

THE COMMISSION ADOPTS ITS NEW BLOCK EXEMPTION REGULATION FOR VERTICAL AGREEMENTS AND THEIR NEW GUIDELINES

In the context of the revision of the Vertical Block Exemption Regulation (the "VBER"), the European Commission has adopted, on 10 May 2022, [the new text of the exemption regulation](#), which enters into force from 1st June 2022 and expires on 31 May 2034. A transition period is foreseen until 31 May 2023 (see the Commission's press release [here](#)).

As far as the Guidelines are concerned, the Commission has so far approved the content of the draft published on 10 May and their formal adoption will take place at a later stage, when all language versions are available.

This publication follows an extensive consultation process which lasted more than three years. During this process, the Commission published a Staff Working Document (our alert [here](#)), an Initial Impact Assessment (our alert [here](#)) and, in July 2021, the draft texts (our alert [here](#)), which gave rise to a final consultation on the subject of information exchange under dual distribution scenarios.

The main objectives pursued by the Commission in drafting the new Regulation were:

- (i) readjusting the safe harbor offered by the VBER to eliminate "false positives" and reduce "false negatives";*
- (ii) providing stakeholders with updated guidance adapted to the current environment, which is being reshaped by the growth of e-commerce and online platforms;*
- (iii) reducing compliance costs for businesses by simplifying the current rules*

THE MAIN DEVELOPMENTS

The main changes concern the following points:

Dual distribution

- The Commission has found that, in particular as a result of the growth of e-commerce, dual distribution situations (where a supplier sells its products not only through independent distributors but also directly to final consumers, in direct competition with its independent distributors) have become common. The Commission, therefore, considers that the current exception for dual distribution could lead to the exemption of vertical agreements where horizontal issues may no longer be negligible with regard to the exchange of information between competitors linked by a vertical relationship.
- The new Regulation thus clarifies that, while vertical agreements between competitors may be exempted, **the exemption does not apply to exchanges of information that are either not directly related to the implementation of the vertical agreement or are not necessary to improve the production or distribution of the contract goods or services** (or do not fulfil either of these conditions). The Guidelines (§100) provide examples of exchanges of information that may not be exempted, such as information on future prices.

In the event that a supplier and a buyer exchange information that does not fulfill the conditions of Article 2(4) (a) or (b), the exchange of information will have to be subject to an individual analysis under Article 101(1) TFEU. In this case, the other provisions of the vertical agreement concerned may nevertheless continue to benefit from the exemption.

In practice, suppliers operating a distribution network while also selling goods or services directly will therefore have to be particularly cautious to ensure that the information exchanged with their distributors or reported back to them does not concern (non-exhaustive list):

- (i) the future prices of the supplier or buyer;
- (ii) individually identifiable information about final consumers - unless the information is intended to meet the particular requirements of a final consumers (loyalty program, after-sales service, etc.) or if the information is used to monitor compliance with a selective distribution network.

This latest exception shows the Commission's willingness to recognize the special status of selective distribution networks, which need specific protection.

- (iii) products sold by the distributor under its own brand name when this information is exchanged with a manufacturer of competing products, unless the latter has manufactured the products sold by the distributor.

Platforms

- The Commission introduced a new exception to the exemption applicable to dual distribution scenarios regarding vertical agreements relating to the provision of online intermediation services if the intermediation service provider **also sells goods or services in competition with undertakings to which it provides online intermediation services** (Article 2.6).
- In other words, vertical agreements relating to the provision of online intermediation services entered into by so-called "hybrid" platforms can no longer benefit from the block exemption, marking a willingness of the Commission not to allow these players to benefit from "false positives" when they could have a key role in the market.
- The Commission has also maintained the definition according to which **online intermediation platforms are considered to be acting as "suppliers" and seems to assume** that, generally, these platforms would not fulfil the conditions to benefit from the **exception applicable to agency relationships** and their relationships with their users will, in fact, be subject to Article 101(1) TFEU.

There is no doubt that this approach will raise difficulties of interpretation, particularly with regard to commission relationships which traditionally fall outside the scope of Article 101(1) TFEU and for which it will be necessary to clarify whether or not the status of agent applies when the intermediary in question decides to digitize its activities by developing a platform.

- The consequences of such a definition are likely to be structuring and will need to be carefully analyzed

Regarding restrictions on active sales

- The Commission has taken a step forward by providing a **clearer definition of the concepts of active and passive sales, adapted to the development of e-commerce**, by specifying that certain types of online behavior, when they **specifically target a customer**, can constitute active sales. This is particularly the case for any means of targeting a customer, such as targeted advertising, the use of price comparison or referencing tools, the use of country extensions beyond the country of establishment, etc. (cf. Article 1 (l) and (m) of the Regulation).
- In effect, the Commission is giving new meaning to territorial or customer exclusivity in the context of online sales which were previously considered by default to be passive sales and therefore could not be restricted.
- It also introduces, in Article 4(b), the possibility of **shared exclusivity**, allowing a supplier to designate, in a given territory or for a customer group, a maximum of **5 other exclusive distributors**.
- Article 4(c) gives greater protection to selective distribution systems against sales by unauthorized distributors located in the territory to which the selective distribution extends.

A more flexible approach to organizing the conditions of online and offline sales...

The Commission has taken into account the major development of online trade and the need to provide operators with greater flexibility in the organization of their distribution systems. It has rightly noted that, contrary to the environment that prevailed in 2010, all operators have now largely embraced online trade, so that there is no longer any legitimate reason to maintain safeguards to promote this form of trade.

It therefore proposes to relax the rules on **dual pricing** and on the **equivalence principle**.

- **With regard to dual pricing**: Article 4 of the Regulation **no longer qualifies dual pricing as a hardcore restriction** and therefore allows suppliers to set different wholesale prices for online and offline sales of the same distributor, provided that the dual pricing is intended to encourage or reward an appropriate level of investment, corresponding with the costs associated with each channel, and is not intended to restrict the distributor's ability to sell the products online, which would constitute a hardcore restriction.
- **With regard to the principle of equivalence**: the Guidelines provide that, in the context of selective distribution, **the selection criteria imposed for online sales need no longer be broadly equivalent** to those imposed on physical outlets, since these two channels are intrinsically different in nature.

... But, an extension of the notion of restricting online sales

- However, the new flexibility is not without a counterpart, as the Commission has adopted a rather broad definition of the notion of online sales restrictions.

For example, and this is new compared to the draft published in July, **restrictions on online sales** are now listed as a hardcore restriction in a new Article 4(e) of the Regulation, which provides that constitutes a hardcore restriction the fact for a supplier to prevent its buyer or its buyer's customers from effectively using the internet to sell the contract goods or services, while clarifying that this principle does not prevent the supplier from imposing on the buyer "other restrictions of online sales".

Paragraph 206 of the Guidelines provides examples of restrictions that may indirectly have the object of preventing the effective use of the internet within the meaning of Article 4(e), such as requiring the distributor to seek prior approval from the supplier for each individual online sale (however leaving open the possibility of seeking general prior approval for online sales), prohibiting the buyer from using the supplier's trademark on its website or prohibiting the buyer from using online advertising tools such as search engines or price comparison tools.

- Also in relation to online sales restrictions, the Commission provides updated guidance to clarify and harmonize the applicable rules and to incorporate the guiding principles for the assessment of online restrictions derived in particular from the case law of the Court of Justice of the EU, notably in the *Pierre Fabre and Coty* cases, for which it clarifies the scope.

Although the Regulation does not revolutionize the field, its entry into force will undoubtedly raise a large number of practical questions in the context of their implementation, particularly in the organization of distribution networks and their commercial strategies

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