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New Vertical Block Exemption Regulation and Vertical Guidelines adopted by the European Commission

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New Vertical Block Exemption Regulation and Vertical Guidelines adopted by the European Commission

Following long-term reviewing and consultation period, the European Commission ("**Commission**") adopted on May 10, 2022 the new Vertical Block Exemption Regulation ("**new VBER"**)[1] and Vertical Guidelines ("**new Guidelines"**), which entered into force on June 1, 2022 following expiration of the current VBER and its accompanying Guidelines. The new VBER provides for a one-year transitional period until May 31, 2023 for agreements already in force on May 31, 2022 which do not satisfy the conditions for exemption provided under the new VBER (but satisfy the conditions of the current VBER) to be aligned with the new rules. It is envisaged that the new VBER will expire in twelve (12) years.

The current VBER and Vertical Guidelines, as in force from June 1, 2010 have provided a safe harbour and have served as a valuable tool for self-assessment and consultation on the exemption of vertical agreements governing the relationships between undertakings that are active at different levels of the production and distribution chain, from the prohibition of article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**").

Adopting to developments and challenges in e-commerce observed over the last few years and embracing the need for enhanced protection of exclusive and selective distribution systems and increased flexibility for online sales, the Commission proceeded to a significant adaptation of the current rules to reflect the aforementioned needs. It should be pointed out that while the new VBER introduces new rules or alterations to current rules as outlined immediately below, the overall structure of the new VBER remains unchanged and several key provisions from the current VBER, such as the 30% market share threshold for benefitting from the safe harbour and most of the hardcore restrictions also survive under the new framework.

Outlined below are some of the key changes introduced under the new VBER on the following areas of interest: (1) dual distribution, (2) online intermediation services, (3) dual pricing, (4)

[1] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

enhanced protection for exclusive and selective distribution networks, (5) most favoured nation (MFN) clauses, (6) agency agreements; and (7) non-compete obligation.

Finally, the approach of the new VBER and its accompanying Guidelines on resale price maintenance ("RPM") is analysed.

1. Dual distribution

Distribution agreements between competitors

In the context of dual distribution, a supplier sells goods or services not only at the upstream level but also at the downstream level, thereby competing with its independent distributors.

Generally, distribution agreements between competitors are excluded from the safe harbour of the new VBER, nonetheless, an exception applies in the case of dual distribution. In such case, in the absence of hardcore restrictions and provided that the buyer does not compete with the supplier at the upstream level, the potential negative impact of the vertical agreement on the competitive relationship between the supplier and buyer at the downstream level is less important than the potential positive impact of the vertical agreement on competition in general at the upstream or downstream level.

It is also expressly provided under article 2(4)(a) of the new VBER that the aforementioned exemption extends to suppliers and distributors operating as wholesalers and importers as well.

Information exchanges

Under the new VBER, exchange of information between the supplier and the buyer in dual distribution is generally exempted under the following cumulative conditions: (i) the information exchanged should be directly related to the implementation of the vertical agreement; and (ii) such information should be necessary to improve the production or distribution of the contract goods or services. The new Guidelines set out a non-exhaustive list of examples to illustrate types of information exchange that may or may not, as the case may be, meet the criteria set hereinabove to benefit from the exemption.

In practice, this list of examples shall serve as a useful tool for undertakings when self-assessing whether the above two conditions are met.

2. Online intermediation services

Online intermediation services provided by providers of such services allow undertakings to offer goods or services to other undertakings or final customers via their online platforms.

Hybrid intermediation services

Under article 2(6) of the new VBER it is provided that, the exemptions on dual distribution, shall not apply to vertical agreements relating to the provision of online intermediation services where the provider of the online intermediation services also competes on the relevant market for the sale of the intermediated goods or services (namely where is has hybrid function).

Online restrictions

The new VBER and the new Guidelines provide an up-to-date guidance on online restrictions incorporating the guiding principles for the assessment of online restrictions drawn from the case law of the Court of Justice of the European Union, namely in *Pierre Fabre and Coty*.

In particular:

❖ ***Hardcore online restrictions***

The new VBER introduces a new provision under article 4(e), addressing a main concern raised during the evaluation of the current VBER, expressly providing that the exemption under article 2(1) shall not apply to vertical agreements which, directly or indirectly, have as their object the prevention of the effective use of the internet by the buyer or its customers to sell the contracts goods or services, highlighting this as a hardcore restriction.

The new Guidelines set out a list of examples of obligations that indirectly have the object of preventing the effective use of the internet as set forth in article 4(e) of the new VBER, namely:

- ❖ Requiring the buyer to prevent customers located in another territory from viewing its website or online store or to re-route customers to the online store of the manufacturer or of another seller.
- ❖ Requiring the buyer to terminate consumers' online transactions where their credit card data reveal an address that is not within the buyer's territory.

- ❖ Requiring the buyer to sell the contract goods or services only in a physical space or in the physical presence of specialised personnel.
- ❖ Requiring the buyer to seek the supplier's prior authorisation before making individual online sales transactions.
- ❖ Prohibiting the buyer from using the supplier's trademarks or brand names on its website or in its online store.
- ❖ Prohibiting the buyer from establishing or operating one or more online stores, irrespective of whether the online store is hosted on the buyer's own server or on a third party server.
- ❖ Prohibiting the buyer from using an entire online advertising channel, such as search engines or price comparison services, or restrictions which indirectly prohibit the use of an entire online advertising channel, such as an obligation not to use the supplier's trademarks or brand names for bidding to be referenced in search engines, or a restriction on providing price-related information to price comparison services.

❖ ***Safe online restrictions***

Notwithstanding the new hardcore online restriction provided under article 4(e), the new Guidelines further provide for types of restrictions that are still covered by the safe harbour of article 2(1).

In particular, restrictions relating to the use of particular online sales channels, such as online marketplaces or the imposition of quality standards for online sales can generally benefit from the exception of article 2(1) of the new VBER, irrespective of the type of distribution system, provided that they do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contracts goods or services to particular territories or customers. Online sales restrictions generally do not have such an object where the buyer remains free to operate its own online store and to advertise online. The new Guidelines set examples which can benefit from the exception provided by article 2(1) of the new VBER, including:

- ❖ Imposing online requirements (including on display of goods of services) to ensure quality or particular appearance of the online store.
- ❖ Direct or indirect ban on the use of online marketplaces.
- ❖ Requirement that the buyer operates at least one or more brick and mortar stores as a condition so as to become a member of the supplier's selective distribution system.

- ❖ Requirement that the buyer sells a minimum absolute amount (in value or volume but not as a proportion of its total sales) of the goods and services covered under the agreement offline to ensure the efficient operation of its brick and mortar shop.
- ❖ Online advertising restrictions that do not exclude the use of entire online advertising channels, if such restrictions are linked to the content of online advertising or set certain quality standards.

3. Dual pricing

Dual pricing is the practice according to which a supplier charges different prices to the same reseller for products intended to be resold online or offline. The new rules introduce a breakthrough approach deviating from the Commission's view up to this point, removing dual pricing from the list of hardcore restrictions.

This change means, in practice, that suppliers can charge the same buyer different wholesale prices for products sold online compared to those sold offline as long as the price differential is intended to incentivise or reward an appropriate level of investments. Nonetheless, the Commission sets a number of conditions as precautions for the supplier, namely for dual pricing practice not to have the object of (i) restricting cross-border sales; or (ii) preventing the effective use of the internet by the buyer.

4. Enhanced protection for exclusive and selective distribution networks

Under the new VBER the framework on safe harbour and hardcore restrictions for the three types of distribution systems, identified as exclusive distribution, selective distribution and distribution which is neither exclusive nor selective (i.e., free distribution) is more clearly outlined. In addition, the new VBER defines active and passive sales, clarifying operation of website.

Deviating from the rather strict rules under the current regime around establishing exclusive and selective distribution networks, the new VBER grants enhanced protection to these networks as summarized below:

- ❖ **Exclusive distribution:** the new VBER is extended to systems of shared exclusivity, allowing suppliers to appoint up to five exclusive distributors for the same territory or customer group. In addition, permitted restrictions are allowed to be passed on to customers of the buyers.

- **Selective distribution:** the new VBER allows for greater protection of the selective distribution system against sales from outside the network to unauthorised distributors in the selective territory.

5. Most favoured nation (MFN) clauses

Most favoured nation (MFN) clauses are contractual provisions requiring a seller of goods/services to offer these goods/services to another party on no less favourable terms (price or non-price) than offered to another party.

While under the current regime all MFNs benefit from the exemption provisions of the VBER, the new VBER introduced a new provision, i.e. article 5(1)(d) expressly excluding the application of the exemption of article 2(1) for obligations contained in vertical agreements preventing a buyer of online intermediation services from offering, selling, or reselling goods or services to end users under more favourable conditions via competing online intermediation services (i.e. wide MFNs).

On the other hand, narrow MFNs (requiring the seller to offer the same favourable conditions charged through its own direct sales channels to another party selling its products as well) still benefit from the same harbour provided the other conditions of the new VBER are met, i.e. 30% market share threshold and absence of any hardcore restrictions included in the agreement.

6. Agency agreements

The privileges applying to genuine agents survive under the provisions of the new framework set under the new Guidelines. A genuine agency agreement falls outside the scope of article 101(1) of the TFEU where the agent does not bear any significant financial or commercial risk in relation to the contracts concluded or negotiated on behalf of the principal. The types of agreements categorized as agency agreements falling outside the scope of article 101(1) of the TFEU remain the same under the new Guidelines with the exemption of an additional scenario where the agent only temporarily acquires the title in the goods for a very brief period while selling them on behalf of the principal. The new VBER also clarifies questions around dual role agents, i.e., agents acting as agent and independent distributor for a supplier within the same product market.

Further, the new VBER and new Guidelines clarify that the online intermediation service provider would generally not be categorized as an agent that would be exempted from the applicability of article 101(1) of the TFEU.

7. *Non-compete obligation*

Addressing concerns raised during the consultation period, under the new VBER, it is allowed for the exemption to endure if the non-compete obligation is tacitly renewable beyond a five-year period as long as the distributor can effectively renegotiate or terminate the non-compete obligation by giving a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period.

RPM

The new VBER maintains the same treatment to RPM in relation to the current VBER. In this context, imposing minimum of fixed resale prices is still considered as a hardcore restriction. The new Guidelines provide guidance on price monitoring, minimum advertised prices ("MAPs") and fulfilment contracts. In particular:

- Price monitoring, which is increasingly used in e-commerce through price monitoring software as well as price reporting do not on their own constitute RPM.
- Imposition of MAPs which prohibit the distributor from advertising prices below a level set by the suppliers is treated as a form of RPM and consequently a hardcore restriction since they disincentivise the distributor from setting a lower sale price.
- Under a fulfillment contract, the supplier enters into a vertical agreement with a buyer for the purpose of executing (fulfilling) a supply agreement concluded previously between the supplier and a specific customer. In such case, when the supplier selects the undertaking that will provide the fulfillment services, the imposition of resale price by the supplier is not RPM. By contrast, where the undertaking that will provide the fulfillment services is selected by the customer, the imposition of a resale price by the supplier may amount to RPM.

Withdrawal in individual cases

The new VBER contains a new article 6 which did not feature in the current VBER. Under the provisions of this new article, the Commission has the power to withdraw the benefit of the exemption of article 2(1) where it finds that a vertical agreement has effects which are incompatible with article 101(3) of the TFEU.

The present newsletter contains general information only and is not intended to provide specific professional advice or services.

If you need further assistance or information with regard to the above please contact us:

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