suppliers should therefore make sure that the difference in the wholesale price is reasonably related to the differences in the investments and costs incurred by the distributor to make sales in each channel and should not have the practical effect of preventing the effective use of the internet.

Online marketplaces and price comparison services

In accordance with the European Court of Justice's judgment in *Coty*, the new rules now explicitly provide that restrictions on the use of online marketplaces can in principle benefit from block exemption (para 208 new VG). This would not only apply to total bans but also to other (more limited) restrictions such as dual pricing. However, a direct or indirect total ban of all price comparison services will generally be considered as a hardcore restriction (paras 203 and 347 new VG). Imposing quality standards or prohibiting certain price comparison services continues to remain permissible (para 349 new VG).

Online platforms

The new VBER recognizes that agreements relating to the provision of online intermediation services (online marketplaces, app stores, price comparison services, social media services, etc.) are vertical agreements and can in principle benefit from block exemption. However, the new rules also point out that agreements between online platforms and their customers will generally not fulfill the conditions for agency agreements exempted from Article 101 TFEU (para 63 new VG).

When applying the VBER to online platform agreements, a provider of online intermediation services is considered a "*supplier*" (rather than an agent) in respect of those services, and companies using these services are categorized as distributors, irrespective of whether they pay for the services (Article 1(1)(d) new VBER). This has a number of important consequences:

- The provider of online intermediation services cannot be considered a distributor of the goods offered through the online intermediation service;
- The market share of the provider of online intermediation services for these services is relevant for assessing whether the 30% market share threshold is met;
- A provider of online intermediation services may only impose sales restrictions on companies using these services within the boundaries of Article 4 of the new VBER;

- A provider of online intermediation services may not impose fixed or minimum sale prices for the transactions that it intermediates;
- A provider of online intermediation services cannot apply "across-platform retail parity obligations" on companies using the service (Article 5(1)(d) new VBER).

Importantly, the block exemption does not apply in dual distribution settings where the provider of online intermediation services has a hybrid function and is competing with the companies using the services for the sale of the intermediated goods or services (Article 2(6) new VBER).

Shared exclusivity

Where previously suppliers could only appoint one exclusive distributor per territory or customer group, now Article 4(b)(i) of the new VBER allows suppliers to allocate up to five exclusive distributors in order to protect them from active sales into their territory or customer group (Article 4(b)(i) new VBER, para 219 new VG).

Enhanced protection for exclusive/selective distribution

The new VBER makes it easier for suppliers to set up different distribution systems in different territories within the EEA and to protect them from each other. This increased flexibility allows suppliers to protect their exclusive distribution territories (with up to five exclusive distributors) against active sales by distributors in selective distribution territories (Article 4 (c)(i)(1) new VBER) and free territories (Article 4(d)(i) new VBER). In addition, suppliers can protect their selective distribution territories against active and passive sales by distributors in exclusive distribution territories (Article 4 (b)(ii) new VBER) and free territories (Article 4(d)(ii) new VBER). These new provisions are intended to protect the closed nature of exclusive/selective distribution systems.

WHAT'S NEXT?

The new rules will enter into force on June 1, 2022 and will be in place until 2034. Existing vertical agreements that qualify for the safe harbor will remain exempt from antitrust challenge until May 31, 2023. After that date, as of June 1, 2023, businesses will need to self-assess all their vertical agreements under the new rules. Companies operating in the EU are thus well advised to review their distribution systems and contractual arrangements against the new rules and consider whether any changes need to be made.