

Revised EU competition rules for distribution agreements entering into force

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What's new? On 1 June 2022, the new Vertical Block Exemption Regulation (" **VBER**") as well as the revised Guidelines on vertical restraints ("**Guidelines**") entered into force. They were adopted following a thorough review of the 2010 texts. The revised framework provides up-to-date rules and guidance allowing companies to self-assess the compatibility of supply and distribution agreements with EU competition rules considering an economic context reshaped by the growth of e-commerce and online sales.

A one-year transition period applies for agreements in force on 31 May 2022 satisfying the conditions for exemption under the 2010 rules, but which do not comply with the new regime.

What is this about? Agreements between parties at a different level of a distribution chain relating to the conditions under which they purchase, sell or resell goods or services, so-called "vertical agreements", may create efficiencies and, absent market power, have benefits for competition. Hence, various contractual arrangements which may be seen as restricting competition are accepted for vertical agreements if a number of conditions are fulfilled – in particular, a 30% market share threshold and the absence of certain hard-core restrictions, such as certain price or territorial restrictions.

Therefore, the prohibition on agreements restrictive of competition in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) does not apply to vertical agreements that meet the exemption conditions set out in the VBER, thus creating a safe harbour. The Guidelines accompany the VBER and explain how to apply the rules, notably for vertical agreements that fall outside the safe harbour and hence require individual assessment as regards their compliance with competition law.

What should you retain? The European Commission explains the main changes as ensuring that the safe harbour is neither too generous nor too narrow, notably in view of new online distribution modes:

- the VBER safe harbour is narrowed as regards (i) dual distribution, i.e. where a supplier sells its goods or services through independent distributors but also directly to end customers, and (ii) parity obligations, i.e. obligations which require a seller to offer the same as or better conditions to its counterparty than those offered on third-party sales channels, such as other platforms, and/or on the seller's direct sales channels, like its website. Such agreements or obligations may no longer be exempted and require individual assessment;
- the VBER safe harbour is enlarged as regards: (i) certain restrictions of a buyer's ability to actively approach individual customers through so-called "active" sales, and (ii) certain restrictions relating to online sales, namely the ability to charge the same distributor different wholesale prices for products to be sold online and offline and the ability to impose different criteria for online and offline sales in selective distribution systems. Such restrictions are now exempted, provided all other VBER exemption conditions are met.

The rules have also been updated regarding the assessment of online sales restrictions (the prevention of the use of the internet for resale by the buyer is blacklisted) as well as with respect to vertical agreements in the platform economy, agreements that pursue sustainability objectives, and non-compete obligations amongst others. In addition, the Guidelines provide updated detailed guidance on topics such as selective and exclusive distribution and agency agreements.

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