CLIENT ALERT

EU Commission Adopts New Rules for Distribution Agreements: What’s to Come for Distribution Relationships in the Digital Age?

May 18, 2022

On May 10, 2022, the European Commission adopted the new Vertical Block Exemption Regulation (VBER) and accompanying Vertical Guidelines. The new rules take into account the specific challenges brought about by the growth of e-commerce and online platforms in the “digital age.” The most significant changes relate to dual distribution, MFNs or retail parity obligations, active and online sales restrictions. The Commission has also provided additional guidance on topics such as RPM and agency agreements.

Businesses distributing goods and services in the EU often rely on the Vertical Block Exemption Regulation (VBER) for legal certainty. The VBER and the accompanying guidelines set out the conditions under which distribution agreements are presumed to comply with EU competition law. To be covered by the VBER, the parties’ market shares may not exceed 30% and the agreement may not include so-called hardcore restrictions. Above the market share threshold, the parties will need to self-assess their agreement based on the guidelines. Over the past few years, the Commission has been working with stakeholders to assess, update and amend the existing rules to take account of market developments, including the emergence of online platforms and e-commerce (see also our Client Alert of August 24, 2021). The most important changes can be summarized as follows:

- **Resale price maintenance (RPM)** (i.e., the practice by which a supplier directly or indirectly establishes a fixed or minimum resale price to be observed by the distributor) continues to be a hardcore restriction under the new VBER. The new Guidelines now explicitly state that imposing Minimum Advertised Prices (MAPs), which prohibit the distributor from advertising below a level set by the supplier, will be treated as a form of RPM. Both for RPM and MAP an efficiency justification can be provided and the new Vertical Guidelines provide four examples of such efficiencies. Three of them were already mentioned in the old version of the Guidelines, namely when a new product is introduced, if there is a short-term low-price campaign, and to avoid free-riding on pre-sale services for complex products. New is that a MAP or minimum resale price can be used to prevent loss-leading promotions by a particular distributor.

- **Dual distribution** (i.e., where a supplier sells not only through independent distributors, but also directly at retail level in competition with its distributors) was covered by the old VBER. The dual distribution exemption is extended to cover more levels of the supply chain, such as wholesalers and importers. Providers of online intermediation services with a hybrid function (i.e., online platforms that offer products in competition with companies that use the platform to offer products) are excluded from the exemption. Their vertical agreements will have to be assessed on a case-by-case basis. The new VBER also excludes from the exemption information exchange in the case of dual distribution that is either not directly related to the implementation of the vertical agreement or is not necessary to improve the production or distribution of the products.

- **Most Favored Nation (MFN)** or retail parity clauses (i.e., obligations to offer the same or better conditions to the contracting party as those offered through any other sales channel or the company's own sales channels) were covered by the old VBER. Across-platform retail parity obligations, i.e. parity obligations imposed by suppliers of online intermediation services obliging distributors not to offer, sell or resell to end users under more favorable conditions using competing online intermediation services, are excluded from the benefit of the new VBER and will need to be assessed individually. All other types of parity obligations, including those requiring distributors not to offer, sell or resell to end users under more favorable conditions when using their own sales channels, continue to be covered by the new VBER.
- **Active sales restrictions**: The new VBER allows active sales restrictions to be passed on to a distributor's direct customers. Pass-on further down the distribution chain remains not exempted. In addition, the Commission has introduced the concept of shared exclusivity – meaning that suppliers will be able to appoint up to five exclusive distributors in a particular territory or for a particular customer group. Above this maximum there is a risk that the exclusive distributors will free-ride on each other's investments.
- **Online sales restrictions:** Dual pricing, where the supplier charges the same distributor a higher wholesale price for products sold online than for products sold in a brick-and-mortar shop, was until now prohibited. Under the new VBER dual pricing is permitted, as long as it does not have the object of preventing the effective use of the internet or restricting cross-border sales. In addition, the new Vertical Guidelines no longer require the criteria in relation to online sales imposed by suppliers in a selective distribution system to be identical to those imposed on brick-and-mortar shops provided that the online sales criteria do not have the object of preventing the effective use of the internet. The Guidelines explain what type of practices should be understood to prevent the effective use of the internet, for example, preventing the use of an entire online sales channel (such as search engine advertising or price comparison services). Where the buyer remains generally free to operate its own online store and to advertise online, online sales restrictions are deemed not to prevent the effective use of the internet.

The new VBER and the new Vertical Guidelines also provide specific rules and guidance relating to the platform economy, which plays an increasingly important role in the distribution of goods and services. Providers of online intermediation services will generally not qualify as genuine agents, but do qualify as suppliers under the new VBER. As a result, restrictions imposed by these companies relating to the price at which, the territories to which, or the customers to whom the products may be sold, can constitute hardcore restrictions preventing the applicability of the VBER.

The new rules will enter into force on **June 1, 2022** and will apply immediately to agreements concluded after May 31, 2022. Agreements already in force on May 31, 2022 will benefit from a transition period until May 31, 2023, as long as they satisfy the conditions of the old VBER. This transitional period aims to provide businesses with sufficient time to prepare for the upcoming changes. Also as of June 1, 2022, the rules applicable to the UK will be included in the UK's own legislation referred to as the Vertical Agreements Block Exemption Order (VABEO). While the VABEO and the VBER are aligned on most material aspects, there are some notable differences which will pose a challenge for business operating in both the EU and the UK.

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